Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192
	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
	)	
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 IN MB DOCKET NOS. 12-68, 07-18, 05-192
FURTHER NOTICE OF PROPOSED RULEMAKING IN MB DOCKET NO. 12-68
ORDER ON RECONSIDERATION IN MB DOCKET NO. 07-29

Adopted: October 5, 2012 **Released: October 5, 2012**

Comment Date: [30 days after date of publication in the Federal Register]
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By the Commission: Chairman Genachowski and Commissioners Clyburn, Rosenworcel and Pai issuing separate statements; Commissioner McDowell approving in part, concurring in part and issuing a statement.

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I. INTRODUCTION

1. In this *Report and Order*, we decline to extend the exclusive contract prohibition section of the program access rules beyond its October 5, 2012 sunset date.[1] This prohibition generally bans exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor in areas served by a cable operator.[2] The prohibition applies only to programming that is delivered via satellite; it does not apply to programming delivered via terrestrial facilities.[3] Congress directed the Commission to adopt this prohibition in 1992 when cable operators served more than 95 percent of all multichannel video subscribers and were affiliated with over half of all national cable networks.[4] In expectation that competition in the video programming and distribution markets would develop, Congress provided that the exclusive contract prohibition would expire on October 5, 2002, unless the Commission found that it "continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming."[5] On two previous occasions, first in 2002[6] and again in 2007,[7] the Commission renewed the prohibition for

[1] *See* 47 U.S.C. § 548(c)(2)(D); 47 C.F.R. § 76.1002(c)(2).

[2] An exclusive contract results in one cable operator having access to a particular cable-affiliated programming network or networks in a given geographic area, to the exclusion of every other multichannel video programming distributor ("MVPD") competing in that geographic area.

[3] The exclusive contact prohibition in Section 628(c)(2)(D) pertains only to "satellite cable programming" and "satellite broadcast programming." *See* 47 U.S.C. § 548(c)(2)(D). Both terms are defined to include only programming transmitted or retransmitted by satellite for reception by cable operators. *See* 47 U.S.C. § 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. § 605); *id*. § 548(i)(3). In this *Order*, we refer to "satellite cable programming" and "satellite broadcast programming" collectively as "satellite-delivered programming." In January 2010, the Commission adopted rules providing for the processing of complaints alleging that an "unfair act" involving terrestrially delivered, cable-affiliated programming violates Section 628(b) of the Act. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* First Report and Order, 25 FCC Rcd 746 (2010) ("*2010 Program Access Order*"), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) ("*Cablevision II*").

[4] *See* H.R. Rep. No. 102-628 (1992), at 41; *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, 17 FCC Rcd 12124, 12132, ¶ 20 (2002) ("*2002 Extension Order*").

[5] 47 U.S.C. § 548(c)(5).

five years, with the latest extension expiring on October 5, 2012, thus extending the prohibition for ten years beyond the original term established by Congress.

2. We find that a preemptive prohibition on exclusive contracts is no longer "necessary to preserve and protect competition and diversity in the distribution of video programming" considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts.[8] In upholding the Commission's last extension of the prohibition in 2007, the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") noted changes in the marketplace since 1992 and stated its expectation that if the market continued to evolve in this manner, "the Commission will soon be able to conclude that the prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming."[9] As discussed below, because the current market presents a mixed picture (with the cable industry now less dominant at the national level than it was when the exclusive contract prohibition was enacted, but prevailing concerns about cable dominance and concentration in various individual markets), we find that extending a preemptive ban on exclusive contracts sweeps too broadly. Rather, this mixed picture justifies a case-by-case approach in applying our program access rules (consistent with the case-by-case inquiries we undertake in the terrestrial programming and program carriage contexts), with special account taken of the unique characteristics of Regional Sports Network ("RSN") programming. In addition to allowing us to assess any harm to competition resulting from an exclusive contract, this case-by-case approach will also allow us to consider the potentially procompetitive benefits of exclusive contracts in individual cases, such as promoting investment in new programming, particularly local programming, and permitting MVPDs to differentiate their service offerings. Accordingly, consistent with Congress's intention that the exclusive contract prohibition would not remain in place indefinitely and its finding that exclusive contracts can have procompetitive benefits in some markets, we decline to extend the preemptive prohibition beyond its October 5, 2012 sunset date.

3. We recognize that the potential for anticompetitive conduct resulting from vertical integration between cable operators and programmers remains a concern. For example, in some markets, vertical integration may result in exclusive contracts between cable operators and their affiliated programmers that preclude competitors in the video distribution market from accessing critical programming needed to attract and retain subscribers and thus harm competition. While the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks has declined since 2007, some of that programming may still be critical for MVPDs to compete in the video distribution market. Congress has provided the Commission with the authority to address exclusive contracts on a case-by-case basis. We thus conclude that, in the context of present market conditions, such an individualized assessment of exclusive contracts in response to complaints is a more appropriate regulatory approach than the blunt tool of a prohibition that preemptively bans all exclusive contracts between satellite-delivered, cable-affiliated programmers and cable operators. This case-by-case consideration of exclusive contracts involving satellite-delivered, cable-affiliated programming will mirror our treatment of terrestrially delivered, cable-affiliated programming, including the establishment of a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect prohibited in Section 628(b) of the Act. As demonstrated by our recent actions on complaints

[6] *See 2002 Extension Order*, 17 FCC Rcd 12124.

[7] *See 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, 22 FCC Rcd 17791 (2007) ("*2007 Extension Order*"), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("*Cablevision I*").

[8] 47 U.S.C. § 548(c)(5).

[9] *Cablevision I*, 597 F.3d at 1314.

involving withholding of terrestrially delivered, cable-affiliated programming, the Commission is committed to exercising its authority under Section 628 of the Act to require cable-affiliated programmers to license their programming to competitors in appropriate cases.[10]

4. In addition to case-by-case adjudication, we expect that additional factors will mitigate the risk of any potentially adverse impact of the expiration of the exclusive contract prohibition on consumers and competition. First, approximately 30 satellite-delivered, cable-affiliated, national networks (accounting for 30 percent of all such networks) and 14 satellite-delivered, cable-affiliated, RSNs (accounting for over 40 percent of all such RSNs) are subject to program access merger conditions adopted in the *Comcast/NBCU Order* until January 2018.[11] These conditions require Comcast/NBCU to make these networks available to competitors, even after the expiration of the exclusive contract prohibition.[12] Second, the record indicates that existing affiliation agreements between programmers and

[10] *See Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011) (concluding that withholding the MSG HD and MSG+ HD RSNs from Verizon is an "unfair act" that has the "effect" of "significantly hindering" Verizon from providing satellite cable programming and satellite broadcast programming to subscribers and consumers in New York and Buffalo) ("*Verizon v. MSG/Cablevision (Bureau Order)*"), *affirmed*, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011) ("*Verizon v. MSG/Cablevision (Commission Order)*"); *AT&T Servs. Inc. et al.*, Order, 26 FCC Rcd 13206 (MB 2011) (reaching the same conclusion with respect to AT&T in the State of Connecticut) ("*AT&T v. MSG/Cablevision (Bureau Order)*"), *affirmed*, *AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011) ("*AT&T v. MSG/Cablevision (Commission Order)*"), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.). In addition, where vertical integration occurs as a result of a transaction involving the transfer of Commission licenses, we have authority under Section 310(d) to impose conditions that address potential competitive harms that might result from such integration. *See, e.g., Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees,* Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast/NBCU Order*").

[11] *See infra* ¶ 24 and Appendices F-G.

[12] These conditions provide that, if "negotiations fail to produce a mutually acceptable set of price, terms, and conditions" for a carriage agreement with one or more Comcast-controlled networks (*see infra* n.89), an MVPD or bargaining agent may "submit [the] dispute to commercial arbitration." *Comcast/NBCU Order*, 26 FCC Rcd at 4259-62, ¶¶ 49-59 and 4358, Condition II. Each party is required to submit a "final offer . . . in the form of a contract for carriage" for a period of three years. *Id*. at 4365, Condition VII.A.13. The arbitrator must "choose the final offer of the party which most closely approximates the fair market value of the programming carriage rights at issue." *Id*. at 4366, Condition VII.B.4. Following the decision of the arbitrator, "the parties shall be bound by the final offer chosen by the arbitrator." *Id*. at 4367, Condition VII.B.11; *see also id*. at 4364, Condition VII.A.1 (stating that the arbitration will "determine the terms and conditions of a new agreement"). By requiring Comcast-controlled networks to enter into arbitration with a requesting MVPD to determine the price, terms, and conditions of a new carriage agreement, these conditions require Comcast-controlled networks to make their programming available to all requesting MVPDs and thus preclude any Comcast-controlled network from enforcing an exclusive contract, including in regions where Comcast does not operate its cable systems. *See id.* at 4261, ¶ 55 (explaining that these conditions apply to the benefit of all MVPDs, "not just those that compete directly with Comcast"); *see also* Comments of The Madison Square Garden Company (June 22, 2012), at 12 (stating that expiration of the exclusive contract prohibition will have no impact on the availability of Comcast networks that will continue to be subject to program access provisions in the *Comcast/NBCU Order*); Comments of Time Warner Cable Inc. (June 22, 2012), at 8 ("TWC Comments") (stating that Comcast-controlled networks "would be subject to program access requirements regardless of the action taken by the Commission in this proceeding and should thus be ignored in this analysis").

Our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the *Comcast/NBCU Order* concluding that these conditions were necessary to curb Comcast's anticompetitive exclusionary program access strategies that might result from the transaction. In that proceeding, based on an extensive factual record in the context of an adjudication, the Commission found MVPDs would be "substantially harm[ed]" without Comcast-NBCU's suite of local, regional, and national programming, and that an (continued….)

MVPDs require programming covered by the agreement to be made available for the term of the existing agreement despite the expiration of the exclusive contract prohibition. This effectively defers the period that exclusive contracts will begin to be enforced and thus minimizes any potential disruption to consumers that could result from the expiration of the prohibition. Third, in addition to claims under Section 628(b) of the Act, additional causes of action under Section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under Section 628(c)(2)(A) and claims alleging discrimination under Section 628(c)(2)(B).[13] In particular, nothing in our decision today will alter our treatment of selective refusals to license, whereby a satellite-delivered, cable-affiliated programmer refuses to license its content to a particular MVPD (such as a new entrant or satellite provider) while simultaneously licensing its content to other MVPDs competing in the same geographic area.[14] Even after the expiration of the exclusive contract prohibition, such conduct will remain a violation of the discrimination provision in Section 628(c)(2)(B) of the Act, unless the cable-affiliated programmer can establish a legitimate business reason for the conduct in response to a program access complaint challenging the conduct. Fourth, we will continue to monitor the video marketplace. If the expiration of the exclusive contract prohibition, combined with future changes in the competitive landscape, result in harm to consumers or competition, we have statutory authority pursuant to Section 628(b) of the Act to take remedial action by adopting rules to address such concerns.[15]

5. We also take related actions herein to amend our rules pertaining to subdistribution agreements, common carriers, and Open Video Systems ("OVS") to reflect the expiration of the exclusive contract prohibition. Further, we modify merger conditions pertaining to exclusive contracts adopted in the *Liberty Media Order* to conform to our revised rules. In addition, we revise our procedural rules to (i) provide for a 45-day answer period for all complaints alleging a violation of Section 628(b), regardless of whether the complaint involves satellite-delivered or terrestrially delivered programming; and (ii) establish a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming.

6. In the *Further Notice of Proposed Rulemaking* ("*FNPRM*") in MB Docket No. 12-68, we seek comment on whether to establish (i) a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an "unfair act" under Section 628(b); (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint; (iii) rebuttable presumptions with respect to the "unfair act" element and/or the "significant hindrance" element of a Section 628(b) claim challenging an exclusive contract involving a cable-affiliated "national sports network" (regardless of whether it is terrestrially delivered or satellite-delivered); and (iv) a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates Section 628(b) (or, potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network violates Section 628(b) (or Section 628(c)(2)(B)). We also seek comment in the *FNPRM* on revisions to the program access rules to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of these rules. In the *Order on Reconsideration* in MB Docket No. 07-29, we (i) affirm the expanded discovery procedures for program access complaints adopted in the *2007 Extension Order*; (ii) modify the standard protective order for use in program access

"anticompetitive exclusionary program access strategy would often be profitable for Comcast." *Comcast/NBCU Order*, 26 FCC Rcd at 4254, ¶ 37 (footnotes omitted) and 4257-58, ¶ 44.

[13] *See* 47 U.S.C. §§ 628(c)(2)(A)-(B).

[14] *See* 47 U.S.C. § 628(c)(2)(B).

[15] *See infra* ¶ 25.

complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (iii) clarify that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

II. REPORT AND ORDER IN MB DOCKET NOS. 12-68, 07-18, 05-192

A. Background

7. An extensive background regarding the program access rules in general and the exclusive contract prohibition in particular is provided in the *Notice of Proposed Rulemaking* ("*NPRM*"), which we incorporate herein by reference and do not repeat at length.[16] In areas served by a cable operator, Section 628(c)(2)(D) generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor.[17] The exclusive contract prohibition applies to all satellite-delivered, cable-affiliated programming and preemptively bans all exclusive contracts for such programming with cable operators, regardless of whether the withholding of particular programming would impact competition in the marketplace.[18] As mentioned above, the exclusive contract prohibition applies only to programming that is delivered via satellite; it does not apply to programming that is delivered via terrestrial facilities.[19] Under the statute and our implementing rules, an exclusive contract is permissible if a cable operator or cable-affiliated programmer obtains prior approval by demonstrating to the Commission that the contract serves the public interest.[20] Congress thus

[16] *See Revision of the Commission's Program Access Rules et al.*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413, 3417-23, ¶¶ 6-16 (2012) ("*NPRM*").

[17] *See* 47 U.S.C. § 548(c)(2)(D). The Commission has implemented this provision through Section 76.1002(c)(2) of the rules. *See* 47 C.F.R. § 76.1002(c)(2). In unserved areas, Congress adopted a *per se* prohibition on exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers. 47 U.S.C. § 548(c)(2)(C). Unlike the exclusive contract prohibition in served areas, the exclusive contract prohibition in unserved areas is not subject to a sunset provision and is unaffected by this *Order*.

[18] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3377-78, ¶¶ 47-49 (1993) ("*1993 Program Access Order*"); *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1930, ¶ 62 (1994) ("*1994 Program Access Order*").

[19] *See supra* ¶ 1.

[20] To enforce or enter into an exclusive contract in a served area, a cable operator or a satellite-delivered, cable-affiliated programmer must submit a "Petition for Exclusivity" to the Commission for approval. *See* 47 U.S.C. § 548(c)(2)(D), (c)(4); *see also* 47 C.F.R. § 76.1002(c)(2), (c)(4), (c)(5); *2002 Extension Order*, 17 FCC Rcd at 12154, n.206 ("While Section 628(c)(2)(D) remains in effect, exclusive contracts generally are prohibited unless the Commission finds that exclusivity is in the public interest. The burden is placed on the party seeking exclusivity to show that a specific exclusive contract meets the statutory public interest standard before any such contract can be enforced.") (citing *1993 Program Access Order*, 8 FCC Rcd at 3384, ¶ 63 and 3386, ¶ 66); *New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231, 3234-35, ¶ 24 (1994) ("[W]e must examine whether the proponent of exclusivity has met its burden of demonstrating that the statutory presumption that the public interest is served by requiring open access by emerging competing distributors to the programming at issue is offset by countervailing public benefits derived from allowing exclusive agreements to create incentives for investment in the development and distribution of services that will promote diversity in the programming market.") ("*NECN Exclusivity Petition*").

recognized that some exclusive contracts may serve the public interest by providing offsetting benefits to the video programming market or assisting in the development of competition among MVPDs.[21]

8. Congress also provided that the exclusive contract prohibition would sunset after ten years (on October 5, 2002), unless the Commission found that it "continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming."[22] On two previous occasions, first in 2002[23] and again in 2007,[24] the Commission found that the prohibition remained necessary and thus renewed it for an additional five-year term on each occasion, with the latest extension expiring on October 5, 2012. In issuing the latest extension, the Commission recognized that "Congress intended for the exclusive contract prohibition to sunset at a point when market conditions warrant" and specifically "caution[ed] competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition, including further investments in their own programming."[25] The D.C. Circuit upheld the Commission's decision, characterizing the developments in the marketplace as a "mixed picture" and deferring to the Commission's analysis.[26] The court expressed an expectation, however, that at the next review "the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset."[27]

9. On March 20, 2012, the Commission adopted and released an *NPRM* initiating a third review of the necessity of the exclusive contract prohibition.[28] The *NPRM* presented data on the current state of competition in the video distribution market and the video programming market and invited commenters to submit more recent data or empirical analyses.[29] The *NPRM* sought comment on whether current conditions in the video marketplace support retaining, sunsetting, or relaxing the exclusive contract prohibition.[30] To the extent that the data might not support retaining the exclusive contract prohibition as it exists today, the *NPRM* sought comment on whether the Commission could preserve and protect competition in the video distribution market by either:

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[21] In determining whether a particular exclusive contract is in the public interest, Congress directed the Commission to consider each of the following factors: (i) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (ii) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable; (iii) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (iv) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and (v) the duration of the exclusive contract. 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4).

[22] 47 U.S.C. § 548(c)(5).

[23] *See 2002 Extension Order*, 17 FCC Rcd 12124.

[24] *See 2007 Extension Order*, 22 FCC Rcd 17791.

[25] *Id.* at 17810, ¶ 29; *see also Cablevision I*, 597 F.3d at 1313 ("We trust that the Commission was sincere when it explicitly anticipated that a market may develop in which exclusive programming could exist but not be harmful to competition, and 'caution[ed] competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition.'") (quoting *2007 Extension Order*, 22 FCC Rcd at 17810, ¶ 29).

[26] *See Cablevision I*, 597 F.3d at 1313-14.

[27] *Id.* at 1314.

[28] *See NPRM*, 27 FCC Rcd 3413.

[29] *See id*. at 3424-30, ¶¶ 21-29 and 3473-87, Appendices A-C. As discussed below, no commenter challenged the accuracy of the data set forth in the *NPRM*. *See infra* ¶ 14.

[30] *See NPRM*, 27 FCC Rcd at 3431-36, ¶¶ 31-43.

- Sunsetting the exclusive contract prohibition in its entirety and instead relying on other existing protections provided by the program access rules that will not sunset: (i) the case-by-case consideration of exclusive contracts pursuant to Section 628(b) of the Act;[31] (ii) the prohibition on discrimination in Section 628(c)(2)(B) of the Act;[32] and (iii) the prohibition on undue or improper influence in Section 628(c)(2)(A) of the Act;[33] or
- Relaxing the exclusive contract prohibition by (i) establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the prohibition on a market-by-market basis based on the extent of competition in the market;[34] (ii) retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and any other satellite-delivered, cable-affiliated programming that the record establishes as being important for competition and non-replicable and having no good substitutes;[35] and/or (iii) other ways commenters propose.[36]

10. In addition, the *NPRM* also sought comment on (i) how to implement a sunset (complete or partial) to minimize any potential disruption to consumers;[37] (ii) the First Amendment implications of the alternatives discussed;[38] (iii) the costs and benefits of the alternatives discussed;[39] and (iv) the impact of a sunset on our rules pertaining to subdistribution agreements, common carriers, and OVS, as well as on existing merger conditions.[40] The *NPRM* also sought comment on whether to make any changes to the program access procedural rules[41] and whether the Commission's rules adequately address potentially discriminatory volume discounts and uniform price increases and, if not, how these rules should be revised to address these concerns.[42]

B. Discussion

11. For the reasons discussed below, we decline to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date. First, we review marketplace developments since 2007 and conclude that, because the current market presents a mixed picture (with the cable industry now less dominant at the national level than it was when the exclusive contract prohibition was enacted, but prevailing concerns about cable dominance and concentration in various individual markets), a preemptive ban on exclusive contracts sweeps too broadly and is no longer "necessary to preserve and protect competition and diversity in the distribution of video programming" considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive

[31] *See id*. at 3438-44, ¶¶ 48-57.

[32] *See id*. at 3444-48, ¶¶ 58-66.

[33] *See id*. at 3448-49, ¶ 67.

[34] *See id*. at 3449-52, ¶¶ 69-71.

[35] *See id*. at 3452-56, ¶¶ 72-80.

[36] *See id*. at 3449, ¶ 68.

[37] *See id*. at 3456-58, ¶¶ 81-85.

[38] *See id*. at 3459, ¶¶ 86-87.

[39] *See id*. at 3460, ¶ 88.

[40] *See id*. at 3460-65, ¶¶ 89-95.

[41] *See id*. at 3466, ¶ 97.

[42] *See id*. at 3466-69, ¶¶ 98-102. This *Order* in MB Docket No. 12-68 *et al.* addresses (i) the expiration of the exclusive contract prohibition for satellite-delivered, cable-affiliated programming and associated rule changes resulting from this expiration; and (ii) a 45-day Answer period for responding to a Section 628(b) complaint. This *Order* does not address the other issues raised in the *NPRM*.

contracts.[43] Second, we describe the case-by-case process that will remain after sunset of the preemptive ban to address competitive harms that may arise in connection with exclusive contracts, including a 45-day period for answering a Section 628(b) complaint and the establishment of a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect prohibited in Section 628(b). We also explain how addressing exclusive contracts on a case-by-case basis comports with the First Amendment. Third, we describe necessary amendments to our rules pertaining to subdistribution agreements, common carriers, and OVS and to merger conditions pertaining to exclusive arrangements adopted in the *Liberty Media Order* to reflect the expiration of the exclusive contract prohibition.

1. Expiration of the Exclusive Contract Prohibition

a. Standard of Review

12. Congress provided that the exclusive contract prohibition would expire on October 5, 2002, unless the Commission found that it continued to be "necessary" to preserve and protect competition and diversity in the distribution of video programming.[44] The Commission has previously determined that the exclusive contract 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.[45] The D.C. Circuit has upheld the Commission's interpretation of the term "necessary"[46] and has also ruled that the Commission's analysis of the prohibition is appropriately focused on harm to competition and consumers, not harm to competitors.[47]

13. The Commission has also explained that the sunset provision "creates a presumption that the rule will sunset" unless the Commission finds that it continues to be necessary.[48] Moreover, the Commission has explained that, because the exclusive contract prohibition has been in effect since 1992, "it is difficult to obtain specific factual evidence of the impact on competition in the video distribution market if the prohibition were lifted."[49] Accordingly, we rely on "economic theory and predictive judgment[s] in addition to specific factual evidence in reaching our decision concerning the continued need for the exclusive contract prohibition."[50]

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[43] 47 U.S.C. § 548(c)(5).

[44] *Id*.

[45] *See 2007 Extension Order*, 22 FCC Rcd at 17800-01, ¶ 13; *2002 Extension Order,* 17 FCC Rcd at 12129-30, ¶ 14.

[46] *See Cablevision I*, 597 F.3d at 1313 (stating that "[t]his interpretation is well within the Commission's discretion to interpret statutory language under *Chevron*").

[47] *See id*. ("Here, the Commission's order discusses harm to consumers and competition that results from harm to competitors, rather than incorrectly believing one harm to be equivalent to the other.").

[48] *2002 Extension Order*, 17 FCC Rcd at 12130-31, ¶ 16; *see also* TWC Comments at 10; Reply Comments of Time Warner Cable Inc. (July 23, 2012), at 6-7 ("TWC Reply Comments"). Commenters' suggestion that vertically integrated cable operators bear the burden of demonstrating that the prohibition is no longer necessary finds no basis in the statute. *See, e.g*., Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association (June 22, 2012), at 5 ("OPASTCO/NTCA Comments"); Reply Comments of AT&T Inc. (July 23, 2012), at 3 ("AT&T Reply Comments").

[49] *2007 Extension Order*, 22 FCC Rcd at 17801, ¶ 14; *2002 Extension Order,* 17 FCC Rcd at 12135-36, ¶ 25.

[50] *2007 Extension Order*, 22 FCC Rcd at 17801, ¶ 14.

b. Analysis

14. In evaluating whether the exclusive contract prohibition continues to be necessary, the Commission has previously examined data on the status of competition in the video programming market and the video distribution market. The Commission presented extensive data in the *NPRM* on these issues, which presented a mixed picture, and invited commenters to submit more recent data or empirical analyses.[51] While no commenter disputed the accuracy of the data presented in the *NPRM*, updated information in the record requires some modifications to these data. In the discussion below and in Appendix E, we present the most recent data available on the market shares of cable operators and other MVPDs in the video distribution market, which differ only slightly from the data presented in the *NPRM*, and continue to show a mixed picture.[52] In addition, in the discussion below and in Appendices F and G, we update the data presented in the *NPRM* on cable-affiliated networks to reflect (i) Comcast/NBCU's sale of its interest in A&E Television Networks, LLC ("A&E");[53] and (ii) information in the record provided by Cablevision, Comcast, and Time Warner Cable ("TWC") regarding their affiliation with RSNs and whether those RSNs are satellite-delivered or terrestrially delivered.[54]

15. Based on similar data and other record evidence, the Commission in past extension decisions has analyzed whether, in the absence of the exclusive contract prohibition, cable-affiliated programmers would have the incentive and the ability to harm competition and diversity in the distribution of video programming by entering into exclusive contracts.[55] We undertake the same analysis here. Below, we consider the "incentive" element followed by the "ability" element.

(i) Incentive

16. In evaluating whether cable-affiliated programmers retain the incentive to enter into exclusive contracts, the Commission analyzes whether there continues to be an economic rationale for exclusivity.[56] The Commission has explained that, if a vertically integrated cable operator enters into an exclusive arrangement for affiliated programming, it can recoup profits lost at the upstream level (*i.e*., lost licensing fees and advertising revenues) by increasing the number of subscribers of its downstream MVPD division.[57] The Commission has also explained that, particularly where rival distributors are limited in their market shares, a cable-affiliated programmer will be able to recoup a substantial amount

[51] *See NPRM*, 27 FCC Rcd at 3424-30, ¶¶ 21-29 and 3473-87, Appendices A-C.

[52] *See infra* Appendix E.

[53] *See infra* Appendix F; *see also* Comcast Corporation, SEC Form 8-K (July 9, 2012); Reply Comments of Comcast Corporation and NBCUniversal Media, LLC (July 23, 2012), at 5 ("Comcast Reply Comments"); Reply Comments of National Cable & Telecommunications Association (July 23, 2012), at 6 ("NCTA Reply Comments").

[54] *See infra* Appendix G; *see also* Letter from Michael E. Olsen, Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 *et al.* (July 11, 2012), at 1 ("*Cablevision July 11th Letter*"); Letter from James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 *et al*. (July 11, 2012), at 2 ("*Comcast July 11th Letter*"); Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 *et al*. (July 11, 2012), at 2 ("*TWC July 11th Letter*"); Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 *et al*. (August 31, 2012) ("*TWC Aug, 31st Letter*").

[55] *See 2007 Extension Order*, 22 FCC Rcd at 17810, ¶ 29; *2002 Extension Order*, 17 FCC Rcd at 12130-31, ¶ 16.

[56] *See 2007 Extension Order*, 22 FCC Rcd at 17820, ¶ 43; *2002 Extension Order*, 17 FCC Rcd at 12139-40, ¶ 35.

[57] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, 8256, ¶ 117 (2006) ("*Adelphia Order*"); *see also 2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53; *2002 Extension Order*, 17 FCC Rcd at 12140, ¶ 36.

of the revenues foregone by pursuing exclusivity.[58] In the *2007 Extension Order*, the Commission concluded that vertically integrated cable programmers retained the incentive to enter into exclusive contracts for satellite-delivered programming.[59]

17. As discussed below, the record here shows a mixed picture, indicating that vertically integrated cable programmers may still have an incentive to enter into exclusive contracts for satellite-delivered programming in many markets.[60] As the Commission explained previously, the profitability of exclusivity increases as the number of subscribers controlled by the vertically integrated cable operator increases.[61] In past extension decisions, the Commission has analyzed the aggregate market share of cable operators on a national and regional basis to assess the profitability of exclusivity.[62] In the *2007 Extension Order*, the Commission found that the cable industry's share of MVPD subscribers nationwide had decreased since 2002 from 78 percent to approximately 67 percent, but that this market share was still sufficient to make exclusivity a profitable strategy.[63] Here, the record evidence indicates that the cable industry's share of MVPD subscribers nationwide has continued to decrease, from 67 percent in 2007 to 57.4 percent today, which indicates that vertically integrated cable operators as a whole – and considered solely on a national basis – have a reduced incentive to enter into exclusive contracts, compared to 2007.[64]

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[58] *See 2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53; *see also 2002 Extension Order*, 17 FCC Rcd at 12140, ¶¶ 37-38.

[59] *See 2007 Extension Order*, 22 FCC Rcd at 17826-27, ¶ 50; *see also 2002 Extension Order*, 17 FCC Rcd at 12147-48, ¶ 53.

[60] Vertically integrated cable operators and their affiliated programmers argue that, with some exceptions, they do not have an incentive to enter into exclusive contracts, whereas MVPDs that compete with vertically integrated cable operators contend that this incentive has remained the same or even increased since 2007. *Compare* Comments of Comcast Corporation and NBCUniversal Media, LLC (June 22, 2012), at 2-3, 7 ("Comcast Comments"); Comments of Discovery Communications, LLC (June 22, 2012), at 3-8 ("Discovery Comments"); MSG Comments at 13-17; Comments of National Cable & Telecommunications Association (June 22, 2012), at 13-14 ("NCTA Comments") *with* Comments of the American Cable Association (June 22, 2012), at 5-9 ("ACA Comments"); Comments of AT&T Inc. (June 22, 2012), at 3, 12-23 ("AT&T Comments"); Comments of CenturyLink (June 22, 2012), at 9-10, 13, 15-16 ("CenturyLink Comments"); Comments of DIRECTV, LLC (June 22, 2012), at 13-18, 23-26 ("DIRECTV Comments"); Comments of DISH Network L.L.C. (June 22, 2012), at 2, 4-10 ("DISH Comments"); Comments of the Independent Telephone & Telecommunications Alliance (June 22, 2012), at 4-5 ("ITTA Comments"); Comments of the United States Telecom Association (June 22, 2012), at 12 ("USTelecom Comments"); Comments of Verizon (June 22, 2012), at 3, 9-10 ("Verizon Comments"); Comments of the Writers Guild of America, West, Inc. (June 22, 2012), at 5-7, 11-12 ("WGA-W Comments"); Reply Comments of the American Cable Association (July 23, 2012), at 14-17 ("ACA Reply Comments"); Reply Comments of the American Public Power Association (July 23, 2012), at 4 ("APPA Reply Comments").

[61] *See 2007 Extension Order*, 22 FCC Rcd at 17821, ¶ 44; *2002 Extension Order*, 17 FCC Rcd at 12140, ¶¶ 37-38.

[62] *See 2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53; *see also 2002 Extension Order*, 17 FCC Rcd at 12147-49, ¶¶ 53-54.

[63] *See 2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53 ("[W]e find that this reduction in potential subscribership or viewership has not reached a point where withholding would be unprofitable.").

[64] *See infra* Appendix E; *see also* Comcast Comments at 7 ("Absent extraordinary circumstances, it would be economically irrational for cable-affiliated programmers to cut themselves off from DBS and telco customers, who together account for more than 40 percent of all multichannel subscribers. The potential revenues are too significant to be lightly disregarded . . . ."); Discovery Comments at 5 ("Any programmer – whether affiliated with a cable operator or not – has a strong and clear incentive to obtain the widest possible distribution of its programming. This business imperative has only grown stronger in recent years as new MVPD competitors have grown to be among the largest distributors, making it implausible that a programmer would deliberately refrain from agreeing to carriage on their platforms."); MSG Comments at 14 n.46 ("The size and market share of competing MVPDs in today's marketplace means that the costs of pursuing a foreclosure strategy through exclusivity also have risen substantially, (continued….)

18. On a regional basis, however, there remain markets where cable operators have a substantial share of subscribers.[65] In the *2007 Extension Order*, the Commission noted that the cable industry's share of MVPD subscribers in certain Designated Market Areas ("DMAs") remained above or near the 78 percent level that the Commission previously found in 2002 was sufficient to make exclusivity a profitable strategy.[66] Here, the record indicates that the cable industry's share of MVPD subscribers in certain DMAs remains above or near both the 67 percent level and the 78 percent level that the Commission has previously found to be sufficient to make exclusivity a profitable strategy.[67] Although the number of DMAs in which the cable industry's share of MVPD subscribers exceeds these benchmarks has decreased since 2007, there are still a considerable number of DMAs in which concerns about competition remain.[68]

19. Moreover, we note that data submitted in the record by cable operators indicate that clustering has increased since 2007.[69] The Commission has, in past orders, observed that clustering may

making it even less likely that lifting the ban would result in anti-competitive uses of exclusivity."); NCTA Comments at 13 ("[T]he very success of DBS and telco video providers means that any decision for a program network to deal exclusively with cable operators would require it to forgo viewership and revenues from more than 40 percent of MVPD households.").

[65] *See infra* nn.67-68, 77.

[66] *See 2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53 ("[B]ecause the share of MVPD subscribers held by cable operators is above or near 78 percent in many DMAs, there is no reduction in potential subscribership or viewership in many regional areas from that which we observed in the *2002 Extension Order*.").

[67] *See NPRM*, 27 FCC Rcd at 3435, ¶ 41 (citing data from Nielsen Media Research and concluding that "[o]n a regional basis, the market share held by cable operators in DMAs varies considerably, from a high in the 80 percent range to a low in the 20 percent range. In some major markets, such as New York, Philadelphia, and Boston, the share of MVPD subscribers attributable to cable operators far exceeds the national cable market share of 67 percent deemed significant in the *2007 Extension Order*."); *see also Comcast/NBCU Order*, 26 FCC Rcd at 4284-85, ¶ 116 (finding that Comcast's market share is 67 percent in the Philadelphia DMA); DIRECTV Comments at 18; DISH Comments at 2, 4; WGA-W Comments at 7; Reply Comments of DIRECTV, L.L.C. (July 23, 2012), at 16 n.59 ("DIRECTV Reply Comments").

[68] In the *2007 Extension Order*, based on data from Nielsen Media Research as of July 2007, the Commission noted that the share of MVPD subscribers held by "wired cable operators" exceeded 78 percent in 36 out of 210 DMAs. *See 2007 Extension Order*, 22 FCC Rcd at 17828, ¶ 53 n.277. Nielsen Media Research data as of July 2012 indicate that the share of MVPD subscribers held by "wired cable operators" (i) exceeds 78 percent in 17 out of 210 DMAs and (ii) exceeds 67 percent in 64 out of 210 DMAs. *See* ADS, OTA and Wired-Cable Penetration by DMA: DMA Household Universe Estimates: July 2012, available at http://www.tvb.org/184839/4729/ads_cable_dma; *see also 2010 Program Access Order*, 25 FCC Rcd at 763, ¶ 27 n.97 (based on data from Nielsen Media Research as of July 2009, finding that the share of MVPD subscribers held by "wired cable operators" exceeded 70 percent in 78 out of 210 DMAs). Nielsen data on "wired cable operators" include wired video providers that compete with incumbent cable operators. Assuming an 8.5 percent market share for these wired video providers in each DMA (*see infra* Appendix E), the share of MVPD subscribers held by incumbent cable operators (*i.e.*, excluding their DBS and wired video provider competitors): (i) exceeds 78 percent in 3 out of 210 DMAs and (ii) exceeds 67 percent in 23 out of 210 DMAs. *See* ADS, OTA and Wired-Cable Penetration by DMA: DMA Household Universe Estimates: July 2012, available at http://www.tvb.org/184839/4729/ads_cable_dma.

[69] *See Cablevision July 11th Letter*; *Comcast July 11th Letter*; Letter from Christopher J. Harvie, Counsel for Cablevision, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 12-68 *et al*. (July 27, 2012) ("*Cablevision July 27th Letter*"); Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 *et al*. (Aug. 16, 2012) ("*TWC Aug. 16th Letter*"); *TWC Aug. 31st Letter*.

increase a cable operator's incentive to enter into exclusive contracts for regional programming.[70] In the *2007 Extension Order*, the Commission noted that Comcast passed more than 70 percent of television households in 30 Designated Market Areas (DMAs) and TWC passed more than 70 percent of television households in 23 DMAs.[71] Based on the 2011 data provided by the cable operators, Comcast now passes more than 70 percent of television households in **[REDACTED]**[72] DMAs and TWC passes more than 70 percent of television households in **[REDACTED]** DMAs.[73] These calculations employ data from Nielsen on television households in each DMA[74] and homes passed data provided by the cable operators.[75] In the *2007 Extension Order*, the Commission also noted that the collective market share of MVPDs that compete with incumbent cable operators in many DMAs where cable multiple system operators ("MSOs") have clusters is far less than their collective nationwide market share.[76] The same holds true today.[77]

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[70] *See 2002 Extension Order*, 17 FCC Rcd at 12145, ¶ 47; *see also 2007 Extension Order*, 22 FCC Rcd at 17830, ¶ 55; ACA Comments at 8-9; DIRECTV Comments at 18; DISH Comments at 4.

[71] *See 2007 Extension Order*, 22 FCC Rcd at 17832, ¶ 58 and 17886, ¶ 9, Appendix C.

[72] The redacted data herein is Highly Confidential Information, as that term is defined in the Second Protective Order issued on June 14, 2012 in this proceeding. *See Revision of the Commission's Program Access Rules et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Second Protective Order, 27 FCC Rcd 6346 (June 14, 2012). Access to an unredacted version of this *Order* is governed by the terms of the Second Protective Order.

[73] We also received data from Cablevision showing **[REDACTED]** DMAs in which Cablevision passes more than 70 percent of television households. Per request from the Media Bureau, Cablevision provided only market-level data for its eastern region. *See Cablevision July 27th Letter*. The Commission did not analyze the extent of clustering of Cablevision systems in the *2007 Extension Order*.

[74] *See* Nielsen, *Local Television Market Universe Estimates: 2011-2012 DMA Ranks*, effective September 24, 2011.

[75] The homes passed figures submitted by the cable operators were adjusted by Commission staff to account for the fact that not all homes passed are television households and that some homes passed are vacant. Since cable operators do not generally have access to homes passed that are not subscribers, the operators are unlikely to be able to adjust for these factors in their counts. Indeed, in some cases, cable operators reported **[REDACTED]**. The adjustments made are based on Nielsen's estimate of 96.7 percent of U.S. homes with a television set and figures from the Bureau of the Census (Current Population Survey) showing that 89.2 percent of total U.S. housing units were either occupied or seasonally occupied. *See* Nielsen, *Client Communication: TV Penetration Trends: Q1 2012 Update*, Feb. 14, 2012; U.S. Bureau of the Census, Current Population Survey, Series H-111: Table 7. Estimates of the Total Housing Inventory for the United States: 1965 to Present, available at http://www.census.gov/hhes/www/housing/hvs/historic/. These figures are from different sources but appear consistent. The Census total of 118.1 million occupied or seasonally occupied households, when multiplied by Nielsen's percentage of homes with a television set, yields a figure of 114.2 million households, strikingly close to Nielsen's 114.7 million television households figure. The adjustments to the DMA-level homes passed data is as follows: Homes passed (adjusted by the Commission) = Homes passed (initial cable operator homes passed figure) * .967 * .892. In a limited number of cases, even after these adjustments, **[REDACTED]**. For those cases, we used data from the Commission's National Broadband Map to estimate the share of television households in the DMA that was passed by the cable operator in question. *See* National Broadband Map Data, *Download Files by State,Territory, and District of Columbia* (download each state zip file and extract the following text files for each state: XX-NBM-Address-Street-CSV-DEC-2011.txt, XX-NBM-CBLOCK-CSV-DEC-2011.txt), *available at* http://www.broadbandmap.gov/data-download.

[76] *See 2007 Extension Order*, 22 FCC Rcd at 17830, ¶ 55 n.296.

20. In addition to this data, we note that real-world evidence indicates that in some markets cable-affiliated programmers may have an incentive to enter into exclusive contracts that can harm competition. As noted in the previous extension decisions as well as in the *2010 Program Access Order*, vertically integrated cable operators have withheld from competitors certain terrestrially delivered networks, which are not subject to the exclusive contract prohibition.[78] Most recently, Cablevision and MSG withheld the terrestrially delivered MSG HD and MSG+ HD RSNs from AT&T and Verizon.[79]

21. Because the record before us indicates that there may be certain region-specific circumstances where vertically integrated cable operators may have an incentive to withhold satellite-delivered programming from competitors,[80] we believe that a case-by-case approach authorized under other provisions of the Act – rather than a preemptive ban on exclusive contracts – will adequately address competitively harmful conduct in a more targeted, less burdensome manner.[81] We disagree with

[77] For example, based on a nationwide market share for these competitors of 42.6 percent (*see infra*, Appendix E), their regional market share is less than their national average in markets including, but not limited to, the following where a cable operator passes more than 70 percent of television households: **[REDACTED**

] *See* ADS, OTA and Wired-Cable Penetration by DMA: DMA Household Universe Estimates: July 2012, available at http://www.tvb.org/184839/4729/ads_cable_dma; *see also supra* n.68.

[78] *See 2010 Program Access Order*, 25 FCC Rcd at 766-67, ¶ 30 (listing examples of withholding of terrestrially delivered, cable-affiliated programming); *2007 Extension Order,* 22 FCC Rcd at 17826, ¶ 49 (same); *2002 Extension Order*, 17 FCC Rcd at 12149-50, ¶ 55; *see also* AT&T Comments at 13-19; DIRECTV Comments, Report of Professor Kevin M. Murphy ("Murphy Report") at 31; DISH Comments, Expert Report of Simon J. Wilkie, Ph.D. ("Wilkie Report") at 3, 10-13; USTelecom Comments at 12; Verizon Comments at 3, 9-10; Reply Comments of Verizon (July 23, 2012), at 2-3 ("Verizon Reply Comments"). DISH also claims that expiration of the prohibition will provide cable-affiliated programmers with an additional incentive to enter into exclusive contracts to avoid program access complaints alleging a violation of the anti-discrimination provision in Section 628(c)(2)(B), which does not have a sunset date. *See* DISH Comments at 13.

[79] *See supra* n.10.

[80] We also note that, in past extension decisions, the Commission has noted that increases in horizontal consolidation among vertically integrated cable operators means they will reap a greater portion of the gains from exclusivity, thereby increasing the incentive to enter into exclusive contracts. *See 2007 Extension Order*, 22 FCC Rcd at 17829-30, ¶ 54; *2002 Extension Order*, 17 FCC Rcd at 12147-48, ¶ 53. Our most recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable operators today is 42.7 percent, an increase from the *2002 Extension Order* (34 percent), but a decrease from the *2007 Extension Order* (54-56.75 percent). *Compare infra* Appendix E with *2002 Extension Order*, 17 FCC Rcd at 12147-48, ¶ 53 and *2007 Extension Order*, 22 FCC Rcd at 17829-30, ¶ 54; *see also* ACA Comments at 7 (stating that horizontal consolidation among the four largest vertically integrated cable operators has not changed significantly over the past 17 years); DIRECTV Comments at 16-17 (noting that horizontal consolidation among the four largest vertically integrated cable operators has increased since 2002); Joint Comments of Interstate Communications, OmniTel Communications, Communications 1 Network, Inc., Farmers Mutual Telephone Coop of Shellsburg, Huxley Communications Cooperative, Hospers Telephone Company, Premier Communications, and Marne & Elk Horn Telephone Company (June 22, 2012), at 4 (same) ("Iowa Telco Comments"); *but see* Discovery Comments at 6-7 (noting a decrease in horizontal consolidation among the four largest vertically integrated cable operators over the past five years). While the record evidence demonstrates that the data pertaining to horizontal consolidation have remained consistent with 2002 levels, this factor is outweighed by other marketplace considerations favoring elimination of the preemptive ban. *See infra* ¶¶ 22-31.

[81] *See infra* ¶ 55 (establishing a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing programming, as set forth in Section 628(b)).

commenters to the extent they imply that Congress intended the prohibition to expire only once vertically integrated cable operators no longer have any incentive to enter into exclusive contracts. Such an interpretation contradicts Congress's recognition that exclusive contracts do not always harm competition and can have procompetitive benefits in some cases.[82]

(ii) Ability

22. In addition to an incentive to enter into exclusive contracts, we also assess the "ability" of vertically integrated cable operators to use exclusivity to harm competition and diversity in the distribution of video programming. In this regard, the Commission considers whether satellite-delivered, cable-affiliated programming remains programming for which there are no good substitutes and are necessary for competition.[83] In previous extension orders, the Commission found that there were no good substitutes for a significant amount of satellite-delivered, cable-affiliated programming, and that such programming remained necessary for viable competition in the video distribution market.[84] Accordingly, the Commission concluded that cable-affiliated programmers retained "the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule."[85] In reaching this conclusion, the Commission explained that "[w]hat is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace."[86]

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[82] *See infra* nn.138, 148; NCTA Reply Comments at 7 ("But the mere fact that it may be profitable for some cable operators to become the exclusive providers of their own programming cannot be a sufficient basis for continuing the ban. If it were, the sunset provision of Section 628(c) would be senseless. Exclusive contracts would continue to be banned – but only so long as such contracts might actually exist!").

[83] *See 2007 Extension Order*, 22 FCC Rcd at 17811, ¶ 30; *2002 Extension Order*, 17 FCC Rcd at 12135, ¶ 24.

[84] *See 2007 Extension Order*, 22 FCC Rcd at 17810, ¶ 29 and 17816, ¶ 38 (stating that the "record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes"); *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33 ("a considerable amount of vertically integrated programming in the marketplace today remains 'must have' programming to most MVPD subscribers"); *see also 2007 Extension Order*, 22 FCC Rcd at 17814-16, ¶ 37 (finding that the four largest cable operators had an interest in "six of the Top 20 satellite-delivered networks as ranked by subscribership, seven of the Top 20 satellite-delivered networks as ranked by prime time ratings, almost half of all RSNs, popular subscription premium networks, such as HBO and Cinemax, and video-on-demand ('VOD') networks, such as iN DEMAND"); *2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32 (finding that cable operators were affiliated with "35 percent of the most popularly rated satellite-delivered prime time programming and 45 percent of the most-subscribed-to programming[,] . . . sought-after and non-duplicable regional sports programming, . . . subscription premium networks, such as HBO and Cinemax . . .").

[85] *2007 Extension Order*, 22 FCC Rcd at 17810, ¶ 29; *see 2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 34.

[86] *2007 Extension Order*, 22 FCC Rcd at 17814-15, ¶ 37; *2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32. The Commission also acknowledged that "there exists a continuum of vertically integrated programming, 'ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact).'" *2007 Extension Order*, 22 FCC Rcd at 17816, ¶ 38 (quoting *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33); *see also* DISH Comments, Wilkie Report at 3 ("Denial of access to *popular programming* by a vertically integrated competitor serves to raise rivals' costs and leads to diminished competition and higher prices in the MVPD market.") (emphasis added).

23. We recognize that some commenters contend that the data in the *NPRM* indicate little change since 2007 in the amount of satellite-delivered, cable affiliated programming among the most popular cable networks.[87] These claims, however, do not consider four developments that impact significantly our determination as to whether a preemptive prohibition remains necessary under the terms of the statute.

24. First, as explained in the *NPRM*, the Commission in 2011 granted the application of Comcast, General Electric Company ("GE"), and NBCU to assign and transfer control of broadcast, satellite, and other radio licenses from GE to Comcast.[88] Reviewing that vertical integration pursuant to Section 310(d), the Commission approved the transaction with conditions, including a program access condition requiring Comcast/NBCU to make networks it controls (the "Comcast-controlled networks")[89] available to competitors. As set forth in Appendices F and G, we estimate that 30 satellite-delivered national networks and 14 satellite-delivered RSNs are Comcast-controlled networks.[90] Comcast/NBCU is subject to these conditions until January 2018.[91] In other words, even after the exclusive contract prohibition expires, these Comcast-controlled networks could not be subject to an exclusive contract until

[87] *See NPRM*, 27 FCC Rcd at 3427-28, ¶ 26 (stating that, since the *2007 Extension Order*, (i) the percentage of satellite-delivered, national programming networks that are cable-affiliated has declined from 22 percent to approximately 14.4 percent; (ii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has increased from six to seven; and (iii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by average prime time ratings has remained at seven); *see also* ACA Comments at 6-7, 9; AT&T Comments at 9-12; CenturyLink Comments at 7, 10-11, 13-15; DIRECTV Comments at 19-21; DISH Comments at 6; ITTA Comments at 5-6; OPASTCO/NTCA Comments at 3-5; USTelecom Comments at 6-8; Verizon Comments at 2-5, 11; WGA-W Comments at 4-5; ACA Reply Comments at iv, 12-13; APPA Reply Comments at 5-6; AT&T Reply Comments at 2, 10.

[88] *See NPRM*, 27 FCC Rcd at 3424, ¶¶ 19-20.

[89] *See Comcast/NBCU Order*, 26 FCC Rcd at 4358, Appendix A, Condition II. As discussed in the *NPRM*, the program access merger conditions apply to "C-NBCU Programmers." *See NPRM*, 27 FCC Rcd at 3428, ¶ 26 n.91. Whether a network qualifies as a "C-NBCU programmer" is a fact-specific determination. *See id*. As described in the *NPRM*, with the exception of the iN DEMAND networks, we assume that any network in which Comcast or NBCU holds a 50 percent or greater interest is a "C-NBCU Programmer" subject to these conditions. *See infra* Appendix F, Table 4 and Appendix G, Tables 2 and 3. We refer to these networks as "Comcast-controlled networks." *See NPRM*, 27 FCC Rcd at 3428, ¶ 26 n.91. We refer to other networks in which Comcast or NBCU holds a less than 50 percent interest as "Comcast-affiliated networks," which we assume for purposes of the estimates in this *Order* are not "C-NBCU Programmers" subject to the program access merger conditions adopted in the *Comcast/NBCU Order*, but are subject to the program access rules, including the exclusive contract prohibition. *See id*. No commenter opposed this proposed distinction between Comcast-controlled and Comcast-affiliated networks as set forth in the *NPRM*. In addition, given Comcast's previous statements that it cannot control decisionmaking at iN DEMAND, the *NPRM* proposed to consider iN DEMAND as Comcast-affiliated, but not Comcast-controlled. *See id*. No commenter opposed this characterization, thus we consider the iN DEMAND networks to be Comcast-affiliated, but not Comcast-controlled, for purposes of the estimates in this *Order*. Nothing in this *Order* should be read to state or imply any position as to whether any particular network qualifies or does not qualify as a "C-NBCU Programmer."

[90] *See infra* Appendix F, Table 4 and Appendix G, Table 2.

[91] *See Comcast/NBCU Order*, 26 FCC Rcd at 4381, Appendix A, Condition XX (stating that the conditions will remain in effect for seven years (until January 2018), provided that the Commission will consider a petition from Comcast/NBCU for modification of a condition if they can demonstrate that there has been a material change in circumstances, or that the condition has proven unduly burdensome, such that the condition is no longer necessary in the public interest).

January 2018.[92] For that reason, we find it appropriate to exclude the Comcast-controlled networks when assessing the continued need for a preemptive ban.[93]

25. Some commenters contend, however, that the Commission must consider the Comcast-controlled networks as if they would be impacted by a sunset of the exclusivity prohibition. They claim that, if the Commission declines to extend the prohibition based on an analysis of the market that ignores the Comcast-controlled networks, the Commission will have no vehicle to consider whether the prohibition remains necessary after the Comcast merger conditions expire.[94] We reject these claims. The Commission may exercise its broad rulemaking authority under Section 628(b) to adopt rules prohibiting certain exclusive contracts involving cable-affiliated programming if it becomes necessary after these merger conditions expire, based on an assessment of the marketplace at that time.[95]

26. Second, after the Commission released the *NPRM*, Comcast sold its interest in A&E to A&E's other owners (Disney and Hearst).[96] As a result of this transaction, the regulatory status of the 17 networks owned by A&E changed from cable-affiliated to non-cable-affiliated.[97] As set forth in the *NPRM*, A&E-owned networks account for four of the Top 20 national cable networks as ranked by average prime-time ratings[98] and three of the Top 20 national cable networks as ranked by

[92] *See supra* n.12.

[93] *See* MSG Comments at 12 (stating that expiration of the exclusive contract prohibition will have no impact on the availability of Comcast networks that will continue to be subject to program access provisions in the *Comcast/NBCU Order*); TWC Comments at 8 (stating that Comcast-controlled networks "would be subject to program access requirements regardless of the action taken by the Commission in this proceeding and should thus be ignored in this analysis"); *see also NPRM*, 27 FCC Rcd at 3433, ¶ 35 (seeking comment on to what extent the Commission should consider Comcast-controlled networks in its review of the exclusive contract prohibition). Our decision here is consistent with the *2011 Program Carriage Order*. *See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 26 FCC Rcd 11494 (2011) ("*2011 Program Carriage Order*"). In that order, the Commission found that the "number of cable-affiliated networks recently increased significantly after the merger of Comcast and NBC Universal, thereby highlighting the continued need for an effective program carriage complaint regime." *Id*. at 11518-19, ¶ 33. In the *Comcast/NBCU Order*, the Commission specifically relied on the program carriage complaint process to address concerns relating to program carriage resulting from the merger. *See id*. Accordingly, the increase in vertical integration resulting from the Comcast/NBCU transaction was a significant factor in the *2011 Program Carriage Order*. With respect to program access concerns, however, the *Comcast/NBCU Order* adopted specific conditions to address these concerns, thus allowing us to exclude the Comcast-controlled networks from consideration here.

[94] *See* ACA Comments at 10; DIRECTV Comments at 21 n.67; DISH Comments at 2, 9-10, 14; *see also* CenturyLink Comments at 7-9; WGA-W Comments at 4-5, 10.

[95] *See Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (holding that Section 628(b) is written in "broad and sweeping terms" and therefore "'should be given broad, sweeping application'") (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)); *see also 2010 Program Access Order*, 25 FCC Rcd at 771, ¶ 35 n.139 (stating that "on an appropriate record the Commission would have authority to adopt a *per se* ban on particular unfair acts prohibited by Section 628(b)").

[96] *See supra* ¶ 14. This transaction closed on August 22, 2012. *See* NBCUniversal Media, LLC, SEC Form 8-K (Aug. 22, 2012).

[97] These networks are: A&E, A&E HD, Bio, Bio HD, Crime & Investigation, Crime and Investigation HD, History, History HD, History en Español, H2 (formerly History International), H2 HD, Lifetime, Lifetime HD, Lifetime Real Women, Lifetime Movie Network, Lifetime Movie Network HD, and Military History Channel. *See NPRM*, 27 FCC Rcd at 3478-81, Appendix B, Table 2.

[98] These four networks are History, A&E, Lifetime, and Lifetime Movie Network. *See id.* at 3477, Appendix B, n.16.

subscribership.[99] Thus, the change in the regulatory status of the A&E networks has reduced since 2007 the number of satellite-delivered, cable-affiliated networks among the Top 20 national cable networks ranked by subscribership and by average prime-time ratings.[100]

27. Third, in both the *2002 Extension Order* and the *2007 Extension Order*, the Commission found significant that the subscription premium networks HBO and Cinemax were cable-affiliated.[101] The Commission relied on comments arguing that "first-run programming produced by HBO and other premium networks [is] essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator."[102] In 2009, however, the Commission approved a transaction resulting in the separation of TWC, a cable operator, from Time Warner Inc., an owner of satellite-delivered, national programming networks, including HBO and Cinemax.[103] As a result, HBO and Cinemax are no longer cable-affiliated. This transaction was also significant because it changed the regulatory status of other cable networks cited by the Commission in the *2007 Extension Order* (CNN, TBS, and TNT) from cable-affiliated to non-cable-affiliated.[104] In declining to adopt a condition applying the program access rules to Time Warner Inc. post-transaction, the Commission explained that the underlying premise of the program access rules would no longer apply because Time Warner Inc. (a non-cable-affiliated programmer) and TWC would no longer have the incentive to discriminate in favor of each other.[105]

28. Fourth, in the *2007 Extension Order*, the Commission relied on data indicating that 46 percent of all RSNs were cable-affiliated.[106] These data, however, did not distinguish between terrestrially delivered and satellite-delivered RSNs. As discussed above, the exclusive contract prohibition applies only to programming that is delivered via satellite; it does not apply to programming that is delivered via terrestrial facilities.[107] An exclusive contract involving a terrestrially delivered, cable-affiliated RSN is permitted unless the Commission finds in response to a complaint that it violates Section 628(b) of the Act.[108] We, therefore, further refine our prior analysis by distinguishing between

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[99] These three networks are A&E, Lifetime, and History. *See id.* at 3476, Appendix B, n.12.

[100] *See infra* Appendix F, Table 2 (listing Top 20 national cable networks ranked by subscribership) and Table 3 (listing Top 20 national cable networks ranked by average prime time ratings).

[101] *See 2007 Extension Order*, 22 FCC Rcd at 17814-16, ¶ 37; *2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32.

[102] *2007 Extension Order*, 22 FCC Rcd at 17815, ¶ 37 n.179. In the *2002 Extension Order*, the Commission stated that, although subscription premium networks such as HBO and Cinemax "are not among the top programming services in subscribership," they nonetheless "make an important contribution to an MVPD's revenue and profits." *2002 Extension Order*, 17 FCC Rcd at 12138, ¶ 32.

[103] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Time Warner Inc., Assignor/Transferor, and Time Warner Cable Inc., Assignee/Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 879 (MB, WCB, WTB, IB, 2009) ("*Time Warner Order*").

[104] *See 2007 Extension Order*, 22 FCC Rcd at 17814-16, ¶ 37 ("The record thus reflects that popular national programming networks, such as CNN, TNT, TBS, and The Discovery Channel . . . are affiliated with the four largest vertically integrated cable MSOs and that such programming networks are demanded by MVPD subscribers."); *2002 Extension Order*, 17 FCC Rcd at 12136-37, ¶ 28.

[105] *See Time Warner Order*, 24 FCC Rcd at 890, ¶ 21.

[106] *See 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22 and 17814-16, ¶ 37.

[107] *See supra* ¶ 1.

[108] Among other things, a complainant must demonstrate that the exclusive contract involving terrestrially delivered, cable-affiliated programming is an "unfair act" and that it has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming to (continued….)

cable-affiliated RSNs that are subject to the prohibition (*i.e.*, RSNs delivered via satellite) and those that are not (*i.e.*, RSNs delivered via terrestrial means). To that end, the Media Bureau asked the three cable operators that own the greatest number of RSNs (Cablevision, Comcast, and TWC) whether their RSNs are satellite-delivered or terrestrially delivered.[109] The responses reveal that a little fewer than half (43 percent) of all cable-affiliated RSNs are terrestrially delivered and therefore beyond the scope of the exclusive contract prohibition.[110] The remaining 57 percent of cable-affiliated RSNs are satellite-delivered, but over 43 percent of these RSNs are Comcast-controlled and thus subject to program access merger conditions until January 2018. As set forth in Appendix G, the data demonstrate the following regarding the 108 RSNs (both cable-affiliated and non-cable-affiliated) available today: (i) 52 RSNs (48 percent) are not cable-affiliated; (ii) 24 RSNs (22 percent) are cable-affiliated but terrestrially delivered and therefore subject to a case-by-case process under Section 628(b);[111] (iii) 14 RSNs (13 percent) are cable-affiliated and satellite-delivered, but are also Comcast-controlled, and therefore subject to program access merger conditions until January 2018 that require Comcast to make these networks available to competitors;[112] and (iv) only 18 RSNs (17 percent) are cable-affiliated, satellite-delivered, and not Comcast-controlled, and therefore potentially impacted by the expiration of the exclusive contract prohibition.[113]

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subscribers or consumers, as required by Section 628(b). *See 2010 Program Access Order*, 25 FCC Rcd at 780-82, ¶¶ 50-51; *see also supra* n.10.

[109] *See* Letter from William T. Lake, Chief, Media Bureau, FCC to Michael E. Olsen, Cablevision, MB Docket No. 12-68 *et al.* (June 27, 2012); Letter from William T. Lake, Chief, Media Bureau, FCC to Kathryn A. Zachem, Comcast, MB Docket No. 12-68 *et al.* (June 27, 2012); Letter from William T. Lake, Chief, Media Bureau, FCC to Steven N. Teplitz, TWC, MB Docket No. 12-68 *et al.* (June 27, 2012).

[110] *See infra* Appendix G. The Media Bureau did not request information from Bright House or Cox regarding whether their affiliated RSNs are satellite-delivered or terrestrially delivered. This includes the following four RSNs: Bright House Sports Network, Bright House Sports Network HD, Cox Sports Television, and Cox Sports Television HD. Moreover, Comcast and TWC did not provide information regarding whether the following affiliated RSNs are satellite-delivered or terrestrially delivered: Comcast SportsNet Houston, Comcast SportsNet Houston HD, Midco Sports Network, Midco Sports Network HD, Time Warner Cable SportsNet, Time Warner Cable SportsNet HD, Time Warner Cable Deportes, and Time Warner Cable Deportes HD. For purposes of this analysis, and with the exception of Cox-4 and Cox-4 HD (which the Commission has previously found are terrestrially delivered (*see 2010 Program Access Order*, 25 FCC Rcd at 756-57, ¶ 17)), we assume that all cable-affiliated RSNs for which we do not have information are satellite-delivered and therefore subject to the exclusive contract prohibition. Thus, our estimate that 43 percent of cable-affiliated RSNs are terrestrially delivered is conservative.

[111] Four of these 24 terrestrially delivered, cable-affiliated RSNs are Comcast-controlled RSNs and therefore also subject to program access merger conditions until January 2018 that require Comcast to make these networks available to competitors. *See infra* Appendix G.

[112] As discussed above, our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the *Comcast/NBCU Order* concluding that the program access merger conditions adopted therein were necessary to curb Comcast's anticompetitive exclusionary program access strategies that might result from the transaction. *See supra* n.12.

[113] *See infra* Appendix G. Even with respect to these 18 RSNs, TWC has stated it will make its four RSNs featuring the games of the Los Angles Lakers (Time Warner Cable SportsNet, Time Warner Cable SportsNet HD, Time Warner Cable Deportes, and Time Warner Cable Deportes HD) available to competing MVPDs. *See* TWC Reply Comments at 9 ("As TWC has explained, there will be many instances where cable operators will choose the broadest possible distribution of vertically integrated content on competing MVPD platforms, as TWC has announced it will do in connection with its forthcoming Lakers RSNs, whereas in other circumstances, exclusive distribution arrangements might be preferable.") (citing *Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season* (Feb. 14, 2011),
(continued….)

29. Based on the four developments noted above, the record indicates a decrease since 2007 in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks. In particular, the number of Top 20 national cable networks as ranked by average prime time ratings that are cable-affiliated has fallen from seven in 2007 to one today[114] and the number of Top 20 national cable networks as ranked by subscribership that are cable-affiliated has fallen from six in 2007 to three today.[115] Moreover, while the Commission in 2007 found that "popular subscription premium networks, such as HBO and Cinemax" were cable-affiliated,[116] those networks are no longer cable-affiliated today. In addition, while the Commission in 2007 relied on data indicating that 46 percent of all RSNs were satellite-delivered and cable-affiliated, this figure is only 17 percent today (not including Comcast-controlled networks, which are subject to program access merger conditions).[117]

30. In light of the mixed picture presented by the current MVPD market (including the decline in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks), we find that a broad, preemptive ban on exclusive contracts is no longer necessary to prevent cable-affiliated programmers from harming competition, considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. We recognize that some satellite-delivered, cable-affiliated programming, such as certain RSNs, remains necessary for competition and has no good substitutes. However, we do not believe this warrants extension of a preemptive ban on exclusivity when a case-by-case approach can address competitively harmful exclusive contracts on a more targeted basis.

(iii) Conclusion

31. Based on the foregoing, we can no longer conclude that the exclusive contract prohibition remains necessary to preserve and protect competition and diversity in the distribution of video programming considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. While the record indicates that vertically integrated cable operators may still have the ability and incentive to withhold satellite-delivered, cable-affiliated programming in some markets with the effect of harming competition and diversity, the record also demonstrates a decline since 2007 in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks. To be sure, absent the prohibition, there may be instances where cable operators enter into exclusive contracts for satellite-delivered, cable-affiliated programming that is

http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight ("The networks will be available to all satellite, cable and telco distributors in the Lakers' territory, which includes all of Southern California, Nevada and Hawaii.")).

[114] This number increases to three if the Comcast-controlled national networks are included. *Compare 2007 Extension Order*, 22 FCC Rcd at 17803-04, ¶ 19 and 17814-16, ¶ 37 *with infra* Appendix F. In the early 1990s when the exclusive contract prohibition was adopted, 12 of the Top 15 national cable networks as ranked by average prime time ratings were cable-affiliated. *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, 7600 (1994) ("*1st Annual Report*").

[115] This number increases to four if the Comcast-controlled national networks are included. *Compare 2007 Extension Order*, 22 FCC Rcd at 17803-04, ¶ 19 and 17814-16, ¶ 37 *with infra* Appendix F. In the early 1990s when the exclusive contract prohibition was adopted, 10 of the Top 25 national cable networks as ranked by subscribership were cable-affiliated. *See 1st Annual Report*, 9 FCC Rcd at 7599.

[116] *See 2007 Extension Order*, 22 FCC Rcd at 17814-16, ¶ 37.

[117] This percentage increases to 30 percent if the Comcast-controlled RSNs are included. *Compare 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22 and 17814-16, ¶ 37 *with infra* Appendix G.

necessary for competition and has no good substitutes.[118] But Congress has provided the Commission with the authority to address such contracts on a case-by-case basis after the expiration of the prohibition.[119] Specifically, Sections 628(b), 628(c)(1), and 628(d) of the Act grant the Commission broad authority to prohibit "unfair acts" of cable operators and their affiliated programmers that have the "purpose or effect" of "hinder[ing] significantly or prevent[ing]" any MVPD from providing "satellite cable programming or satellite broadcast programming to subscribers or consumers."[120] In addition, the Commission has authority (i) pursuant to Section 628(c)(2)(B) of the Act to prohibit discrimination in the prices, terms, and conditions for sale of satellite-delivered, cable-affiliated programming among MVPDs;[121] and (ii) pursuant to Section 628(c)(2)(A) of the Act to prohibit a cable operator from engaging in undue or improper influence over the decision of its affiliated, satellite-delivered programmer to enter into an exclusive contract.[122] The Commission is committed to using this statutory authority to require cable-affiliated programmers to license programming to competitors in appropriate cases, as demonstrated by our recent actions on complaints involving terrestrially delivered, cable-affiliated RSNs.[123] As

[118] *See* DIRECTV Comments, Murphy Report at 28 ("Vertically integrated programmers will find it in their interest to withhold precisely when withholding has the worst price impacts for consumers, i.e., in those cases where the prices of the vertically integrated MVPD would fall the most and its competitor's prices would increase the least if the rival MVPD had access to the programming."); DISH Comments, Wilkie Report at 8-9 ("For programming so unpopular that its withdrawal induces minimal churn, there is little threat of foreclosure. However, for programming that is pivotal and where the withdrawal induces significant churn, there is a very real threat of foreclosure . . . ."); Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (Sept. 7, 2012) ("NCTA Sept. 7, 2012 *Ex Parte* Letter") (attaching Dr. Mark Israel, *An Economic Assessment of the Prohibition on Exclusive Contracts for Satellite-Delivered, Cable-Affiliated Networks* ("Israel Decl.") at 15 (¶ 21) ("[T]here may be specific circumstances in which a vertically integrated cable network's refusal to license its content to unaffiliated MVPDs may have anti-competitive effects. . . .")).

[119] We discuss the details of this case-by-case process below. *See infra* ¶¶ 51-64.

[120] 47 U.S.C. § 548(b); *see* 47 U.S.C. § 548(c)(1); 47 U.S.C. § 548(d). Vertically integrated cable operators and their affiliated programmers agree that the Commission may address exclusive contracts on a case-by-case basis pursuant to Section 628(b) after the expiration of the exclusive contract prohibition. *See* Comments of Cablevision Systems Corp. (June 22, 2012), at 6-7, 11 ("The most sensible and appropriate means by which the Commission could enable local market conditions to be taken into account would to be to allow the exclusivity ban to sunset and rely upon Section 628(b) for case-by-case adjudications of exclusive arrangements that harm competition in local markets.") ("Cablevision Comments"); MSG Comments at 5, 17 ("Sunset of the blanket exclusivity ban would not leave the Commission without tools to protect competition, when and where needed. . . . [A]ggrieved MVPDs and the Commission can seek to bring the Section 628(b) general prohibition on unfair acts to bear."); NCTA Comments at 16 ("Section 628(*b*) will, of course, remain in effect as a safeguard against any anticompetitive effects of particular conduct that may occur in a particular market or in particular circumstances . . . ."); Comcast Reply Comments at 3 ("MVPDs that profess to be concerned about exclusive contracts will be able to bring claims under Section 628(b) alleging that any particular exclusive contract is 'unfair' and will 'hinder significantly or prevent' any MVPD from providing video programming."); TWC Reply Comments at 10 ("Under Section 628, the Commission will continue to have the authority to evaluate allegations of unfair or deceptive practices on a case-by-case basis, and that is the best mechanism for it to address any competitive issues that arise from exclusive distribution arrangements."); *see also* Discovery Comments at 11; NCTA Reply Comments at 10, 13; NCTA Sept. 7, 2012 *Ex Parte* Letter, Israel Decl. at 3-4 (¶ 8) ("evaluation of any particular exclusive contract should be based on the merits of the arrangement in question, using the Commission's established procedure for evaluating specific exclusive arrangements") (citing Section 628(b)) and 14 (¶ 18) ("a determination of whether or not exclusive arrangements are harmful should be made on a case-by-case basis").

[121] *See* 47 U.S.C. § 548(c)(2)(B); *see also* 47 C.F.R. § 76.1002(b).

[122] *See* 47 U.S.C. § 548(c)(2)(A).

[123] *See supra* n.10.

demonstrated in those proceedings, a case-by-case approach allows for an individualized assessment of exclusive contracts based on the facts presented in each case.

32. As some commenters note, however, the Commission in previous extension decisions characterized a case-by-case process for addressing exclusive contracts as an inadequate substitute for the "particularized protection" afforded by the exclusive contract prohibition.[124] But the Commission reached that conclusion on a much different factual record.[125] Here, based on the decline during the past five years in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks, we can no longer conclude that a case-by-case process is insufficient to protect MVPDs from the potential anticompetitive impact of exclusive contracts or that a preemptive ban continues to be warranted.[126] Moreover, our recent actions addressing complaints involving terrestrially delivered, cable-affiliated RSNs demonstrates the adequacy of a case-by-case process.[127]

33. Some commenters note that Congress has already established a case-by-case approach for assessing exclusive contracts involving satellite-delivered, cable-affiliated programming.[128] Specifically, pursuant to Section 628(c)(4), a cable operator or a satellite-delivered, cable-affiliated programmer may submit a "Petition for Exclusivity" to the Commission for approval to enforce or enter into an exclusive contract by demonstrating that the contract serves the public interest.[129] Some commenters claim that the Commission could streamline this procedure rather than requiring MVPDs to pursue complaints.[130] We reject this contention. Given the decline during the past five years in the amount of satellite-delivered,

[124] *2002 Extension Order,* 17 FCC Rcd at 12153-54, ¶ 65 n.206; *see 2007 Extension Order*, 22 FCC Rcd at 17834-35, ¶ 62 n.320; *see also* DIRECTV Comments at 48-49; APPA Reply Comments at 8.

[125] In fact, while finding at the time that a case-by-case process was an inadequate substitute for the broad, prophylactic exclusive contract prohibition, the Commission simultaneously acknowledged that the prohibition was "temporary" and would apply only "for the period necessary to preserve and protect competition," thus recognizing that a case-by-case process would eventually replace the prohibition. *2002 Extension Order,* 17 FCC Rcd at 12153-54, ¶ 65 n.206.

[126] The Commission's conclusions in the *Comcast/NBCU Order* do not require a different result. *See* ACA Comments at 7-8; DIRECTV Comments at 11-12; DISH Comments at 9-10; OPASTCO/NTCA Comments at 4; ACA Reply Comments at 14-15; *see also* CenturyLink Comments at 12. In that proceeding, based on an extensive factual record in the context of an adjudication, the Commission found that the "record evidence supports a finding that without Comcast-NBCU's suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast, substantially harming those MVPDs that compete with Comcast in video distribution." *Comcast/NBCU Order*, 26 FCC Rcd at 4254, ¶ 37 (footnotes omitted). Moreover, the Commission found that "this anticompetitive exclusionary program access strategy would often be profitable for Comcast." *Id*. at 4257-58, ¶ 44. The Commission's findings with respect to that transaction, which involved the nation's largest cable operator both in terms of subscribers and number of cable networks owned, do not compel the same conclusion with respect to all other vertically integrated cable operators. Indeed, the Commission specifically noted that "[a]ll adjudicatory findings are fact specific and based on the evidence in the record in a specific matter." *Id*. at 4258, ¶ 45. Moreover, consistent with the case-by-case approach we describe herein, the Commission explained that "[a]n assessment of the consequences of foreclosure of the programming at issue in a particular transaction must be made on a case-by-case basis, considering whether the foreclosure to rival MVPDs of access to the specific programming networks offered by the parties to the transaction likely would result in the loss of subscribers to MVPDs having access." *Id*. at 4258, ¶ 45 n.109.

[127] *See supra* n.10.

[128] *See* AT&T Comments at 4-5, 27-28; DIRECTV Comments at 3-4, 26-27; ITTA Comments at 8; DIRECTV Reply Comments at 17-18; Reply Comments of DISH Network L.L.C. (July 23, 2012), at 5-6 ("DISH Reply Comments"); Verizon Reply Comments at 2.

[129] *See supra* nn.20-21 and accompanying text.

[130] *See* AT&T Comments at 28; DIRECTV Reply Comments at 11-12, 17-18.

cable-affiliated programming among the most popular cable networks, we find no basis to continue to preemptively ban exclusive contracts and to place the burden on cable operators or their affiliated programmers to demonstrate that an exclusive contract serves the public interest before entering into or enforcing the contract.[131] Indeed, relying on the Petition for Exclusivity process to avoid the expiration of the prohibition would mean that the prohibition would never expire, contrary to Congress's direction.[132]

34. We recognize the possibility that the expiration of the exclusive contract prohibition may result in cable operators acquiring additional programming, including "must have" programming, and then entering into exclusive contracts for such programming.[133] We also recognize the possibility that some existing satellite-delivered, cable-affiliated programming may increase in popularity in the future. The record, however, provides no basis on which to predict the likelihood of these developments or their impact on competition.[134] Indeed, such developments seem contrary to current market trends, as discussed above.[135] Given this, extending the prohibition based simply on the chance of a reversal in industry trends would be at odds with Congress' inclusion of a sunset provision.[136] Moreover, even if a marketplace reversal were to occur, the Commission has the tools in place to address these developments, either on a case-by-case basis in response to complaints, which include a rebuttable presumption of "significant hindrance" for RSNs, or by adopting rules pursuant to Section 628(b) that prohibit certain types of exclusive contracts involving cable-affiliated programming.[137]

[131] *See supra* nn.18, 20-21 and accompanying text.

[132] *See Cablevision I*, 597 F.3d at 1314 (stating that the court expects that "the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset").

[133] *See NPRM*, 27 FCC Rcd at 3434, ¶ 37 (seeking comment on whether allowing cable operators to enter into exclusive contracts with satellite-delivered, cable-affiliated programmers will result in the acquisition of existing programming networks by cable operators, thereby increasing vertical integration).

[134] *See* DIRECTV Comments at 22-23 ("[W]hile ESPN is not cable-affiliated (and has never been withheld), the Commission must consider the possibility that a cable operator and Disney might engage in a transaction through which ESPN would become cable-affiliated."); *see also* ACA Comments at 11; Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (Oct. 1, 2012) (discussing non-cable-affiliated national sports networks (ESPN, TNT, TBS)) ("ACA Oct. 1, 2012 *Ex Parte* Letter"); *but see* Comcast Reply Comments at 5 n.13 (referring to DIRECTV's concerns as "mere speculation of future vertical integration based on hypothetical transactions").

[135] *See supra* ¶¶ 29-30.

[136] *See supra* n.132.

[137] *See supra* ¶ 25. Some commenters also speculate that cable operators will enter into exclusive contracts covering a bundle of cable-affiliated networks, which has a more harmful impact on competitors than an exclusive contract involving a single network. *See* AT&T Comments at 20; DIRECTV Comments at 20-21, Murphy Report at 28-29; DISH Comments at 7, Wilkie Report at 3, 19-22; DIRECTV Reply Comments at 4-5. Should this occur, however, the Commission will be able to address these situations post-sunset pursuant to the provisions of Section 628 that do not sunset. The Commission's conclusions in the *Comcast/NBCU Order* do not require a different result. *See* DIRECTV Comments at 20-21; ACA Reply Comments at 11-12 n.36. In that proceeding, the Commission found that the "evidence suggests that the overall bundle of NBCU cable networks is critical programming that MVPDs need to offer a competitive service that is attractive to consumers even if no individual network in the bundle were considered 'marquee' programming." *Comcast/NBCU Order*, 26 FCC Rcd at Appendix B, 4395-96, ¶ 46. As discussed above, this conclusion was based on an extensive factual record in the context of an adjudication involving the nation's largest cable operator, both in terms of subscribers and number of cable networks owned, and does not compel the same conclusion with respect to all other vertically integrated cable operators. *See supra* n.126.

c. Additional Factors Weighing in Favor of Expiration of the Exclusive Contract Prohibition

35. We find additional factors also weigh in favor of our decision to decline to extend the prohibition beyond its sunset date. First, as both Congress and the Commission have specifically recognized, exclusive contracts may result in the procompetitive benefit of increasing investment in programming in some cases, thereby promoting competition and diversity in the video programming market.[138] Vertically integrated cable operators and cable-affiliated programmers note that expiration of the prohibition will provide cable operators with an incentive to increase their investment in programming ventures, particularly local and regional programming.[139] They also claim that exclusivity is critical to programmers for the following reasons: (i) a new service with limited interest may be able to gain carriage only if it can provide a distributor with exclusive carriage;[140] (ii) exclusivity may be critical for a niche network that targets a particular audience;[141] (iii) a programmer may wish to enter into an exclusive

[138] *See* 47 U.S.C. § 548(c)(4) (listing factors that weigh in favor of an exclusive contract, including the effect of the exclusive contract on the "attraction of capital investment in the production and distribution of new satellite cable programming" and the "diversity of programming in the multichannel video programming distribution market"); *NECN Exclusivity Petition*, 9 FCC Rcd at 3236, ¶ 33 ("Congress recognized that exclusivity arrangements are typically used by suppliers to create incentives for distributors to aggressively promote and sell a particular product. In this manner, exclusive distribution may be offered to engender distributor support for a fledgling service to help it gain a foothold in the market."); *id*. at 3237, ¶ 40 ("exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service"); *see also 2007 Extension Order*, 22 FCC Rcd at 17835, ¶ 63 ("We recognize the benefits of exclusive contracts and vertical integration cited by some cable MSOs, such as encouraging innovation and investment in programming . . . ."); *1993 Program Access Order*, 8 FCC Rcd at 3385, ¶ 65 ("Particularly with respect to new programming, we recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market."); *see id*. at 3385, ¶ 65 n.83 ("[I]t is possible that local or regional news channels could be economically infeasible absent an exclusivity agreement.").

[139] *See* Cablevision Comments at 2, 7-9 ("The benefits of exclusivity are evident from Cablevision's investment in *terrestrially-delivered* local programming, which has always been free from the ban. . . . Cablevision invests in these services in part to differentiate its products from rival MVPDs, and that freedom was critical to Cablevision's willingness to invest."); Comcast Comments at 12-13 ("[A]llowing the exclusivity prohibition to sunset will create new incentives for investing in innovative programming."); Discovery Comments at 8-11 ("Allowing exclusivity . . . encourages investment and innovation in programming by reducing the substantial risks associated with developing a new programming service by allowing programmers to share both the risks and rewards of developing a new service with their distributors."); MSG Comments at 17-19 ("[T]he ability to engage in exclusive contracts encourages programmer investment and innovation in new programming."); TWC Comments at 13-15 ("[T]he exclusivity ban is thwarting competition by reducing cable operators' incentive to invest in new and existing programming."); Comcast Reply Comments at 6; Reply Comments of the Madison Square Garden Company (July 23, 2012), at 6-7 ("[C]onsumers benefit when an exclusivity arrangement encourages a cable operator to share in the investment and risks associated with launching a new programming network, without which the programmer might not be able to develop the programming.") ("MSG Reply Comments"); TWC Reply Comments at 5; NCTA Sept. 7, 2012 *Ex Parte* Letter, Israel Decl. at 15-16 (¶ 21).

[140] *See* Discovery Comments at 8-9; MSG Reply Comments at 7; *see also NECN Exclusivity Petition*, 9 FCC Rcd at 3236, ¶¶ 33-34.

[141] *See* Discovery Comments at 9 ("Without exclusivity, a distributor might not otherwise agree to carriage of the network, because there might not be enough target customers overall to warrant dedication of limited channel space unless the distributor was reasonably certain of securing a significant amount of the target audience."); MSG Comments at 22; MSG Reply Comments at 7.

arrangement to reduce or share the risks with a cable operator;[142] and (iv) exclusivity enhances the incentive of the cable operator to market and publicize the network.[143] Moreover, expiration of the exclusive contract prohibition may also encourage other MVPDs or non-MVPD-affiliated programmers to create programming to counteract any exclusives involving cable operators, thereby leading to more competition and diversity in the video programming market.[144] The Commission recognized this benefit in the *2010 Program Access Order*, explaining that, "[i]f particular programming is replicable, our policies should encourage MVPDs or others to create competing programming, rather than relying on the efforts of others, thereby encouraging investment and innovation in programming and adding to the diversity of programming in the marketplace."[145]

36. Some MVPDs question the potential for procompetitive benefits resulting from exclusive contracts involving satellite-delivered, cable-affiliated programming, noting that exclusive contracts involving non-cable-affiliated programmers are rare[146] and that the Commission previously noted an increase in programming networks over time despite the exclusive contract prohibition.[147] Nevertheless,

[142] *See* Discovery Comments at 9-10 ("If the new service is successful, it gains wide distribution; if not, generally only the programmer bears the consequences of the failure. Allowing exclusivity, however, encourages investment and innovation in programming by reducing the substantial risks associated with developing a new programming service by allowing programmers to share both the risks and rewards of developing a new service with their distributors."); MSG Comments at 18-19; MSG Reply Comments at 7.

[143] *See* Discovery Comments at 10; MSG Comments at 19.

[144] *See* Cablevision Comments at 5, 9 ("DBS operators and telcos have the resources to counter exclusivity by cable by engaging in their own exclusive arrangements, developing their own programming, or engaging in a wide range of competitive counter-measures – as occurs in response to exclusivity in all other competitive markets."); Discovery Comments at 11 ("In addition to direct benefits, exclusivity has the potential to create indirect benefits. As the Commission has acknowledged, when one distributor offers exclusive content, it can encourage investment by rival distributors to create content of their own."); MSG Comments at 9-10, 19-22 ("[E]xclusivity enhances competition in video service markets through increased investment in programming by MVPDs that, facing competition from a rival that has exclusive programming, seek to differentiate their own services to consumers with new or improved program offerings – perhaps through their own exclusive arrangements with programmers."); MSG Reply Comments at 7 ("Consumers who are customers of other MVPDs also benefit . . . when their provider, in response to an exclusive arrangement, develops new programming, cuts prices, or offers quality and service improvements to offset the attractiveness of the exclusive offering."); NCTA Reply Comments at 10; NCTA Sept. 7, 2012 *Ex Parte* Letter, Israel Decl. at 15-18 (¶¶ 21-23).

[145] *2010 Program Access Order*, 25 FCC Rcd at 750-51, ¶ 9. Some MVPDs claim that they do not have sufficient resources to invest in the creation of programming. *See* CenturyLink Comments at 18; ITTA Comments at 7; USTelecom Comments at 12; OPASTCO/NTCA Reply Comments at 4. Vertically integrated cable operators respond by noting that certain MVPDs, such as DIRECTV, DISH, Verizon, and AT&T, are large, established companies with significant resources. *See* Cablevision Comments at 5; MSG Comments at 9; *see also* NCTA Reply Comments at 10. At least with respect to regional programming, however, the Commission has noted that national distributors such as DBS operators do not have an economic base for substantial investment in regional programming. *See 2007 Extension Order*, 22 FCC Rcd at 17830-31, ¶ 55; *2002 Extension Order*, 17 FCC Rcd at 12151, ¶ 59. Even if MVPDs lack resources to create their own programming to counteract an exclusive contract, however, non-MVPD-affiliated programmers may fill the void by creating competing programming to license to competitive MVPDs, thereby leading to even greater diversity in the video programming market. *See* Comcast Comments at 12; *see also* NCTA Comments at 14.

[146] *See* AT&T Comments at 5, 27; DIRECTV Comments at 26-34, Murphy Report at 15-18; AT&T Reply Comments at 6; DIRECTV Reply Comments at 8-9; DISH Reply Comments at 3-5; Verizon Reply Comments at 3-4.

[147] *2007 Extension Order*, 22 FCC Rcd at 17836-37, ¶ 64; *see id*. at 17838-39, ¶ 66; *2002 Extension Order*, 17 FCC Rcd at 12153, ¶ 64; *see also* AT&T Comments at 5, 27; CenturyLink Comments at 18 n.47; DISH Comments at 6 n.13; AT&T Reply Comments at 6; DIRECTV Reply Comments at 8-9.

Congress specifically recognized the benefits of exclusive contracts in some cases, as demonstrated by its mandate that the Commission allow the exclusive contract prohibition to expire when it is no longer "necessary" to preserve and protect competition and diversity in the video distribution market.[148]

37. Second, the Commission has recognized that exclusive contracts may result in the procompetitive benefit of allowing MVPDs to differentiate their service offerings.[149] To be sure, the issue of whether the procompetitive benefits of product differentiation outweigh the anticompetitive harms is a fact-specific determination best handled on a case-by-case basis.[150] But, at least in some markets, it is possible that consumers will benefit from increased competition in the video distribution market when MVPDs differentiate their service offerings and thereby invite competitive countermeasures from their rivals.[151]

38. Third, declining to extend the exclusive contract prohibition beyond its sunset date and relying instead on a case-by-case process is consistent with our First Amendment obligations[152] and

[148] 47 U.S.C. § 548(c)(5); *see* S. Rep. No. 102-92 (1991), at 28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 ("The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition."); *see also Cablevision II*, 649 F.3d at 721 (stating that Congress "recogni[zed] that vertical integration and exclusive dealing arrangements are not always pernicious and, depending on market conditions, may actually be procompetitive"); *id*. (explaining that the framework Congress adopted for exclusive arrangements involving satellite-delivered, cable-affiliated programming "accords with the generally accepted view in antitrust and other areas that exclusive contracts may have both procompetitive and anticompetitive purposes and effects").

[149] *See 2007 Extension Order*, 22 FCC Rcd at 17835, ¶ 63 ("We recognize the benefits of exclusive contracts and vertical integration cited by some cable MSOs, such as . . . allowing for 'product differentiation' among distributors."); *see also Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13169-70, ¶ 29 ("We do not dispute that product differentiation strategies may be procompetitive in many instances . . . ."), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd 15849; *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13232-33, ¶ 30 (same), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd 15871, *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.). Some commenters claim that exclusivity will harm consumers because no consumer could access the full range of programming available without having to subscribe to more than one service. *See* WGA-W Comments at 5; DISH Reply Comments at 2. This argument, however, is not specific to cable-affiliated programming. Rather, it is an argument against any type of exclusive programming arrangement, including those involving non-cable-affiliated programming that is not covered by the exclusive contract prohibition. Moreover, despite this alleged drawback of exclusivity, Congress has specifically found that exclusive contracts may have countervailing procompetitive benefits in some cases. *See supra* nn.138, 148.

[150] *See Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13166-77, ¶¶ 24-41 (finding that the anticompetitive effects of a product differentiation strategy outweighed any procompetitive benefits), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd 15849; *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13229-40, ¶¶ 25-42 (same), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd 15871, *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.).

[151] *See* MSG Reply Comments at 10-11 (referring to countermeasures such as price cutting, service improvements, and emphasis on unique offerings); *see also id*. at 7; Cablevision Comments at 5; Discovery Comments at 11; MSG Comments at 19-20; NCTA Reply Comments at 10; NCTA Sept. 7, 2012 *Ex Parte* Letter, Israel Decl. at 17 (¶ 22). The Commission in the *2007 Extension Order* found that the ability of MVPDs to engage in competitive countermeasures did not mitigate the impact of being unable to offer essential programming, as demonstrated by the material adverse impact on competition in the video distribution market resulting from withholding of RSNs in San Diego and Philadelphia. *See 2007 Extension Order*, 22 FCC Rcd at 17833-34, ¶ 61. For the reasons discussed herein, given market developments since 2007, we find no basis to assume that the anticompetitive impact of exclusive arrangements always outweighs the procompetitive benefits.

[152] *See Cablevision II*, 649 F.3d at 710-14 (upholding under the First Amendment the Commission's decision to consider "unfair acts" involving terrestrially delivered, cable-affiliated programming on a case-by-case basis; stating that "[a]lthough it is true that competition in the MVPD industry has generally increased even absent rules (continued….)

promotes the goals of Executive Order 13579 and the Commission's plan adopted consistent with the Executive Order, whereby the Commission analyzes rules that may be outmoded, ineffective, insufficient, or excessively burdensome and determines whether any such regulations should be modified, streamlined, or repealed.[153] In today's marketplace, a nuanced, narrower, case-by-case approach that meets the statutory objectives is more appropriate than the blunt regulatory tool of a prohibition that preemptively bans all exclusive contracts and places the burden on the proponent of exclusivity to demonstrate how the exclusive contract serves the public interest before entering into or enforcing the contract.[154]

39. Fourth, our action here promotes regulatory parity by treating satellite-delivered and terrestrially delivered programming similarly. Specifically, we will now consider all exclusive contracts involving cable-affiliated programming on a case-by-case basis in response to complaints, regardless of whether the programming is satellite-delivered or terrestrially delivered. Nothing in the record here establishes any basis for continuing to apply a preemptive prohibition to exclusive contracts involving satellite-delivered, cable-affiliated programming while assessing exclusive contracts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis.[155] Achieving parity in treatment between these two types of programming will remove any uncertainty and confusion surrounding which regulatory approach (preemptive prohibition or case-by-case) applies. In addition, parity in regulatory treatment will help to ensure that business reasons, rather than regulatory distinctions, drive the decision whether to deliver programming by satellite or terrestrial means.

40. Fifth, we expect that any enforcement of exclusive contracts in the near term will be limited by the terms of existing affiliation agreements. In the *NPRM*, the Commission sought comment

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restricting terrestrial withholding, nothing prevents the Commission from addressing any remaining barriers to effective competition with appropriately tailored remedies"); *id*. at 721 (stating that "one reason why [the Commission's] rules survive First Amendment scrutiny" is that the Commission "has substantially narrowed the scope of its regulations by focusing on the effect of terrestrial withholding in individual cases"); *see also 2010 Program Access Order*, 25 FCC Rcd at 776-77, ¶ 44 ("We decline to adopt a broad prophylactic rule that subjects all terrestrially delivered, cable-affiliated programming to the program access rules because we lack sufficient record evidence to reach general conclusions that unfair acts involving terrestrially delivered, cable-affiliated programming will always prevent or significantly hinder an MVPD from providing video services. . . . [O]ur action today addresses any legitimate concerns about tailoring by adopting a case-by-case evaluation rather than a broad prophylactic rule.").

[153] *See* Executive Order No. 13579, § 2, 76 FR 41587 (July 11, 2011); *Final Plan for Retrospective Analysis of Existing Rules*, 2012 WL 1851335 (May 18, 2012).

[154] *See* TWC Comments at 12-16 ("The [exclusive contract prohibition] inappropriately *presumes* that exclusive contracts would cause competitive harm, rather than requiring complainants or the Commission to demonstrate such harm before infringing on the speech of cable operators and their affiliated programmers. A number of less restrictive alternatives for addressing potentially harmful exclusivity arrangements are available under Section 628 that would appropriately place the burden on complainants."); Cablevision Comments at 7, 9-10; Comcast Comments at 9-10; NCTA Comments at 17-18; Comcast Reply Comments at 7; TWC Reply Comments at 2; *but see* Verizon Comments at 11-12 (arguing that extension of the exclusive contract prohibition would withstand intermediate scrutiny); AT&T Reply Comments at 9-11; DIRECTV Reply Comments at 2, 12-26; Verizon Reply Comments at 7-8.

[155] *See NPRM*, 27 FCC Rcd at 3431-32, ¶ 32 (asking whether there is any basis for treating satellite-delivered, cable-affiliated programming and terrestrially delivered, cable-affiliated programming differently with respect to the exclusive contract prohibition and whether there are differences between satellite-delivered programming and terrestrially delivered programming that would result in cable operators having a greater ability and incentive to favor affiliates providing satellite-delivered programming); *2010 Program Access Order*, 25 FCC Rcd at 759, ¶ 21 (finding that "unfair acts" involving cable-affiliated programming may harm competition in the video distribution market "regardless of whether that programming is satellite-delivered or terrestrially delivered"); *Adelphia Order*, 21 FCC Rcd at 8276, ¶ 162.

on which of two alternative scenarios would occur after the expiration of the exclusive contract prohibition: (i) existing affiliation agreements allow programmers to terminate or modify their existing agreements immediately on the effective date of the sunset and to instead enter into exclusive contracts with cable operators; or (ii) existing affiliation agreements require programmers to continue to provide their programming to MVPDs for the duration of the term of the affiliation agreements despite the expiration of the exclusive contract prohibition.[156] In response, no commenter claimed that expiration of the exclusive contract prohibition would allow cable-affiliated programmers to immediately terminate existing agreements. Rather, one commenter noted that programmers have contractual commitments to continue to provide their programming to MVPDs despite the expiration of the exclusive contract prohibition.[157] Thus, enforcement of exclusive contracts in the near term will be limited, thereby effectively deferring the period that exclusive contracts will begin to be enforced.

d. Impact of the Expiration of the Exclusive Contract Prohibition on Competition and Consumers

41. Some commenters claim that declining to extend the exclusive contract prohibition beyond its sunset date and relying instead on a case-by-case process will harm competition, consumers, and MVPDs. We find these claims unpersuasive. First, they claim that a case-by-case complaint process is burdensome and time-consuming, especially for smaller MVPDs.[158] These claims are based on the length of time needed to resolve complaints involving terrestrially delivered RSNs, such as the recent *Verizon v. MSG/Cablevision* and *AT&T v. MSG/Cablevision* cases.[159] In those decisions, however, the Media Bureau specifically noted certain atypical circumstances that resulted in a delay in resolution of the complaints.[160] We do not expect that complaints challenging exclusive contracts involving satellite-delivered, cable-affiliated programming will present similarly atypical circumstances. In any event, for the reasons discussed below, we establish a six-month deadline (calculated from the date of filing of the

[156] *See NPRM*, 27 FCC Rcd at 3457-58, ¶ 84.

[157] One cable-affiliated programmer noted that "most, if not all, of the handful of programming networks deemed affiliated with a cable operator that would be afforded relief from elimination of the exclusivity ban likely have contractual commitments with MVPDs for some period of time going forward, thereby further minimizing the prospect that a sunset could have any near-term effect should any such programming network elect to pursue an exclusive arrangement for an existing service." MSG Comments at 12.

[158] *See* AT&T Comments at 3-4, 19-20, 23-26; CenturyLink Comments at 19-21; DIRECTV Comments at 40-42; Iowa Telcos Comments at 5; ITTA Comments at 2-3, 7 n.17, 9-10; OPASTCO/NTCA Comments at 7-8; USTelecom Comments at 13-14; APPA Reply Comments at 8-9; DIRECTV Reply Comments at 7.

[159] *See supra* n.10.

[160] The unusual circumstances at play in those cases included the following: (i) the complaints were filed after the Commission had initiated a rulemaking proceeding considering the threshold legal issue in the case (*i.e.*, whether unfair acts involving terrestrially delivered, cable-affiliated programming could be challenged pursuant to Section 628(b)); (ii) the Commission issued an order in the rulemaking proceeding (the *2010 Program Access Order*) resolving this issue after the pleading cycle on the complaints had closed; (iii) the *2010 Program Access Order* required the complainants to supplement their complaints to the extent they wanted to take advantage of the new rules adopted therein (including a rebuttable presumption of significant hindrance for RSNs), which both complainants did once the rules took effect after being approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995; (iv) the *2010 Program Access Order* provided the defendants with 45 days to answer the supplement and provided the complainant with 15 days to reply; (v) after post-discovery briefing was completed, the D.C. Circuit vacated one part of the *2010 Program Access Order* – the Commission's decision to treat certain acts involving terrestrially delivered, cable-affiliated programming as categorically "unfair"; and (vi) the parties made several additional filings and the staff conducted meetings with the parties to address the D.C. Circuit's decision. *See Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13153, ¶ 9 n.51; *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13214, ¶ 9 n.52; *2010 Program Access Order,* 25 FCC Rcd at 751, ¶ 10, 756-57, ¶ 17, 785, ¶ 55, 789, ¶ 64 n.237.

complaint) for the Media Bureau to act on a complaint alleging a denial of programming.[161] Some commenters also claim that a complainant will not have access to the programming subject to the exclusive contract during the pendency of the complaint, thereby harming the complainant's ability to attract and retain subscribers.[162] As the Commission explained in the *2010 Program Access Order*, however, a complainant may seek a standstill of an existing programming contract during the pendency of a complaint.[163] Moreover, to the extent MVPDs are concerned about the costs of pursuing a complaint, they may seek to join with other MVPDs in pursuing a complaint to share those costs.[164] An exclusive contract results in one cable operator having access to a particular cable-affiliated programming network or networks in a given geographic area, to the exclusion of every other MVPD competing in that geographic area. Accordingly, unlike a selective refusal to license where a cable-affiliated programmer withholds programming from one rival MVPD, an exclusive contract impacts every MVPD competing in the geographic area subject to the exclusive contract. For example, if a satellite-delivered, cable-affiliated RSN enters into an exclusive contract with an incumbent cable operator for each franchise area within a DMA, there are at least two DBS operators as well as potentially several telcos and cable overbuilders that will be impacted by the exclusive contract and that can seek to join as complainants in challenging the contract.

42. Second, some commenters claim that expiration of the exclusive contract prohibition will hinder the deployment of broadband.[165] They note that the Commission in the *2010 Program Access Order* explained that a wireline firm's decision to deploy broadband is linked to its ability to offer video and that unfair acts involving terrestrially delivered, cable-affiliated programming that impede the ability of MVPDs to provide video service can also impede the ability of MVPDs to provide broadband services.[166] The Commission, however, did not address this concern by adopting a preemptive ban on exclusive contracts and other allegedly unfair acts involving terrestrially delivered, cable-affiliated programming.[167] Rather, the Commission adopted a case-by-case approach for addressing these allegedly unfair acts, which is precisely the approach we rely on here.[168] As in the *2010 Program Access Order*, we

[161] *See infra* ¶¶ 63-64.

[162] *See* AT&T Comments at 26; ITTA Comments at 10.

[163] *See 2010 Program Access Order,* 25 FCC Rcd at 794-97, ¶¶ 71-75; *see also* 47 C.F.R. § 76.1003(l). We also seek comment in the *FNPRM* on whether to establish a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint. *See infra* ¶¶ 78-79.

[164] *See WaveDivision Holdings, LLC, Horizon Cable TV, Inc., Stanford University, and the City of San Bruno, California v. Comcast Corporation et al.*, Order, 26 FCC Rcd 182, 182, ¶ 1 (MB 2011) (noting settlement of a program access complaint filed on behalf of four MVPDs).

[165] *See* CenturyLink Comments at 18; ITTA Comments at 2, 8-9; OPASTCO/NCTA Comments at 6; USTelecom Comments at 10, 23-25; APPA Reply Comments at 6-7.

[166] *See 2010 Program Access Order*, 25 FCC Rcd at 771-72, ¶ 36 (citing *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2006) ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.") (citation omitted), *aff'd., Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008)); *see also Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13175-76, ¶ 38 and 13176-77, ¶ 40; *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13238-39, ¶ 39 and 13239-40, ¶ 41.

[167] *See 2010 Program Access Order*, 25 FCC Rcd at 770-71, ¶ 35.

[168] *See id.*

believe that a case-by-case process will protect MVPDs from the potential anticompetitive impact of exclusive contracts, including the impact on broadband deployment.

43. Third, although some commenters claim that expiration of the exclusive contract prohibition will have a particularly adverse impact on new entrants in the video distribution market, including small and rural MVPDs,[169] we note that the expiration of the exclusive contract prohibition does not impact the ability of MVPDs to challenge selective refusals to license.[170] Specifically, to the extent that these concerns are based on fear that cable-affiliated programmers will single out certain MVPDs (such as a satellite provider or a new entrant with a small subscriber base) and withhold programming from them,[171] as discussed below, such programmers will face the prospect of a complaint alleging non-price discrimination in violation of Section 628(c)(2)(B).[172]

44. Fourth, DISH claims that expiration of the exclusive contract prohibition will result in increased programming costs for MVPDs by providing cable-affiliated programmers with increased leverage in negotiations based on threats to provide a competing cable operator with exclusivity.[173] As with certain other concerns mentioned above, this concern is not specific to cable-affiliated programming and argues against any type of exclusive programming arrangement.[174] In addition, DISH provides no evidence that non-cable-affiliated programmers have used such threats in programming negotiations. Moreover, as mentioned above, Congress specifically recognized the procompetitive benefits of exclusivity in some cases.[175] DISH offers no basis to conclude that this singular concern about increased programming costs outweighs the potential procompetitive benefits of exclusivity envisioned by Congress.

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[169] *See* Blooston Rural Video Providers Comments at 6; CenturyLink Comments at 2, 16-17; ITTA Comments at 3-5; OPASTCO/NTCA Comments at 5-6; USTelecom Comments at 12-15, 19-23. To the extent these concerns are based on the alleged burdens of the case-by-case complaint process, we address these concerns herein. *See supra* ¶ 41 and *infra* ¶¶ 63-64.

[170] *See* 47 U.S.C. § 548(c)(2)(B).

[171] *See* CenturyLink Comments at 2 ("[C]able operators and their affiliated programmers retain at least the same ability and incentive to withhold critical programming from new entrant and smaller MVPDs as they did five years ago."); *id*. at 16-17 ("smaller MVPDs simply offer fewer 'eyeballs' compared to larger MVPDs, and thus are at greater risk that a cable-affiliated programmer would either decline to provide that programming to the MVPD or would demand terms and/or prices that were more onerous than those provided to larger MVPDs for the same programming"); USTelecom Comments at 12 ("Given the opportunity, vertically integrated MVPDs will not hesitate to withhold their programming from new MVPD entrants."); *see also* AT&T Comments at 21-22 (noting an example where the HD versions of cable-affiliated RSNs were withheld from AT&T and Verizon, but not from DIRECTV).

[172] *See infra* ¶ 61. Some commenters claim that the emergence since 2007 of distributors of video programming over the Internet justifies extension of the exclusive contract prohibition, claiming that vertically integrated cable operators have an enhanced incentive to withhold programming from potential new sources of competition. *See* DISH Reply Comments at 6-7; *see also* Free Press Comments at 7. Even assuming that these distributors qualify as MVPDs entitled to the benefits of the program access rules, however, this type of selective refusal to license would be addressed pursuant to the discrimination provision in Section 628(c)(2)(B). *See Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Public Notice, 27 FCC Rcd 3079 (MB 2012).

[173] *See* DISH Comments at 3, 13-14.

[174] *See supra* n.149.

[175] *See supra* nn.138, 148.

45. As the preceding analysis makes clear, the benefits of our decision to decline to extend the exclusive contract prohibition beyond its sunset date will outweigh any potential costs.[176] We believe that the case-by-case approach for considering exclusive contracts — which will allow the Commission to consider the unique facts and circumstances of each case — will be sufficient to protect MVPDs, including small, rural, and new entrant MVPDs, in their efforts to compete and will minimize the alleged costs of allowing the exclusive contract prohibition to sunset.[177] We also expect that the following additional factors will further reduce these alleged costs: (i) a significant percentage of satellite-delivered, cable-affiliated programming is subject until January 2018 to program access merger conditions adopted in the *Comcast/NBCU Order*, which require Comcast/NBCU to make these networks available to competitors even after the expiration of the exclusive contract prohibition;[178] (ii) we expect that any enforcement of exclusive contracts in the near term will be limited by the terms of existing affiliation agreements;[179] (iii) even after the expiration of the exclusive contract prohibition, a satellite-delivered, cable-affiliated programmer's refusal to license its content to a particular MVPD (such as a small, rural, or new entrant MVPD), while simultaneously licensing its content to other MVPDs competing in the same geographic area, will continue to be a violation of the discrimination provision in Section 628(c)(2)(B), unless the programmer can establish a "legitimate business reason" for the conduct in response to a program access complaint challenging the conduct;[180] and (iv) if the expiration of the exclusive contract prohibition results in harm to consumers or competition on a broad scale, we have statutory authority pursuant to Section 628(b) of the Act to take remedial action by adopting rules, including a prohibition on certain types of exclusive contracts involving cable-affiliated programming, to address these concerns.[181]

46. We acknowledge that a case-by case approach will result in certain costs by requiring affected parties and the Commission to expend time and resources litigating and resolving complaints.[182] We find, however, that certain factors will help to minimize these costs. Below, we establish a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b).[183] This presumption will reduce costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and

[176] *See NPRM*, 27 FCC Rcd at 3439, ¶ 49 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts to reliance instead on a case-by-case process, including Section 628(b) complaints), 3443-44, ¶ 57 (seeking comment on the costs and benefits of retaining, after a sunset, the existing process whereby a cable operator or a satellite-delivered, cable-affiliated programmer may seek Commission approval for an exclusive contract by demonstrating that the arrangement serves the public interest), 3448, ¶ 66 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts to reliance instead on a case-by-case process, including non-price discrimination complaints), 3452, ¶ 71 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts throughout the nation to reliance instead on a market-by-market assessment); 3460, ¶ 88 (seeking comment generally on the costs and benefits of the alternatives discussed in the *NPRM*).

[177] *See supra* ¶¶ 31-32.

[178] *See supra* ¶ 24 and Appendices F-G. As discussed above, our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the *Comcast/NBCU Order* concluding that the program access merger conditions adopted therein were necessary to curb Comcast's anticompetitive exclusionary program access strategies that might result from the transaction. *See supra* n.12.

[179] *See supra* ¶ 40.

[180] *See infra* ¶ 61.

[181] *See supra* ¶ 25.

[182] *See supra* ¶ 41.

[183] *See infra* ¶¶ 55-56.

empirical evidence on RSNs.[184] In addition, as noted above, the costs of pursuing a complaint can be shared by joining with other MVPDs.[185] With these additional measures to ease the burdens of litigating complaints, we believe that the costs of the case-by-case approach are outweighed by the significant benefits of our decision to decline to extend the exclusive contract prohibition beyond its sunset date.

e. Alternatives to Expiration of the Exclusive Contract Prohibition

47. In the *NPRM*, the Commission sought comment on two ways to relax the exclusive contract prohibition as alternatives to a complete expiration. For the reasons discussed below, we decline to adopt these approaches. First, the Commission sought comment on establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can file a Petition for Sunset seeking to remove the exclusive contract prohibition on a market-by-market basis based on the extent of competition in the market.[186] Both vertically integrated cable operators and their MVPD competitors oppose this approach.[187] Given the lack of any record support for a market-by-market sunset process, we decline to adopt it.

48. Second, the Commission sought comment on whether to retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming.[188] In the *2010 Program Access Order*, the Commission rejected suggestions that it adopt a preemptive prohibition on exclusive contracts involving terrestrially delivered, cable-affiliated RSNs.[189] The Commission explained that, previously in the *Adelphia Order*, it analyzed the impact of the withholding of three terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators.[190] While the Commission found a significant impact on predicted DBS market share in two cases,[191] it found no statistically significant impact in a third case.[192] While the Commission found

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[184] *See id.*

[185] *See supra* ¶ 41.

[186] *See NPRM*, 27 FCC Rcd at 3449-52, ¶¶ 69-71.

[187] *See* DIRECTV Comments at 35-36; NCTA Comments at 15; OPASTCO/NTCA Comments at 8; TWC Comments at 17-19; USTelecom Comments at 13-14; Comcast Reply Comments at 8-9; Verizon Reply Comments at 9.

[188] *See NPRM*, 27 FCC Rcd at 3452-56, ¶¶ 72-80. Vertically integrated cable operators claim, among other things, that an RSN-only prohibition (i) would not allow for an individual assessment of the unique facts of each case; (ii) is inappropriate because RSNs are not "must have" programming; and (iii) would violate the First Amendment. *See* Comcast Comments at 21-22; MSG Comments at 5, 22-29; NCTA Comments at 15; TWC Comments at 19-21; Comcast Reply Comments at 10-13; MSG Reply Comments at 12-13. While some MVPDs that compete with incumbent cable operators urge the Commission to adopt an RSN-only prohibition "at the very least" should it decline to extend the prohibition in its entirety, others note that the Commission previously rejected proposals to narrow the prohibition based on the type of programming. *Compare* OPASTCO/NTCA Comments at 9 n.38; USTelecom Comments at 8-10; Verizon Comments at 2-3, 6-10; Verizon Reply Comments at 4-9 *with* CenturyLink Comments at 18-19; DIRECTV Comments at 36-39; *see also 2007 Extension Order*, 22 FCC Rcd at 17839-40, ¶ 69 ("[I]n adopting the exclusive contract prohibition in Section 628(c)(2)(D), Congress applied the prohibition to all cable-affiliated programming. Congress did not distinguish between different types of cable-affiliated programming. . . . [W]e believe that treating all satellite cable programming and satellite broadcast programming uniformly for purposes of the exclusive contract prohibition is consistent with Section 628(c)(2)(D) and the definitions set forth in Sections 628(i)(1) and (3)."); *2002 Extension Order,* 17 FCC Rcd at 12156, ¶ 69.

[189] *See 2010 Program Access Order*, 25 FCC Rcd at 750, ¶ 7, 770-71, ¶ 35, and 782-83, ¶ 52.

[190] *See id*. at 770-71, ¶ 35 and 782-83, ¶ 52 (citing *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149 and 8271-72, ¶ 151).

[191] *See id*. (citing *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149 (concluding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; (continued….)

this evidence sufficient to support a rebuttable presumption of "significant hindrance,"[193] it rejected the claim that the "empirical evidence concerning RSNs is so uniform that it supports a *per se* rule that an unfair act involving a terrestrially delivered, cable-affiliated RSN always significantly hinders or prevents the MVPD from providing satellite cable programming or satellite broadcast programming."[194]

49. Based on the record here, we find no basis to reach a different conclusion for satellite-delivered, cable-affiliated RSNs.[195] We note that, since the *2010 Program Access Order*, the Commission has found that the withholding of two additional terrestrially delivered, cable-affiliated RSNs (MSG HD and MSG+ HD) "significantly hindered" two MVPDs (Verizon and AT&T).[196] Commenters also put forth surveys and other evidence, including evidence previously submitted in program access complaint proceedings, to support their claims regarding the uniform nature of RSNs as critical for competition.[197] But this additional evidence fails to refute the Commission's previous findings that withholding of a cable-affiliated RSN does not always have a significant competitive impact.[198] As the *Adelphia Order* demonstrates, unique factors at play in individual cases can dictate the extent to which withholding of an RSN impacts competition, such as whether the teams carried by the RSN are new and without an established following.[199] Moreover, as discussed above, if we were to adopt a preemptive prohibition for exclusive contracts involving satellite-delivered, cable-affiliated RSNs, the prohibition would impact only

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concluding that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been)).

[192] *See id*. (citing *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149 and 8271-72, ¶ 151 (concluding that withholding of a terrestrially delivered RSN in Charlotte did not show a statistically significant effect on predicted market share)). The Commission noted that the RSN in the third case showed the games of a relatively new team "'that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs.'" *See id*. at 782-83, ¶ 52 (quoting *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149 and 8271-72, ¶ 151).

[193] *See id*. at 782-83, ¶ 52.

[194] *Id*.

[195] *See NPRM*, 27 FCC Rcd at 3453, ¶ 74 (seeking comment on whether there are legal and/or policy reasons why the Commission may want to establish a case-by-case approach for assessing exclusive contracts involving terrestrially delivered, cable-affiliated RSNs, but to retain an across-the-board prohibition on exclusive contracts involving satellite-delivered, cable-affiliated RSNs).

[196] *See supra* n.10; *see also* AT&T Comments at 17-19; DIRECTV Comments at 10-11; USTelecom Comments at 8-10; Verizon Comments at 2-3; Verizon Reply Comments at 4-6.

[197] *See* AT&T Comments at 13-15 and Attachments 1-6; Verizon Comments at 2, 7-8; Verizon Reply Comments at 4-7.

[198] *See 2010 Program Access Order*, 25 FCC Rcd at 770-71, ¶ 35, and 782-83, ¶ 52; *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149 and 8271-72, ¶ 151.

[199] *See Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149 and 8271-72, ¶ 151; MSG Comments at 26 (stating that whether an exclusive contract for an RSN has the potential to harm competition depends on a wide variety of factors, including the size of the market, the number of professional sports teams, the number of RSNs in the market, the volume and type of sports programming carried by the RSN in question, and the performance of the teams carried by the RSN, but that a "one-size-fits-all blanket ban on RSN exclusivity . . . effectively preempts any assessment of these factors in determining the competitive impact of any particular exclusive agreement. As a result, any ban on RSN exclusivity hinders licensing arrangements that may have no adverse competitive effects and could enhance consumer welfare."); NCTA Sept. 7, 2012 *Ex Parte* Letter, Israel Decl. at 12 (¶ 16) ("the situation surrounding any particular RSN is inherently localized—depending on the content available on the RSN, the preferences of local viewers, alternative sources of content, *etc*.—and thus the example of RSNs highlights the need for case-by-case analysis").

18 out of the 56 cable-affiliated RSNs available today.[200] The remaining cable-affiliated RSNs are either terrestrially delivered (and thus subject to a case-by-case complaint process) or Comcast-controlled (and thus subject to program access merger conditions that require Comcast to make these networks available to competitors).[201] We find no basis in the record to single out these 18 RSNs for a preemptive prohibition on exclusive contracts. To be sure, as discussed below, we find, as the Commission found in the *2010 Program Access Order*, that the weight of the existing precedent and categorical evidence concerning RSNs is sufficient to establish a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect prohibited in Section 628(b) of the Act.[202] But, consistent with our previous holding, we continue to believe that, "[r]ather than adopting a general conclusion about the effect of these unfair acts, . . . case-by-case consideration of the impact on competition in the video distribution market is necessary to address whether unfair practices significantly hinder competition in particular cases."[203]

50. We also decline to retain a preemptive prohibition for any other categories of satellite-delivered, cable-affiliated programming.[204] Several commenters offer examples of networks and programming that they consider to be "must have" programming.[205] These commenters, however, fail to provide empirical data supporting their positions, nor do they offer a rational and workable definition of such programming that can be applied objectively.[206] Accordingly, we conclude that there is insufficient evidence in the record to support retention of a preemptive prohibition for any categories of satellite-delivered, cable-affiliated programming.[207]

2. Case-by-Case Complaint Process

51. For the reasons discussed above, rather than continue the current approach of a preemptive prohibition on exclusive contracts between cable operators and satellite-delivered, cable-

[200] *See supra* ¶ 28.

[201] As discussed above, our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the *Comcast/NBCU Order* concluding that the program access merger conditions adopted therein were necessary to curb Comcast's anticompetitive exclusionary program access strategies that might result from the transaction. *See supra* n.12.

[202] *See 2010 Program Access Order*, 25 FCC Rcd at 782-83, ¶ 52; *see also infra* ¶ 55.

[203] *2010 Program Access Order*, 25 FCC Rcd at 770-71, ¶ 35.

[204] *See NPRM*, 27 FCC Rcd at 3454-55, ¶ 76 (seeking comment on whether there are any other categories of satellite-delivered, cable-affiliated programming besides RSNs that can be deemed "must have" and for which the Commission should retain the exclusivity prohibition).

[205] *See* AT&T Comments at 20 (arguing that the Commission should consider not only "must have" networks, but also "must have" programs, such as *Pawn Stars* and *American Pickers* on the History Channel and *Suits* and *Burn Notice* on USA Network); CenturyLink Comments at 18 (citing USA Network, Discovery, and the Travel Channel as examples of "must have" programming); DIRECTV Comments at 37-38, 42 (arguing that national sports networks have many characteristics in common with regional ones and thus are "must have" programming); USTelecom Comments at 7 (citing Lifetime, A&E, SyFy, E! Entertainment Television, Bravo, History Channel, Weather Channel, and USA Network as examples of "must have" programming); *see also* ACA Oct. 1, 2012 *Ex Parte* Letter at 4 (discussing non-cable-affiliated national sports networks).

[206] *See NPRM*, 27 FCC Rcd at 3454-55, ¶ 76 (requesting that commenters provide "a rational and workable definition of such programming that can be applied objectively" and "reliable, empirical data supporting their positions, rather than merely labeling such programming as 'must have'").

[207] This lack of record evidence supporting retention of a preemptive prohibition should not be read to state or imply that a complainant could not show that withholding of certain programming results in significant hindrance under Section 628(b) based on the facts presented in a complaint proceeding.

affiliated programmers, we will consider these exclusive contracts instead on a case-by-case basis in response to complaints alleging a violation of Section 628(b). Moreover, additional causes of action under Section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under Section 628(c)(2)(A)[208] and claims alleging discrimination under Section 628(c)(2)(B).[209]

a. Section 628(b) Complaints

(i) Procedures for Challenging Exclusive Contracts Involving Satellite-Delivered, Cable-Affiliated Programming Pursuant to Section 628(b)

52. The Commission in the *2010 Program Access Order* adopted a case-by-case complaint process to address unfair acts involving terrestrially delivered, cable-affiliated programming that allegedly violate Section 628(b).[210] As detailed below, we are extending these rules and policies to Section 628(b) complaints challenging exclusive contracts involving satellite-delivered, cable-affiliated programming.[211]

53. Under the case-by-case process for complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b), the complainant will have the burden to establish that the exclusive contract at issue is "unfair" based on the facts and circumstances presented. The Commission has held previously that determining whether challenged conduct is "unfair" requires "balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits."[212] In addition, the complainant will have the burden of proving that the exclusive contract has the "purpose or effect" of "significantly hindering or preventing" the complainant

[208] *See* 47 U.S.C. § 548(c)(2)(A). The Commission has explained that the "concept of undue influence between affiliated firms is closely linked with discriminatory practices and exclusive contracting" and that the prohibition on undue influence "can play a supporting role where information is available (such as might come from an internal 'whistleblower') that evidences 'undue influence' between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding." *1993 Program Access Order*, 8 FCC Rcd at 3424, ¶ 145. The Commission has acknowledged that "such conduct may be difficult for the Commission or complainants to establish" but "its regulation provides a useful support for direct discrimination and contracting regulation." *Id*. The *NPRM* sought comment on whether, in the event of the expiration of the exclusive contract prohibition, a cable operator can "unduly influence" a satellite-delivered, cable-affiliated programmer to enter into an exclusive contract only if the underlying contract violates Section 628(b) or Section 628(c)(2)(B). *See NPRM*, 27 FCC Rcd at 3448-49, ¶ 67. Because the record on this issue is not well developed, we decline to address this issue at this time as a rulemaking matter, but leave open the possibility to consider such claims in the context of an appropriate adjudicatory matter.

[209] *See* 47 U.S.C. §§ 628(c)(2)(B); *see infra* ¶¶ 60-62.

[210] *See 2010 Program Access Order*, 25 FCC Rcd at 777-88, ¶¶ 46-61.

[211] *See NPRM*, 27 FCC Rcd at 3439-44, ¶¶ 50-57 (seeking comment on the process for complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b)).

[212] *See, e.g., Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13160-77, ¶¶ 18-41 (finding that withholding of the HD versions of the MSG and MSG+ RSNs from Verizon was an "unfair act"), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15852-53, ¶ 8 ("Determining whether challenged conduct is 'unfair' requires balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits."); *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13222-40, ¶¶ 19-42 (finding that withholding of the HD versions of the MSG and MSG+ RSNs from AT&T was an "unfair act"), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15874-75, ¶ 8 ("Determining whether challenged conduct is 'unfair' requires balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits."), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); *see also* Comcast Reply Comments at 16-17 (arguing that the Commission cannot presume that exclusive contracts are categorically "unfair").

from providing satellite cable programming or satellite broadcast programming.[213] As noted in the *2010 Program Access Order*, it is not our intent to remove incentives for MVPDs to improve their program offerings in order to differentiate themselves in the marketplace as long as their efforts to do so do not have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming.[214] In this regard, as previously noted in the *2010 Program Access Order*, it is highly unlikely that an unfair act involving local news and local community or educational programming will have the prescribed purpose or effect under Section 628(b).[215] As the Commission noted, local news and local community or educational programming is readily replicable by competitive MVPDs and exclusivity has played an important role in the growth and viability of local cable news networks.[216]

54. The Commission has not adopted specific evidentiary requirements with respect to proof that the defendant's alleged activities have the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming.[217] Rather, the evidence required to satisfy this burden will vary based on the facts and circumstances of each case and may depend on, among other things, whether the complainant is a new entrant or an established competitor and whether the programming the complainant seeks to access is new or existing programming.[218] Illustrative examples of evidence that a complainant may provide include: (i) an appropriately crafted regression analysis that estimates what the complainant's market share in the MVPD market would be if it had access to the programming and how that compares to its actual market share; or (ii) statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or not to switch to an MVPD that did not carry the withheld programming.[219] We will assess

[213] *See* 47 U.S.C. § 548(b); *see also 2010 Program Access Order*, 25 FCC Rcd at 781, ¶ 51.

[214] *See 2010 Program Access Order*, 25 FCC Rcd at 781-82, n.200.

[215] *See id.*

[216] *See id*.

[217] *See id*. at 785-86, ¶ 56.

[218] *See id.* Comcast maintains that Section 628(b) cannot be read to mean that every exclusive contract involving satellite-delivered, cable-affiliated programming would violate the "hinder significantly or prevent" prong of Section 628(b) because the contract would "prevent" an MVPD from providing the particular satellite-delivered programming subject to the exclusive contract. *See* Comcast Reply Comments at 17 n.63. We agree. As the Commission and the D.C. Circuit have explained previously, the "hinder significantly or prevent" prong of Section 628(b) focuses on how the withholding at issue impacts the MVPD's ability to provide a competing video service, not particular video programming. *See 2010 Program Access Order*, 25 FCC Rcd at 774-75, ¶ 39 ("The focus of the statute is not on the ability of an MVPD to provide a particular terrestrially delivered programming network, but on the ability of the MVPD to compete in the video distribution market by selling satellite cable and satellite broadcast programming to subscribers and consumers. . . . [I]n some cases the effect of denying an MVPD the ability to provide certain terrestrially delivered, cable-affiliated programming may be to significantly hinder the MVPD from providing video programming in general . . . ."); *see also Cablevision II*, 649 F.3d at 708 (rejecting claims that withholding of terrestrially delivered programming does not significantly hinder an MVPD from providing "satellite cable programming or satellite broadcast programming," explaining that this argument "wrongly assumes an MVPD's lack of commercial attractiveness will never prevent or significantly hinder it from providing satellite programming"), *id*. (explaining that when an MVPD is denied access to "programming that customers want and that competitors are unable to duplicate—like the games of a local team selling broadcast rights to a single sports network—competitor MVPDs will find themselves at a serious disadvantage when trying to attract customers away from the incumbent cable company").

[219] *See 2010 Program Access Order*, 25 FCC Rcd at 785-86, ¶ 56. We recognize that not all potential complainants will have the resources to perform a regression analysis or market survey and reiterate that these examples are illustrative only. *See id*.

the reliability of any evidence presented, such as the regression analysis, survey data, or other empirical data, on a case-by-case basis. The discovery process will enable parties to obtain additional evidence to assist in making these showings.[220]

55. We also establish a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming, as set forth in Section 628(b).[221] The record in this proceeding supports the conclusion that RSNs are non-replicable and, in many cases, critically important to consumers.[222] We note that in the *2010 Program Access Order* the Commission adopted a similar rebuttable presumption for terrestrially delivered, cable-affiliated RSNs, relying on Commission precedent and record evidence that demonstrated that RSNs are likely to be both non-replicable and highly valued by consumers.[223] The D.C. Circuit upheld the Commission's decision to establish this rebuttable presumption under both First Amendment and APA review.[224] The same analysis and findings from the *2010 Program Access Order* supporting a rebuttable presumption for terrestrially delivered, cable-affiliated RSNs apply equally to satellite-delivered, cable-affiliated RSNs. Indeed, commenters in this proceeding have not provided any evidence or suggested any basis for having a rebuttable presumption of "significant hindrance" for

[220] *See id.; see also* 47 C.F.R. § 76.1003(j).

[221] *See NPRM*, 27 FCC Rcd at 3441-42, ¶ 53 (seeking comment on whether to adopt a rebuttable presumption of "significant hindrance" under Section 628(b) for exclusive contracts involving satellite-delivered, cable-affiliated RSNs).

[222] Several commenters cite the Commission's recent decisions in *Verizon v. MSG/Cablevision* and *AT&T v. MSG/Cablevision* as further evidence that RSNs are non-replicable, must have programming. In each of these decisions, the Commission found that the record contained "additional support for the Commission's conclusion that [RSNs] are non-replicable and critically important to consumers and competition." *Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13181, ¶ 47 (citing, among other things, MSG's statements from a previous litigation conceding that close substitutes do not exist for sports content, ratings demonstrating that RSNs are popular programming, evidence that RSNs receive significantly higher license fees than other types of programming, thus indicating their value and importance to consumers, and results from a consumer survey demonstrating that a significant number of consumers in New York and Buffalo watch RSNs), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15852-54, ¶¶ 7-9; *see AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13244-45, ¶ 48 (citing, among other things, MSG's statements from a previous litigation conceding that close substitutes do not exist for sports content, and results from a consumer survey demonstrating that a significant number of consumers in New York watch RSNs), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15874-76, ¶¶ 7-9, *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); *see also* AT&T Comments at 15-20; DIRECTV Comments at 10-11; USTA Comments at 8-9; Verizon Comments at 7-10. Commenters also put forth surveys and other evidence to support their claims regarding the importance of RSNs, including evidence previously submitted in program access complaint proceedings. *See* AT&T Comments at 13-15 and Attachments 1-6; Verizon Comments at 2, 7-8; Verizon Reply Comments at 4-7; *see also* Letter from William M. Wiltshire, Counsel for DIRECTV, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (August 31, 2012) (attaching Kevin M. Murphy, *Economic Analysis of the Impact on DIRECTV's Subscribership of Carrying an RSN - Evidence from San Diego* (August 31, 2012)).

[223] *See 2010 Program Access Order*, 25 FCC Rcd at 782-83, ¶ 52; *see also supra* ¶ 48.

[224] *See Cablevision II*, 649 F.3d at 716-18; *id*. at 717 ("[T]he Commission advanced compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market."); *id*. at 718 ("Given record evidence demonstrating the significant impact of RSN programming withholding, the Commission's presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming.").

terrestrially delivered, cable-affiliated RSNs, but not for satellite-delivered, cable-affiliated RSNs.[225] Moreover, real-world evidence of withholding of RSNs, as well as the data in our record showing the increase of regional clusters, demonstrate that cable-affiliated programmers may still have an incentive to enter into exclusive contracts for satellite-delivered RSNs in some markets.[226] Accordingly, we believe that the record justifies the establishment of a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b).[227]

56. For purposes of this rebuttable presumption, we will define the term "RSN" in the same way the Commission defined that term in the *2010 Program Access Order* and in previous merger proceedings that have adopted program access conditions:[228]

> any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball, Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division, and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of

[225] *See NPRM*, 27 FCC Rcd at 3441, ¶ 53 (requesting comment on whether there is any basis to have a rebuttable presumption of "significant hindrance" for terrestrially delivered, cable-affiliated RSNs, but not when these networks are satellite-delivered); *see also* DIRECTV Comments at 42 (stating that it would be appropriate to adopt the same rebuttable presumption for unfair acts involving satellite-delivered, cable-affiliated RSNs that applies with respect to unfair acts involving terrestrial-delivered, cable-affiliated RSNs because cable's incentive and ability do not vary based on whether the programming is delivered by satellite or terrestrial means); *see also* ITTA Comments at 6-7. To be sure, some vertically integrated cable operators and cable-affiliated programmers claim that there is no basis to presume that exclusive contracts for any RSNs significantly hinder MVPDs from providing a competing video service, noting that certain MVPDs do not carry one or more RSNs in certain markets and that DBS operators' collective market share in Philadelphia (where they do not carry a Comcast-affiliated RSN) is higher than in some other markets where DBS operators carry some or all of the applicable RSNs. *See* Comcast Reply Comments at 12-13, 17-18; *see also* Comcast Comments at 21-22; MSG Comments at 5, 22-27; MSG Reply Comments at 12-13. We find that this evidence fails to refute the existing precedent and evidence concerning the importance of RSNs, including the rigorous empirical analysis set forth in the *Adelphia Order*. *See supra* n.191; *see also Cablevision II*, 649 F.3d at 716-18; *Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13181, ¶ 47 n.219 ("[T]he record here contains no evidence of the circumstances that led to the MVPDs' decision to refrain from carrying an RSN."), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15866, ¶ 25; *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13261, ¶ 63 n.330 (same), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15888, ¶ 25, *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); Verizon Reply Comments at 6-7.

[226] *See supra* ¶¶ 18-20.

[227] A defendant may overcome this presumption by establishing that the exclusive contract does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming. *See 2010 Program Access Order*, 25 FCC Rcd at 782-83, ¶ 52. As the Commission and the D.C. Circuit have explained, "a rebuttable presumption does not shift the burden of proof to defendants; rather, it requires defendants to come forward with evidence that rebuts or meets the presumption." *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15863, ¶ 20; *see AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15885, ¶ 20; *see also Cablevision II*, 649 F.3d at 716 ("Reviewing the Commission's order, we think it clear that its rebuttable presumptions shift only the burden of production.").

[228] *See NPRM*, 27 FCC Rcd at 3441, ¶ 53 (proposing to define the term "RSN" in the same way the Commission defined that term in the *2010 Program Access Order*).

subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.[229]

A complainant will have the burden of showing that the network at issue satisfies this definition.[230]

57. Given consumers' growing preference for HD programming,[231] we will analyze the HD version of a network separately from the standard definition ("SD") version of the network for purposes of determining whether an exclusive contract involving satellite-delivered, cable-affiliated programming has the purpose or effect set forth in Section 628(b).[232] The Commission has recognized that consumers are increasingly demanding HD programming and do not view the SD version of a particular network to be an acceptable substitute for the HD version due to the different technical characteristics and sometimes different content of these versions.[233] The D.C. Circuit upheld under both First Amendment and APA review the Commission's decision in the *2010 Program Access Order* to analyze the HD and SD versions of a network separately when evaluating Section 628(b) complaints involving terrestrially delivered programming.[234] The same analysis and findings from the *2010 Program Access Order* pertaining to the distinction between HD and SD versions of a network apply here. Thus, in considering a complaint regarding an exclusive contract involving a satellite-delivered, cable-affiliated HD network, the mere fact that the complainant offers the SD version of the network to subscribers will not alone be sufficient to refute a claim under Section 628(b).[235] In cases involving an RSN, there will be a rebuttable presumption that an exclusive contract involving the HD version of the RSN results in "significant hindrance" even if the complainant offers the SD version of the RSN to subscribers.[236]

58. We decline to establish a rebuttable presumption of "significant hindrance" for any categories of satellite-delivered, cable-affiliated programming other than RSNs.[237] Several commenters

[229] *2010 Program Access Order*, 25 FCC Rcd at 783-84, ¶ 53.

[230] *See id*. at 784, ¶ 53.

[231] *See* ITTA Comments at 6 (noting that "while it is important for competing MVPDs to carry both SD and HD versions of a particular network, HD networks are particularly valuable to subscribers who own HD televisions and want access to HD programming that will allow them to fully realize the enhanced picture quality and other benefits associated with such programming."); *see also Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13182-84, ¶ 48 (noting record evidence providing further support for the Commission's conclusion regarding the growing significance of HD RSNs to consumers), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd 15849; *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13245-47, ¶ 49 (same), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd 15871, *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); Verizon Reply Comments at 6-7.

[232] *See NPRM*, 27 FCC Rcd at 3442, ¶ 54.

[233] *See id.* at 784-85, ¶ 54-55.

[234] *See Cablevision II*, 649 F.3d at 716-18.

[235] *See 2010 Program Access Order*, 25 FCC Rcd at 785, ¶ 55.

[236] *See id.*

[237] *See NPRM*, 27 FCC Rcd at 3441-42, ¶ 53 (seeking comment on whether there are other types of satellite-delivered, cable-affiliated programming besides RSNs for which the Commission should establish a rebuttable presumption). The Commission also sought comment in the *NPRM* on whether to establish a rebuttable presumption that, once a complainant succeeds in demonstrating an exclusive contract involving a satellite-delivered, cable-affiliated programming network violates Section 628(b) or Section 628(c)(2)(B), any other exclusive contract involving the same network violates Section 628(b) or Section 628(c)(2)(B). *See id*. at 3443, ¶ 56. While we have received a few *ex parte* submissions on this issue, we do not believe the record on this issue is sufficiently developed and thus decline to adopt this rebuttable presumption at this time. *See, e.g*., Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, MB (continued….)

offer examples of networks and programming that they consider to be "must have" programming.[238] These commenters, however, fail to provide empirical data supporting their positions, nor do they offer a rational and workable definition of such programming that can be applied objectively.[239] Accordingly, we conclude that there is insufficient evidence in the record to support adoption of a rebuttable presumption for any other categories of satellite-delivered, cable-affiliated programming.[240]

(ii) 45-day Answer Period

59. We amend our rules to provide for the same 45-day answer period for all complaints alleging a violation of Section 628(b), regardless of whether the complaint involves satellite-delivered or terrestrially delivered programming.[241] While our current program access procedural rules require a defendant to a complaint involving satellite-delivered programming to file an answer within 20 days after service,[242] the Commission allows a defendant to a complaint involving terrestrially delivered programming 45 days after service to file an answer.[243] The Commission determined that additional time is appropriate because, unlike complaints alleging a violation of the prohibitions set forth in Section 628(c), a complaint alleging a violation of Section 628(b) entails additional factual inquiries, including whether the allegedly "unfair act" at issue has the purpose or effect set forth in Section 628(b).[244] Although one commenter expresses concern that a 45-day answer period will lead to delays in resolving complaints,[245] we conclude that the same 45-day answer period should apply in all complaint proceedings alleging a violation of Section 628(b) because all such complaints will involve the factual issue of whether the challenged conduct has the purpose or effect set forth in Section 628(b).[246] To the extent a complaint alleges a violation of both Section 628(b) and Section 628(c), the longer (45-day) answer period will apply.

b. Section 628(c)(2)(B) Discrimination Complaints

60. Price and non-price discrimination complaints under Section 628(c)(2)(B) of the Act will also continue to protect MVPDs in their efforts to compete following expiration of the exclusive contract prohibition.[247] With respect to non-price discrimination, the sunset of the exclusive contract prohibition

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Docket Nos. 12-68, 07-18, 05-192 (Oct. 3, 2012), at 2-3; Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (Sept. 25, 2012), at 9-10.

[238] *See supra* n.205.

[239] *See NPRM*, 27 FCC Rcd at 3442, ¶ 53 (requesting that commenters provide "a rational and workable definition of such programming that can be applied objectively" and "reliable, empirical data supporting their positions, rather than merely labeling such programming as 'must have'").

[240] This lack of record evidence supporting a rebuttable presumption for this programming should not be read to state or imply that a complainant could not show that withholding of such programming results in significant hindrance under Section 628(b) based on the facts presented in a complaint proceeding.

[241] *See NPRM*, 27 FCC Rcd at 3466, ¶ 97 (proposing to amend the Commission's rules to provide for a 45-day answer period for all complaints alleging a violation of Section 628(b)).

[242] *See* 47 C.F.R. § 76.1003(e).

[243] *See* 47 C.F.R. § 76.1001(b)(2)(i); *2010 Program Access Order*, 25 FCC Rcd at 779-80, ¶ 49.

[244] *See 2010 Program Access Order*, 25 FCC Rcd at 779-80, ¶ 49.

[245] *See* OPASTCO/NTCA Comments at 10-11.

[246] *See* Comcast Comments at 14; DIRECTV Comments at 43 (both supporting adoption of a 45-day answer period).

[247] *See 1993 Program Access Order*, 8 FCC Rcd at 3364, ¶ 14 ("[W]e will find price discrimination to have occurred if the difference in the price charged to competing distributors is not explained by the statute's permissible factors. In general terms, these factors involve (1) cost differences at the wholesale level in providing a program (continued….)

does not impact the ability of MVPDs to challenge selective refusals to license under Section 628(c)(2)(B), which does not contain a sunset provision. In addition, the statute and our precedent provide that an exclusive "arrangement" (as opposed to an exclusive "contract") may violate Section 628(c)(2)(B) of the Act.[248]

61. As described in the *NPRM*, a selective refusal to license occurs when a satellite-delivered, cable-affiliated programmer singles out a particular MVPD (such as a satellite provider or a small, rural, or new entrant MVPD) for differential treatment by refusing to license its content to the MVPD while simultaneously licensing its content to other MVPDs competing in the same geographic area.[249] Commission precedent establishes that a selective refusal to license is a violation of the discrimination provision in Section 628(c)(2)(B), unless the programmer can establish a "legitimate business reason" for the conduct.[250] Thus, if a satellite-delivered, cable-affiliated programmer discriminates against an MVPD in this manner, the expiration of the exclusive contract prohibition does not limit the existing right of an MVPD to file a complaint challenging the selective refusal to license as a form of non-price discrimination in violation of Section 628(c)(2)(B).[251]

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service to different distributors; (2) volume differences; (3) differences in creditworthiness, financial stability, or character; and (4) differences in the way the service is offered.").

[248] *See NPRM*, 27 FCC Rcd at 3444, ¶ 59 (seeking comment on whether to interpret Section 628(c)(2)(B) to allow challenges to exclusive arrangements as unreasonable refusals to license). The Commission also sought comment in the *NPRM* on whether an exclusive contract can be challenged post-sunset as an unreasonable refusal to license in violation of Section 628(c)(2)(B). *See NPRM*, 27 FCC Rcd at 3444-47, ¶¶ 60-63. The record on this issue, however, is not well developed. Accordingly, we defer consideration of this issue. We will instead assess this issue based on the facts presented in an individual adjudication.

[249] *See NPRM*, 27 FCC Rcd at 3447-48, ¶ 64. As the Commission explained in the *2007 Extension Order*, "a vertically integrated programmer that withholds programming from a recent entrant with a minimal subscriber base but chooses to offer the programming to all other competitive MVPDs in the market could be found in violation of the program access rules based on an unreasonable refusal to sell." *2007 Extension Order*, 22 FCC Rcd at 17832-33, ¶ 60 n.309; *see also id*. at 17832-33, ¶ 60 ("[A] vertically integrated programmer that withholds programming from one competitive MVPD in a market would generally need to withhold the programming from all other competitive MVPDs in the market, thereby increasing the foregone revenues resulting from a withholding strategy."); ACA Reply Comments at 21 ("[I]t is possible that, in some cases, a cable-affiliated programmer might find it profitable to withhold programming from a small overbuilder operating within its affiliated cable operator's footprint, even if it would not find it profitable to withhold the same programming from the four large national MVPDs who typically compete against cable (DirecTV, Dish, AT&T, and Verizon). In such a case, the discrimination prohibition would continue to provide the small overbuilder with some protection even if the exclusive contract prohibition is allowed to sunset.").

[250] *See 1993 Program Access Order*, 8 FCC Rcd at 3364, ¶ 14 ("The statute's prohibition against discrimination also encompasses non-price discrimination, which we believe could occur through 'unreasonable refusals to sell' programming, including instances where a vendor refuses to initiate negotiations, or to offer particular terms, to an individual distributor, or to a class of distributors, when such programming or terms are offered to competing distributors."); *id*. at 3412-13, ¶ 116 ("We believe that the Commission should distinguish 'unreasonable' refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor."); *see also Bell Atlantic Video Servs. Co. v. Rainbow Programming Holdings Inc. and Cablevision Sys. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 9892, 9899, ¶ 18 (CSB 1997) (finding that defendant cable-affiliated programmer had engaged in impermissible non-price discrimination).

[251] Complaints alleging a violation of Section 628(c)(2)(B) do not require a showing of harm to the complainant. *See 1993 Program Access Order*, 8 FCC Rcd at 3377-78, ¶¶ 47-49 ("[W]e believe that if behavior meets the definitions of the activities proscribed in [Section 628(c)], such practices are implicitly harmful. . . . In each case, a (continued….)

62. As described in the *NPRM*, an exclusive "arrangement" exists when a satellite-delivered, cable-affiliated programmer unilaterally refuses to license its programming to all MVPDs competing in a geographic area except for one (such as its affiliated cable operator), without any exclusive contract with the MVPD.[252] While the expiration of the exclusive contract prohibition in Section 628(c)(2)(D) will generally permit "exclusive contracts" between cable operators and satellite-delivered, cable-affiliated programmers,[253] it does not permit the unilateral action of the programmer described here, unless the programmer can establish a "legitimate business reason" for the conduct. Accordingly, the expiration of the exclusive contract prohibition does not limit the existing right of an MVPD to challenge the unilateral action of a satellite-delivered, cable-affiliated programmer to refuse to license its programming to all MVPDs in a market except for one as a form of non-price discrimination in violation of Section 628(c)(2)(B).[254]

c. Deadline for Media Bureau Action on Complaints Alleging a Denial of Programming

63. We adopt a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. This deadline will apply regardless of whether the programming subject to the exclusive contract is terrestrially delivered or satellite-delivered. As noted above, some commenters claim that a case-by-case complaint process is burdensome and time-consuming.[255] We believe that codifying a specific deadline in our rules for the Media Bureau to act on a complaint alleging a denial of programming will help to resolve disputes quickly and efficiently, provide certainty to all parties to the complaint, and fulfill our statutory mandate to "provide for expedited review" of program access complaints.[256]

64. A complainant alleging a denial of programming may bring a claim pursuant to Section 628(b) or Section 628(c) or both. For complaints brought pursuant to Section 628(b), an initial 60-day pleading cycle applies.[257] For complaints brought pursuant to Section 628(c), an initial 35-day pleading

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legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited. Therefore, we will not impose a threshold burden of demonstrating some form of anticompetitive harm on a complainant alleging a violation of Section 628(c).") (citations omitted); *see also 1994 Program Access Order*, 10 FCC Rcd at 1930, ¶ 62 ("We affirm our prior determination that there is no requirement to show harm in a complaint alleging violations of conduct prohibited under Section 628(c). Instead, Congress presumed that the conduct enumerated in Section 628(c) injured competition.").

[252] *See NPRM*, 27 FCC Rcd at 3444, ¶ 59.

[253] Section 628(c)(2)(D) of the Act prohibits "exclusive contracts . . . between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest." 47 U.S.C. § 548(c)(2)(D). This language presumes that an agreement exists between the cable operator and the satellite-delivered, cable-affiliated programmer that would provide the cable operator with exclusivity.

[254] The scenario presented in paragraph 62 assumes that a satellite-delivered, cable-affiliated programmer licenses its programming to one MVPD in a geographic area, to the exclusion of all other MVPDs competing in that geographic area. Conversely, as discussed above, a selective refusal to license assumes that a satellite-delivered, cable-affiliated programmer licenses its programming to more than one MVPD competing in a geographic area, but refuses to license its programming to one or more other MVPDs competing in the same geographic area. *See supra* ¶ 61. In either scenario, an aggrieved MVPD can challenge this conduct as a form of non-price discrimination in violation of Section 628(c)(2)(B).

[255] *See supra* ¶ 41.

[256] *See* 47 U.S.C. § 548(f)(1).

[257] *See supra* ¶ 59 (establishing a 45-day answer period for a complaint alleging a violation of Section 628(b)); *infra* Appendix C (adopting amendment to 47 C.F.R. § 76.1003(e)(1) to provide for a 45-day answer period for a complaint alleging a violation of Section 628(b)); 47 C.F.R. § 76.1003(f) (providing for a 15-day reply period).

cycle applies.[258] After the close of the pleading cycle, the parties may elect to engage in discovery and then file post-discovery pleadings.[259] Although the length of the discovery process will necessarily vary on a case-by-case basis, given our experience in other complaint proceedings, we expect that parties will agree on the scope of discovery and complete discovery and post-discovery briefing within approximately 60 days.[260] When combined with the initial 60-day pleading cycle (in a Section 628(b) complaint) or 35-day pleading cycle (in a Section 628(c) complaint), this would provide the Media Bureau with the complete record on which to base its decision approximately four months (in a Section 628(b) complaint) or three months (in a Section 628(c) complaint) after the filing of the complaint. Thus, based on these assumptions, the Media Bureau would have approximately two months (in a Section 628(b) denial of programming complaint) or three months (in a Section 628(c) denial of programming complaint) to reach a decision once the record closes. We believe this timeframe is sufficient to allow for the Media Bureau to review the record and draft and release a decision while also providing for the "expedited review" required by Congress and ensuring fairness to all parties.[261]

d. Petitions for Exclusivity

65. We retain our exclusivity petition process,[262] whereby a cable operator or satellite-delivered, cable-affiliated programmer may file a Petition for Exclusivity seeking a Commission ruling that an exclusive contract involving satellite-delivered, cable-affiliated programming serves the public interest.[263] To be sure, post-sunset, there is no requirement for a cable operator or a satellite-delivered, cable-affiliated programmer to seek prior approval for an exclusive contract. However, should a cable operator or satellite-delivered, cable-affiliated programmer elect to pursue a Petition for Exclusivity grant of such a petition will immunize the contract from potential complaints alleging a violation of Section 628(c)(2)(B), as required by the terms of Section 628(c)(2)(B)(iv).[264]

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[258] *See* 47 C.F.R. § 76.1003(e)(1) (providing for a 20-day answer period); 47 C.F.R. § 76.1003(f) (providing for a 15-day reply period). As stated above, to the extent a complaint alleges a violation of both Section 628(b) and Section 628(c), the longer (45-day) answer period will apply. *See supra* ¶ 59.

[259] *See* 47 C.F.R. § 76.1003(j). In light of the expedited timeframe for the Media Bureau's decision adopted herein, we emphasize that complainants should not raise new matters in a reply. *See* 47 C.F.R. § 76.1003(f).

[260] *See Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13152-53, ¶ 9.

[261] We will allow the Media Bureau to extend these deadlines under exceptional circumstances, such as where the parties jointly agree to toll the deadline.

[262] *See NPRM*, 27 FCC Rcd at 3443-44, ¶ 57 (seeking comment on whether there would be any benefit to retaining post-sunset the existing process whereby a cable operator or a satellite-delivered, cable-affiliated programmer may file a Petition for Exclusivity seeking Commission approval for an exclusive contract involving satellite-delivered, cable-affiliated programming by demonstrating that the arrangement serves the public interest based on the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules).

[263] *See* 47 U.S.C. § 548(c)(2)(D), (c)(4); *see also* 47 C.F.R. § 76.1002(c)(4), (c)(5); *supra* n.21 (listing the factors the Commission is required to consider in determining whether an exclusive contract serves the public interest).

[264] Section 628(c)(2)(B)(iv) provides that it is not a violation of Section 628(c)(2)(B) for a satellite-delivered, cable-affiliated programmer to "enter [] into an exclusive contract that is permitted under [Section 628(c)(2)(D)]." 47 U.S.C. § 548(c)(2)(B)(iv). The Commission has previously interpreted this language to pertain to only those exclusive contracts deemed to serve the public interest in response to a Petition for Exclusivity based on the factors set forth in Section 628(c)(4). *See* 47 U.S.C. § 548(c)(2)(D) (prohibiting specified exclusive contracts "unless the Commission determines (in accordance with [Section 628(c)(4)]) that such contract is in the public interest"); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, 18319, ¶ 185 n.428 (1996) ("We interpret this provision as providing a safe harbor from challenge under Section 628(c)(2)(B)'s discrimination prohibition to exclusive contracts that the Commission has determined to be in the public interest under Section 628(c)(2)(D)."") ("*1996 OVS Order*").

e. First Amendment

66. We conclude that addressing complaints challenging exclusive contracts for satellite-delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.[265] As explained below, the case-by-case process we adopt for exclusive contracts involving satellite-delivered, cable-affiliated programming satisfies intermediate scrutiny.[266]

67. Although we conclude herein that changes in the video programming market warrant the expiration of the broad, prophylactic exclusive contract prohibition, regulation of exclusive contracts involving satellite-delivered, cable-affiliated programming on a case-by-case basis is still necessary to preserve and promote competition and diversity in the video distribution market.[267] Cable operators continue to control 57.4 percent of MVPD subscribers nationwide[268] and have an overwhelming share of subscribers in many regional markets, in the 80 percent range in some cases.[269] Moreover, there is evidence that cable prices have risen in excess of inflation.[270] In addition, as discussed above, the record indicates that vertically integrated cable operators may still have an incentive and ability to enter into exclusive contracts for satellite-delivered, cable-affiliated programming in some cases, and there may be instances where this programming is necessary for competition and has no good substitutes.[271] In rejecting a First Amendment challenge to the case-by-case approach adopted by the Commission for considering unfair acts involving terrestrially delivered, cable-affiliated programming, the D.C Circuit in *Cablevision II* stated that "[t]he Commission has no obligation to establish that vertically integrated cable

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[265] *See NPRM*, 27 FCC Rcd at 3459, ¶¶ 86-87 (seeking comment on the First Amendment implications of the alternatives discussed in the *NPRM*).

[266] *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) ("*Time Warner*") (holding that intermediate scrutiny applies to the program access rules) (quoting *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 662 (1994) ("*Turner*") (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968))).

[267] *Id.* at 978 (finding that the governmental interest Congress intended to serve in enacting the program access provisions was "the promotion of fair competition in the video marketplace" and that this interest was substantial); *id.* (noting Congress' conclusion that "the benefits of these provisions — the increased speech that would result from fairer competition in the video programming marketplace — outweighed the disadvantages [resulting in] the possibility of reduced economic incentives to develop new programming). Furthermore, one of Congress' express findings in enacting the 1992 Cable Act was that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 1992 Cable Act, § 2(a)(6).

[268] *See supra* ¶ 17.

[269] *See id.*; *see also NPRM*, 27 FCC Rcd at 3435, ¶ 41 (citing data from Nielsen Media Research and concluding that, "[o]n a regional basis, the market share held by cable operators in DMAs varies considerably, from a high in the 80 percent range to a low in the 20 percent range. In some major markets, such as New York, Philadelphia, and Boston, the share of MVPD subscribers attributable to cable operators far exceeds the national cable market share of 67 percent deemed significant in the *2007 Extension Order*."); *Comcast/NBCU Order*, 26 FCC Rcd at 4284-85, ¶ 116 n.275 ("Comcast has over 60 percent of MVPD subscribers in the third (Chicago, 62 percent) and fourth (Philadelphia, 67 percent) largest MVPD markets."); DIRECTV Comments at 18 (noting that regional concentration in many major metropolitan areas — including New York, Boston, Philadelphia, and Washington, DC — remains much higher than national concentration, with market share in the 80 percent range in some cases); DISH Comments at 4 (noting that cable controls as much as 83 percent of the market in Philadelphia, 77 percent of the market in Chicago, and 88.5 percent of the market in New York).

[270] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, DA 12-1322 (MB 2012); DIRECTV Reply Comments at 16 n.59.

[271] *See supra* ¶¶ 31-32; *see also supra* ¶ 55 (noting evidence that RSNs are non-replicable and, in many cases, critically important for competition).

companies retain a stranglehold on competition nationally or that all withholding of terrestrially delivered programming negatively affects competition."[272] Rather, the Commission "need only show that vertically integrated cable operators remain dominant in *some* video distribution markets, that the withholding of highly desirable terrestrially delivered cable programming, like RSNs, inhibits competition in those markets, and that providing other MVPDs access to such programming will 'promot[e] . . . fair competition in the video marketplace.'"[273] Given the clear evidence in the record that cable operators remain dominant in some regional markets and in some cases may enter into exclusive contracts for satellite-delivered, cable-affiliated programming that is necessary for competition and has no good substitutes, we find that the case-by-case approach adopted in this *Order* serves an important governmental interest.

68. Our decision to address exclusive contracts involving satellite-delivered, cable-affiliated programming on a case-by-case basis is not based on programming content but rather is intended to address the impact on competition in the video distribution market.[274] Because the regulations we adopt herein respond to concerns about competition, not content, they are content-neutral and unrelated to the suppression of free speech. Similarly, our decision to adopt a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the prohibited purpose or effect set forth in Section 628(b) is based not on content but on the existing precedent and record evidence before us regarding the importance of RSNs for competition.[275] As the D.C. Circuit explained in upholding a similar rebuttable presumption for terrestrially delivered, cable-affiliated RSNs, the "clear and undisputed evidence shows that the Commission established presumptions for RSN programming due to that programming's economic characteristics, not to its communicative impact."[276]

69. Finally, we conclude that any incidental restriction on speech which may result from our decision to adopt a case-by-case process to address exclusive contracts involving satellite-delivered, cable-affiliated programming "is no greater than is essential to the furtherance" of Congress' interest in promoting competition in the video distribution market. The court in *Cablevision II* explained that, "[b]y imposing liability only when complainants demonstrate that a company's unfair act has the 'purpose or effect' of 'hinder[ing] significantly or . . . prevent[ing] the provision of satellite programming, . . . the Commission's terrestrial programming rules specifically target activities where the governmental interest is greatest."[277] Similarly, the tailored case-by-case process for addressing exclusive contracts involving satellite-delivered, cable-affiliated programming targets activities where the governmental interest is greatest by limiting liability to cases where a complainant demonstrates that an exclusive contract is an "unfair act" that has the "purpose or effect" of "significantly hindering or preventing" the provision of

[272] *Cablevision II*, 649 F.3d at 712. The court further found that "[a]lthough it is true that competition in the MVPD industry has generally increased even absent rules restricting terrestrial withholding, nothing prevents the Commission from addressing any remaining barriers to effective competition with appropriately tailored remedies." *Id.*

[273] *Id.* (quoting *Time Warner*, 93 F.3d at 978).

[274] *See Time Warner,* 93 F.3d at 978 (holding that the governmental objective served by the program access provisions was unrelated to the suppression of free expression); *id.* ("[T]he vertically integrated programming provisions apply to only a limited number of companies for a perfectly legitimate reason: the antitrust concerns underlying the statute arise precisely because the number of vertically integrated companies is small. The vertically integrated programmer provisions are thus not 'structured in a manner that raise[s] suspicions that their objective was, in fact, the suppression of certain ideas.'" (quoting *Turner*, 512 U.S. at 660)).

[275] *See supra* ¶ 55.

[276] *Cablevision II*, 649 F.3d at 718.

[277] *Id*. at 711-12 (quoting 47 U.S.C. § 548(b)).

satellite programming in violation of Section 628(b).[278] Moreover, with respect to the rebuttable presumption for satellite-delivered, cable-affiliated RSNs adopted herein, the D.C. Circuit has explained regarding a similar rebuttable presumption for terrestrially delivered, cable-affiliated RSNs that "[g]iven record evidence demonstrating the significant impact of RSN programming withholding, the Commission's presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming."[279]

C. Subdistribution Agreements

70. Consistent with our decision to decline to extend the exclusive contract prohibition beyond its sunset date, we eliminate the restrictions on exclusive subdistribution agreements in served areas between cable operators and satellite-delivered, cable-affiliated programmers.[280] The Commission's rules define a subdistribution agreement as "an arrangement by which a local cable operator is given the right by a satellite cable programming vendor or a satellite broadcast programming vendor to distribute the vendor's programming to competing multichannel video programming distributors."[281] Based on the exclusive contract prohibition, the Commission adopted certain restrictions on exclusive subdistribution agreements in the *1993 Program Access Order* to "address any incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights" and to ensure "appropriate safeguards to limit the potential for anticompetitive behavior."[282] Because we have concluded that the exclusive contract prohibition in served areas is no longer necessary to preserve and protect competition and

[278] Some vertically integrated cable operators suggest that the program access rules are underinclusive because they apply to cable-affiliated programmers but not other MVPD-affiliated or unaffiliated programmers. *See* TWC Comments at 16-17; NCTA Reply Comments at 3; TWC Reply Comments at 3-4. As an initial matter, we note that the issue of whether to extend certain program access rules to programmers affiliated with non-cable MVPDs is pending before the Commission. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17861, ¶ 118 (2007). With respect to unaffiliated programmers, the Commission in the *2007 Extension Order* found no record evidence to conclude that exclusive arrangements involving unaffiliated programmers have harmed competition in the video distribution market, and commenters offer no evidence in the record of this proceeding that would cause us to revisit this conclusion. *See 2007 Extension Order,* 22 FCC Rcd at 17843, ¶ 77. In any event, the D.C. Circuit in *Cablevision II* rejected claims that the program access rules were underinclusive, explaining that these rules "focus on vertically integrated cable companies due to their ''special characteristics'' and their unique ability to impact competition." *Cablevision II*, 649 F.3d at 713 (citing *Time Warner,* 93 F.3d at 978 (quoting *Turner Broad. Sys.,* 512 U.S. at 660–61, 114 S.Ct. 2445)). Moreover, the court explained that "[w]ere the Commission to persist in regulating only the conduct of cable operators in the face of evidence that exclusive dealing arrangements involving other MVPDs have similar negative impacts on competition, then our analysis would necessarily change. But nothing in the present record suggests such unjustified discrimination." *Id*. The same conclusion applies based on the record in this proceeding.

[279] *Cablevision II*, 649 F.3d at 718.

[280] *See NPRM*, 27 FCC Rcd at 3460-61, ¶ 89 (proposing to eliminate the restrictions on exclusive subdistribution agreements in served areas if the exclusive contract prohibition expires). No commenter addressed this proposal.

[281] 47 C.F.R. § 76.1000(k).

[282] *1993 Program Access Order*, 8 FCC Rcd at 3387, ¶ 68. These restrictions prohibited a cable operator engaged in subdistribution from (i) requiring a competing MVPD to purchase additional or unrelated programming as a condition of such subdistribution; (ii) requiring a competing MVPD to provide access to private property in exchange for access to programming; and (iii) charging a competing MVPD more for programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. *Id.* at 3387, ¶ 69. These restrictions also required a cable operator engaged in subdistribution to respond to a request for access to such programming by a competing MVPD within fifteen (15) days of the request and, if the request is denied, to permit the competing MVPD to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor. *Id.*

diversity in the video distribution market, we conclude that the restrictions on exclusive subdistribution agreements in served areas are likewise no longer necessary and we accordingly eliminate them. In addition, as proposed in the *NPRM*, we conform Section 76.1002(c)(3) as it pertains to exclusive subdistribution agreements in unserved areas to the amendments previously adopted in the *1994 Program Access Order*.[283]

D. Common Carriers and Open Video Systems

71. The Commission's rules contain provisions pertaining to exclusive contracts involving common carriers or OVS and their affiliated programmers in served areas that mirror the rules applicable to exclusive contracts involving cable operators and their affiliated programmers in served areas.[284] We conclude that the amendments adopted herein to the rules pertaining to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas will apply equally to common carriers and OVS.[285] Thus, with respect to common carriers, the prohibition on exclusive contracts in served areas between a satellite-delivered, common carrier-affiliated programmer and a common carrier or its affiliate that provides video programming by any means directly to a subscriber will expire.[286] Similarly, the exclusive contract prohibition in served areas will expire as to exclusive contracts (i) between a satellite-delivered, OVS-affiliated programmer and an OVS or its affiliate that provides video programming on its OVS;[287] and (ii) between a satellite-delivered, cable-affiliated programmer and an OVS video programming provider in which a cable operator has an attributable interest.[288] Instead, we will rely on the protections provided by the case-by-case complaint process described above.[289] We also conform the rules pertaining to exclusive subdistribution agreements involving common carriers and OVS to the rules adopted herein for cable operators by eliminating the restrictions on such agreements in served areas.[290] In addition, as proposed in the *NPRM*, we conform

[283] As explained in the *NPRM*, certain amendments to Section 76.1002(c)(3) pertaining to exclusive subdistribution agreements that were adopted in the *1994 Program Access Order* and subsequently published in the *Federal Register* are not reflected in the *Code of Federal Regulations*. *See NPRM*, 27 FCC Rcd at 3460-61, ¶ 89 n.298; c*ompare 1994 Program Access Order*, 10 FCC Rcd at 1955, Appendix A (showing adopted amendments to Section 76.1002(c)(3)) *and Cable Television Act of 1992—Program Distribution and Carriage Agreements*, 59 FR 66255 (Dec. 23, 1994) (publishing adopted amendments to Section 76.1002(c)(3) in the *Federal Register*) *with* 47 C.F.R. § 76.1002(c)(3).

[284] *See* 47 C.F.R. § 76.1004; 47 C.F.R. § 76.1507(a)-(b).

[285] *See NPRM*, 27 FCC Rcd at 3461-62, ¶ 90 (proposing that any amendments made to the rules pertaining to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas will apply equally to the rules pertaining to common carriers and OVS). No commenter addressed this proposal.

[286] *See* 47 U.S.C. § 548(j) (providing that "[a]ny provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers"); 47 C.F.R. § 76.1004.

[287] *See* 47 U.S.C. § 573(c)(1)(A) (providing that "[a]ny provision that applies to a cable operator under [Section 628] of this title shall apply . . . to any operator of an open video system"); 47 C.F.R. § 76.1507(a)(2), (a)(3)(ii); *1996 OVS Order*, 11 FCC Rcd at 18315-18, ¶¶ 175-180.

[288] *See* 47 U.S.C. § 573(c)(1)(A) (providing that "[a]ny provision that applies to a cable operator under [Section 628] of this title shall apply . . . to any operator of an open video system"); 47 C.F.R. § 76.1507(b)(2); *1996 OVS Order*, 11 FCC Rcd at 18317-24, ¶¶ 181-194; *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20299-302, ¶¶ 168-174 (1996).

[289] *See supra* ¶¶ 51-64.

[290] *See supra* ¶ 70; *NPRM*, 27 FCC Rcd at 3461-62, ¶ 90.

Section 76.1507 as it pertains to exclusive subdistribution agreements involving OVS in unserved areas to the amendments previously adopted in the *1994 Program Access Order*.[291]

E. *Liberty Media Order* Merger Conditions

72. We modify the exclusivity conditions adopted in the *Liberty Media Order,*[292] which prohibit certain programmers affiliated with Liberty Media and DIRECTV from entering into exclusive contracts.[293] DIRECTV, the only commenter to address this issue, states that if the Commission declines to extend the exclusive contract prohibition beyond its sunset date, conforming modifications to the exclusivity conditions in the *Liberty Media Order* would be appropriate.[294] We agree. The merger conditions adopted in the *Liberty Media Order* provide that "if the program access rules are modified these commitments shall be modified, as the Commission deems appropriate, to conform to any revised rules adopted by the Commission."[295] Consistent with our decision not to extend the exclusive contract prohibition beyond its sunset date, we modify the exclusivity conditions in the *Liberty Media Order* to provide that exclusive contracts will not be subject to a preemptive prohibition. No commenter opposed this proposal as set forth in the *NPRM*.[296] Because our rules will allow an exclusive contract involving cable-affiliated programming to be challenged on a case-by-case basis post-sunset, however, we further modify these conditions to provide that an exclusive contract involving programming covered by these conditions may be challenged as violating Section 628(b) of the Act and Section 76.1001(a) of the Commission's Rules.[297] Specifically, we modify Conditions III.1 and III.2 in the *Liberty Media Order* to state as follows:

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[291] As explained in the *NPRM*, the Commission's rules pertaining to exclusive subdistribution agreements involving OVS were adopted in 1996. *See NPRM*, 27 FCC Rcd at 3461-62, ¶ 90 n.303; *1996 OVS Order*, 11 FCC Rcd at 18372-74, Appendix A. These rules, however, do not reflect amendments the Commission made to its rules pertaining to exclusive subdistribution agreements involving cable operators adopted in the *1994 Program Access Order*. *See 1994 Program Access Order*, 10 FCC Rcd at 1955, Appendix A (showing adopted amendments to Section 76.1002(c)(3)).

[292] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, News Corporation. and The DIRECTV Group, Inc., Transferors, to Liberty Media Corporation., Transferee,* Memorandum Opinion and Order, 23 FCC Rcd 3265, 3303, ¶ 83 and 3340-41, Appendix B, § III (2008) ("*Liberty Media Order*").

[293] *See NPRM*, 27 FCC Rcd at 3463-65, ¶¶ 94-95 (seeking comment on the impact of an expiration of the exclusive contract prohibition on merger conditions adopted in the *Liberty Media Order*).

[294] DIRECTV Comments at 49. The Commission also sought comment on the impact of an expiration of the exclusive contract prohibition on merger conditions applicable to TWC adopted in the *Adelphia Order*. *See NPRM*, 27 FCC Rcd at 3462-63, ¶¶ 92-93. These conditions, however, expired in July 2012, after release of the *NPRM* and before adoption of this *Order*.

[295] *Liberty Media Order*, 23 FCC Rcd at 3341, Appendix B, § III.6. In contrast to the *Liberty Media Order*, there is no provision in the *Comcast/NBCU Order* requiring the conditions adopted therein to be modified to conform to changes the Commission makes to the program access rules. *See Comcast/NBCU Order*, 26 FCC Rcd at 4381, Appendix A, Condition XX (stating that the conditions will remain in effect for seven years, provided that the Commission will consider a petition from Comcast/NBCU for modification of a condition if they can demonstrate that there has been a material change in circumstances, or that the condition has proven unduly burdensome, such that the Condition is no longer necessary in the public interest). Accordingly, the conditions adopted in the *Comcast/NBCU Order* will not be affected by the rule changes adopted in this proceeding.

[296] *See NPRM*, 27 FCC Rcd at 3463-65, ¶¶ 94-95.

[297] As discussed above, we defer consideration of whether an exclusive contract can be challenged post-sunset as an unreasonable refusal to license in violation of Section 628(c)(2)(B). *See supra* n.248. We will instead assess this issue based on the facts presented in an individual adjudication. We also note that "Liberty Media RSNs," as defined in the *Liberty Media Order*, will continue to be subject to the arbitration condition set forth in the *Liberty Media Order* until February 27, 2014, unless the arbitration condition is modified earlier in response to a petition. (continued….)

Condition III.1: Liberty Media shall continue to make its existing or future national and regional programming services available to all MVPDs on nondiscriminatory terms and conditions. Notwithstanding the foregoing, Liberty Media may enter into an exclusive contract for any of these services with any MVPD, provided that the exclusive contract may be challenged as violating Section 628(b) of the Act and Section 76.1001(a) of the Commission's Rules.[298]

Condition III.2: DIRECTV may enter into an exclusive contract with any Affiliated Program Rights Holder,[299] provided that the exclusive contract may be challenged as violating Section 628(b) of the Act and Section 76.1001(a) of the Commission's Rules.[300]

73. To the extent that any programming covered under such an exclusive contract is cable-affiliated, the exclusive contract may also be assessed on a case-by-case basis in response to a program access complaint alleging a violation of Section 628(b) or, potentially, Section 628(c)(2)(B) of the Act.[301]

III. FURTHER NOTICE OF PROPOSED RULEMAKING IN MB DOCKET NO. 12-68

A. Rebuttable Presumptions for Cable-Affiliated RSNs

74. We seek comment on whether to establish (i) a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered)

See Liberty Media Order, 23 FCC Rcd at 3346-49, Appendix B, § IV; *see also id*. at 3348-49, Appendix B, § IV.E.2 (providing that the RSN arbitration condition will expire six years after the consummation of the transaction, unless modified earlier in response to a petition); Letter from Robert L. Hoegle, Counsel for Liberty Media Corp., to Ms. Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-18 (March 13, 2008) (stating that the transaction was consummated on February 27, 2008).

[298] *See Revision of the Commission's Program Access Rules, et al.*, Report and Order and Order on Reconsideration, FCC 12-123, at ¶¶ 72-73 (2012) ("*2012 Program Access Order*"). The term "Liberty Media" as used in this Appendix includes any entity or program rights holder in which Liberty Media or John Malone holds an attributable interest. Thus, the term "Liberty Media" includes Discovery Communications. Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in any non-broadcast national or regional programming service while these conditions are in effect if the programming service is not obligated to abide by such conditions.

[299] The term "Affiliated Program Rights Holder" includes (i) any program rights holder in which Liberty Media or DIRECTV holds a non-controlling 'attributable interest' (as determined by the FCC's program access attribution rules) or in which any officer or director of Liberty Media, DIRECTV, or of any other entity controlled by John Malone holds an attributable interest; and (ii) any program rights holder in which an entity or person that holds an attributable interest also holds a non-controlling attributable interest in Liberty Media or DIRECTV, provided that Liberty Media or DIRECTV has actual knowledge of such entity's or person's attributable interest in such program rights holder.

[300] *See 2012 Program Access Order* at ¶¶ 72-73.

[301] *See Liberty Media Order,* 23 FCC Rcd at 3300-02, ¶¶ 78-80 (explaining that Discovery is a cable-affiliated programmer due to its affiliation with Advance-Newhouse, which holds an attributable interest in a cable system). In addition, regardless of whether the programming is cable-affiliated, the Commission has not foreclosed a challenge under Section 628(b) to an exclusive contract with a cable operator involving non-cable-affiliated programming. *See 1996 OVS Order*, 11 FCC Rcd at 18319, ¶ 184 ("[C]able operators, common carriers providing video programming directly to subscribers and open video system operators are not generally restricted from entering into exclusive contracts with non-vertically integrated programmers. Nonetheless, as we found in the [*1994 DBS Order*], our finding herein does not preclude an aggrieved party from seeking relief in an appropriate case under other provisions of Section 628 and the Commission's rules thereunder.") (citing *1994 DBS Order*, 10 FCC Rcd at 3121, 3126-27 (citing *1993 Program Access Order*, 8 FCC Rcd at 3374 (discussing Section 628(b))); *2010 Program Access Order*, 25 FCC Rcd at 779, ¶ 49 n.191 ("We do not reach any conclusions in this *Order*, nor do we foreclose potential complaints, regarding other acts that may be 'unfair methods of competition or unfair acts or practices' under Section 628(b). For example, the rules established by this *Order* do not address exclusive contracts between a cable operator and a non-cable-affiliated programmer.").

is an "unfair act" under Section 628(b); and (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract for that RSN during the pendency of a complaint.

1. Rebuttable Presumption that an Exclusive Contract for a Cable-Affiliated RSN is an "Unfair Act"

75. As discussed above, under the case-by-case process for complaints alleging that an exclusive contract violates Section 628(b), the complainant will have the burden of proving that the exclusive contract at issue (i) is an "unfair act" and (ii) has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming.[302] With respect to the second element, we establish above a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming, as set forth in Section 628(b).[303] The Commission established an identical presumption for terrestrially delivered, cable-affiliated RSNs in the *2010 Program Access Order*.[304]

76. With respect to the first element (the "unfair act" element), however, the Commission has not established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN is an "unfair act." In the *2010 Program Access Order*, the Commission established a categorical rule that all exclusive contracts involving terrestrially delivered, cable-affiliated programming (regardless of whether the programming qualifies as an RSN) are "unfair" under Section 628(b).[305] The D.C. Circuit vacated this aspect of the *2010 Program Access Order*, holding that (i) just because Congress treated certain acts involving satellite programming as "unfair" does not mean the same acts are necessarily "unfair" in the context of terrestrial programming; (ii) even with respect to satellite-delivered programming, Congress established a sunset provision for the exclusivity ban and allowed cable operators or cable-affiliated programmers to seek prior approval to enter into an exclusive contract (neither of which would apply to terrestrially delivered programming under the *2010 Program Access Order*); and (iii) by labeling conduct "unfair" simply because it might in some circumstances negatively affect competition in the video distribution market, the Commission failed to consider whether it should treat conduct as "unfair" despite it being procompetitive in a given instance.[306] The court concluded that "if the Commission believes that conduct involving the withholding of terrestrial programming should be treated as categorically unfair, *as opposed to assessing fairness on a case-by-case basis* or perhaps adopting a public interest exception mirroring the one for satellite programming, then it must grapple with whether its definition of unfairness would apply to conduct that appears procompetitive and, if so, whether that result would comport with section 628."[307] Consistent with the court's decision, as demonstrated by the *Verizon v. MSG/Cablevision* and *AT&T v. MSG/Cablevision* cases, the Commission to date has elected to address whether challenged conduct, including an exclusive contract, is "unfair" on a case-by-case basis.[308]

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[302] *See supra* ¶ 53.

[303] *See supra* ¶ 55.

[304] *See 2010 Program Access Order*, 25 FCC Rcd at 782-83, ¶ 52.

[305] *See id*. at 778-80, ¶¶ 48-49.

[306] *See Cablevision II*, 649 F.3d at 720-22.

[307] *Id*. at 723 (emphasis added).

[308] *See supra* n.10.

77. We seek comment on whether to establish a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an "unfair act" under Section 628(b).[309] The D.C. Circuit has explained that an evidentiary presumption is only permissible (i) "if there is a sound and rational connection between the proved and inferred facts" and (ii) "when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact … until the adversary disproves it."[310] Would a rebuttable presumption that an exclusive contract for a cable-affiliated RSN is an "unfair act" under Section 628(b) satisfy this requirement? The Commission has held that determining whether challenged conduct is "unfair" requires "balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits."[311] What are the potentially procompetitive benefits of an exclusive contract for a cable-affiliated RSN? How do these potential benefits compare to the potentially anticompetitive harms of an exclusive contract for a cable-affiliated RSN? We ask commenters to provide evidence supporting their positions.

2. Rebuttable Presumption that a Complainant Challenging an Exclusive Contract Involving a Cable-Affiliated RSN is Entitled to a Standstill

78. As discussed above, the Commission in the *2010 Program Access Order* established a process whereby a complainant may seek a standstill of an existing programming contract during the pendency of a complaint.[312] The complainant has the burden of proof to demonstrate how grant of the standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay.[313]

79. We seek comment on whether to establish a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract for that RSN during the pendency of a complaint. Would such a rebuttable presumption meet the requirements for establishing such a presumption as set forth by the D.C. Circuit described above?[314] Would this rebuttable presumption meet the requirements set forth by the D.C. Circuit only if we also establish a rebuttable presumption that an exclusive contract for a cable-affiliated RSN is an "unfair act" under

[309] As the Commission and the D.C. Circuit have explained, "a rebuttable presumption does not shift the burden of proof to defendants; rather, it requires defendants to come forward with evidence that rebuts or meets the presumption." *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15863, ¶ 20; *see AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15885, ¶ 20; *see also Cablevision II*, 649 F.3d at 716 ("Reviewing the Commission's order, we think it clear that its rebuttable presumptions shift only the burden of production.").

[310] *Cablevision II,* 649 F.3d at 716.

[311] *See, e.g., Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13160-77, ¶¶ 18-41 (finding that withholding of the HD versions of the MSG and MSG+ RSNs from Verizon was an "unfair act"), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15852-53, ¶ 8 ("Determining whether challenged conduct is 'unfair' requires balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits."); *AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13222-40, ¶¶ 19-42 (finding that withholding of the HD versions of the MSG and MSG+ RSNs from AT&T was an "unfair act"), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, 26 FCC Rcd at 15874-75, ¶ 8 ("Determining whether challenged conduct is 'unfair' requires balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits."), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.).

[312] *See 2010 Program Access Order,* 25 FCC Rcd at 794-97, ¶¶ 71-75; *see also* 47 C.F.R. § 76.1003(l).

[313] *See* 47 C.F.R. § 76.1003(l).

[314] *See supra* ¶ 77; *see also Cablevision II,* 649 F.3d at 716.

Section 628(b)? Are the rebuttable presumptions applicable to the "unfair act" (if adopted) and "significant hindrance" elements of a Section 628(b) claim rationally related only to the "likelihood to prevail on the merits" prong of the four-part test for a standstill? What basis would there be for rationally presuming the other three elements of the test for a standstill (irreparable harm, no significant harm to other parties, and public interest) for purposes of establishing a standstill presumption for claims involving cable-affiliated RSNs? We ask commenters to provide evidence supporting their positions.

B. Other Rebuttable Presumptions

1. Rebuttable Presumptions for Exclusive Contracts Involving Cable-Affiliated National Sports Networks

80. We seek comment on whether to establish rebuttable presumptions with respect to the "unfair act" element and/or the "significant hindrance" element of a Section 628(b) claim challenging an exclusive contract involving a cable-affiliated "national sports network" (regardless of whether it is terrestrially delivered or satellite-delivered). How should the Commission define a "national sports network"? What cable-affiliated national sports networks exist today? Would these rebuttable presumptions meet the requirements for establishing such presumptions as set forth by the D.C. Circuit described above?[315] On what basis can the Commission conclude that these networks have no good substitutes, are important for competition, and are non-replicable, as the Commission has found with respect to RSNs?[316] We ask that commenters provide reliable, empirical data supporting their positions and address Commission precedent.[317] We also request comment on whether and how these rebuttable presumptions would be consistent with the First Amendment. To the extent we adopt these rebuttable presumptions, should we also adopt a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated national sports network (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract for that network during the pendency of a complaint?

2. Rebuttable Presumption for Previously Challenged Exclusive Contracts

81. We seek comment on whether the Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates Section 628(b) (or, potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network violates Section 628(b) (or Section 628(c)(2)(B)). While we sought comment on this issue in the *NPRM*,[318] we conclude above that the record on this issue was not sufficiently developed.[319] Would this rebuttable presumption meet the requirements for establishing such a presumption as set forth by the D.C. Circuit described above?[320] Is there a reasonable basis for presuming liability based on a prior determination of a Section 628(b) violation involving the same network? How would differences among complainants

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[315] *See supra* ¶ 77; *see also Cablevision II,* 649 F.3d at 716.

[316] *See supra* ¶ 55.

[317] *See 2010 Program Access Order,* 25 FCC Rcd at 777 n.182 (discussing exclusive arrangements for "out-of-market, non-regional sports programming" and concluding that commenters "failed to provide evidence in the record of this proceeding of any harm to competition resulting from these arrangements"); *2007 Extension Order,* 22 FCC Rcd at 17843 n.380 (discussing national sports programming and concluding that "[u]nlike in the case of cable-affiliated regional sports programming, we have no evidence that the inability to access this sports programming has impacted MVPD subscribership").

[318] *See NPRM*, 27 FCC Rcd at 3443, ¶ 56.

[319] *See supra* n.237.

[320] *See supra* ¶ 77; *see also Cablevision II,* 649 F.3d at 716.

(*e.g.,* differences in the complainants' market power) or changing circumstances over time (*e.g.,* whether the network continues to carry the same highly coveted content) impact such a presumption? If we establish such a rebuttable presumption, should it be time limited? If we establish such a rebuttable presumption, should it apply if the complaints concern the same network but different geographic markets?

C. Buying Groups

82. We also solicit comment on possible modifications to the program access rules relating to buying groups. ACA filed comments in this proceeding asserting that revisions to the program access rules are needed to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of the program access rules.[321] ACA seeks three modifications to the program access rules: (i) revision of the definition of "buying group" to accurately reflect the level of liability assumed by buying groups under current industry practices; (ii) establishment of standards for the right of buying group members to participate in their group's master licensing agreements; and (iii) establishment of a standard of comparability for a buying group regarding volume discounts.[322] In addition to seeking comment on ACA's proposed modifications, we propose to revise our definition of "buying group" to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership.

1. Definition of "Buying Group"

83. As ACA explains, buying groups play an important role in the market for video programming distribution, both for small and medium-sized MVPDs and for programmers.[323] A buying group negotiates master agreements with video programmers that its MVPD members can opt into and then acts as an interface between its members and the programmers so that the programmers are able to deal with a single entity.[324] Thus, a buying group is generally able to obtain lower license fees for its members than they could obtain through direct deals with the programmers and lower transaction costs for programmers by enabling them to deal with a single entity, rather than many individual MVPDs, for their negotiations and fee collections.[325] Because small and medium-sized MVPDs rely on buying groups as the primary means by which they purchase their programming, ACA asserts that small and medium-sized MVPDs are protected under the program access rules only to the extent that buying groups are

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[321] *See* ACA Comments at 11-12; Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (August 2, 2012), Attachment at 5 ("ACA August 2, 2012 *Ex Parte* Letter"); *see also* Cox Reply Comments at 3 ("Cox . . . agrees with ACA's requests for reform of the rules governing buying groups to make such groups more useful to small and mid-sized operators."); Mediacom Reply Comments at 9 ("Mediacom agrees with ACA that the current rules do not provide buying groups the protection Congress intended.").

[322] *See* ACA Comments at 15; ACA August 2, 2012 *Ex Parte* Letter at 2.

[323] *See* ACA Comments at 12.

[324] *See id.* at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 3.

[325] *See* ACA Comments at 12, Appendix A, Report of William P. Rogerson, Professor of Economics, Northwestern University ("Rogerson Report"), at 9 ("From an economic perspective, the main efficiency that a buying group creates is that it dramatically reduces the transactions costs for a programmer of separately dealing with a large number of small and medium sized MVPDs by allowing the programmer to deal instead with a single entity to negotiate and administer contracts. Programmers benefit from reduced transactions costs and some of these benefits are passed on to MVPDs in the form of lower rates."); ACA August 2, 2012 *Ex Parte* Letter, Attachment at 3; *see also 1993 Program Access Order*, 8 FCC Rcd at 3411, ¶ 114 ("We agree with commenters that buying groups or purchasing agents can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute.").

given the same protection in their dealings with cable-affiliated programmers as individual MVPDs are given.[326] ACA notes that Congress, recognizing small MVPDs' reliance on buying groups, explicitly extended the non-discrimination protections of Section 628(c)(2)(B) of the Act to buying groups.[327] The Commission likewise extended the protections of the non-discrimination provision of the program access rules to buying groups by including "buying groups" within the definition of "multichannel video programming distributor" set forth in Section 76.1000(e) of the Commission's program access rules.[328]

84. Although Congress did not define the term "buying group," the Commission has adopted a definition for this term. Section 76.1000(c) of the Commission's rules sets forth the requirements that an entity must satisfy in order to be considered a "buying group" eligible to avail itself of the non-discrimination protections afforded to MVPDs under the program access rules.[329] One of these requirements pertains to the liability of the buying group or its members to the programmer for payments.[330] The Commission has established three alternative ways for the buying group to satisfy this requirement. First, the entity seeking to qualify as a "buying group" may agree "to be financially liable for any fees due pursuant to a . . . programming contract which it signs as a contracting party as a representative of its members" (the "full liability" option).[331] Second, the members of the buying group, as contracting parties, may agree to joint and several liability (the "joint and several liability" option).[332] Third, the entity seeking to qualify as a "buying group" may maintain liquid cash or credit reserves equal

[326] *See* ACA Comments at 12-13, Rogerson Report at 9; ACA August 2, 2012 Ex Parte Letter, Attachment at 4.

[327] *See* ACA Comments at 13; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 3; *see also* 47 U.S.C. § 548(c)(2)(B) (prohibiting discrimination by a vertically integrated satellite cable programming vendor "among or between cable systems, cable operators, or other multichannel video programming distributors, *or their agents or buying groups* . . . .") (emphasis added). The legislative history of Section 628(c)(2)(B) also reflects Congress's intent to afford small MVPDs that purchase programming through buying groups the same protection against discrimination as other MVPDs. *See* S. REP. NO. 102-92, at 25 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1160 ("To address the complaints of small cable operators that cable programmers will not deal with them or will unreasonably discriminate against them in the sale of programming, the legislation requires vertically integrated, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms, and conditions."); H.R. CONF. REP. NO. 102-862, at 91 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273 ("National and regional programmers affiliated with cable operators are required by the Senate bill to offer their programming to buying groups on terms similar to those offered to cable operators.").

[328] *See* ACA Comments at 13; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 3; *see also* 47 C.F.R. § 76.1000(e) (defining "multichannel video programming distributor" as "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities."); *1993 Program Access Order*, 8 FCC Rcd at 3362 n.3 (including buying groups under the definition of "multichannel video programming distributor" for purposes of the program access rules).

[329] *See* 47 C.F.R. § 76.1000(c).

[330] In addition to satisfying this requirement, the entity seeking to qualify as a "buying group" must also agree (i) to uniform billing and standardized contract provisions for individual members; and (ii) either collectively or individually, on reasonable technical quality standards for individual members of the group. *See* 47 C.F.R. § 76.1000(c)(2), (3).

[331] 47 C.F.R. § 76.1000(c)(1); *see also 1993 Program Access Order*, 8 FCC Rcd at 3412, ¶ 115.

[332] *See* 47 C.F.R. § 76.1000(c)(1); *see also 1993 Program Access Order*, 8 FCC Rcd at 3412, ¶ 115.

to the cost of one month of programming fees for all buying group members and each member of the buying group must remain liable for its pro rata share (the "cash reserve" option).[333]

85. ACA asserts that none of these alternative liability options reflects current industry practice. First, with respect to the "full liability" option, ACA asserts that buying groups, such as the National Cable Television Cooperative ("NCTC"),[334] never assume full liability for the contractual commitment that each member company makes when it opts into a master agreement.[335] Rather, NCTC's obligation is limited to forwarding any payments that are received from members to the programmer and notifying the programmer of any default by one of its members.[336] Additionally, NCTC's general practice is to deal with delinquent members by terminating their membership and thus all of the master agreements of the delinquent member.[337] Second, with respect to the "joint and several liability" option, ACA notes that NCTC found this option impracticable because it would interfere with some members' loan covenants as to debt and result in fewer MVPDs being able to participate in NCTC master agreements.[338] Third, with respect to the "cash reserve" option, ACA notes that NCTC's standard practice in its early years was to require its members to deposit 30 days of payments into an escrow account when they opted into a master agreement, but programmers and NCTC eventually decided this protection was unnecessary.[339]

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[333] *See 1998 Program Access Order*, 13 FCC Rcd at 15859, ¶ 78. ACA notes that the changes to Section 76.1000(c)(1) to reflect the "cash reserve" option were not included in the *1998 Program Access Order* and that a subsequent Erratum making the relevant changes to Section 76.1000(c)(1) was not published in the *Federal Register*. *See* ACA Comments at 22-23, Rogerson Report at 14-15; *see also 1998 Program Access Order*, 13 FCC Rcd at 15862, Appendix A; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding the Development of Competition and Diversity in Video Programming Distribution and Carriage*, Erratum, 14 FCC Rcd 18611, 18611-12 (CSB 1999). While ACA notes that, as a result, the changes to Section 76.1000(c)(1) to reflect the "cash reserve" option are not reflected in the *Code of Federal Regulations*, a summary of the *1998 Program Access Order*, including a discussion of the "cash reserve" option, was published in the *Federal Register* and is thus a binding rule. *See Development of Competition and Diversity in Video Programming Distribution and Carriage*, 63 FR 45740-02, 45742 (1998); *see also Application for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, 23 FCC Rcd 12348, 12420-22, ¶¶ 156-61 (2008); *General Elec. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).

[334] NCTC is a buying group with approximately 910 member companies representing approximately 25 million MVPD subscribers. NCTC's members vary widely in size, from a few dozen subscribers to several million subscribers. More than half of NCTC's 910 members have fewer than 1,000 subscribers, while a little over 100 of its members have more than 10,000 subscribers. In addition to negotiating the rates, terms, and conditions of master agreements with programmers, NCTC acts as an interface for all billing and collection activities between its member companies and the programmer. *See* ACA Comments at 17, Appendix B, Declaration of Frank Hughes, Senior Vice President of Member Services for NCTC ("NCTC Declaration"), at 2.

[335] *See* ACA Comments at 18, 23, Rogerson Report at 11, NCTC Declaration at 3; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 7.

[336] *See* ACA Comments at 18, 23, Rogerson Report at 11.

[337] *See* ACA Comments at 18, NCTC Declaration at 4.

[338] *See* ACA Comments, NCTC Declaration at 3. In addition, ACA states that it is unlikely that a buying group that attempted to impose joint and several liability on its membership would be viable because potential members would simply be unwilling to risk being responsible for the failure to pay of all of the other members. *See* ACA Comments, Rogerson Report at 13, n.3. Since programmers would likely target recovery efforts on the largest and financially strongest members, ACA believes that those MVPDs would be particularly unwilling to join the buying group. *See id.*

[339] *See* ACA Comments, Rogerson Report at n.15.

86. According to ACA, programmers have widely accepted NCTC's current business model, including the reduced level of liability that NCTC assumes under a master agreement.[340] Because the existing definition of "buying group" does not conform to these widely accepted practices, ACA asserts that NCTC is effectively barred from bringing a program access complaint concerning a master agreement on behalf of its member companies.[341] ACA accordingly recommends that the Commission modernize the definition of "buying group" in Section 76.1000(c)(1) by adding, as an alternative to the existing liability options, a requirement that the entity seeking to qualify as a "buying group" assumes liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.[342]

87. Based on ACA's comments, it appears that our existing definition of "buying group" set forth in Section 76.1000(c)(1) does not reflect accepted industry practices and thus may have the unintended effect of barring some buying groups from availing themselves of the protections of the non-discrimination provision of the program access rules, in contravention of Congress's express intent in enacting Section 628(c)(2)(B) of the Act.[343] We tentatively conclude that we should revise Section 76.1000(c)(1) to require, as an alternative to the current liability options, that the buying group agree to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.[344] We seek comment on this tentative conclusion. We also seek comment on whether NCTC's practices in terms of the level of liability it assumes under a master agreement are consistent with that of other buying groups. To the extent that the practices of other buying groups differ, how do they differ?

88. We note that the Commission adopted the liability options in Section 76.1000(c)(1) to address concerns about the creditworthiness and financial stability of buying groups and protect programmers from excessive financial risk.[345] We do not believe that revising the definition of buying group as discussed above would subject programmers to greater financial risk when contracting with a buying group than they would be when contracting with an individual MVPD.[346] According to ACA, if an individual MVPD defaults on its payments for programming, a programmer may attempt to require the MVPD to continue making payments over the life of the agreement, or it may cease delivery of the programming to the MVPD.[347] ACA states that the programmer's legal rights are the same regardless of

[340] *See* ACA Comments at 18, NCTC Declaration at 3.

[341] *See* ACA Comments at 23.

[342] *See id.* at 24; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 8; *see also* Mediacom Reply Comments at 9 ("supports ACA's recommendation that the Commission update its buying group definition so that it more closely reflects the financial relationship that has evolved between buying groups and programmers.").

[343] *See supra* n. 330.

[344] As discussed above, the changes to Section 76.1000(c)(1) to reflect the "cash reserve" option adopted in the *1998 Program Access Order* are not reflected in the *Code of Federal Regulations*. *See supra* n.336. We intend to conform Section 76.1000(c)(1) as amended in this proceeding to the amendment previously adopted in the *1998 Program Access Order*.

[345] *See 1993 Program Access Order*, 8 FCC Rcd at 3411, ¶ 114 (concluding that "in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance"); *see also 1994 Program Access Order*, 10 FCC Rcd at 1948, ¶ 103 (affirming Section 76.1000(c) as adopted but clarifying that, in situations where a programmer has reasonable doubts about the financial stability and responsibility of a buying group, it may insist on appropriate assurances of creditworthiness).

[346] *See* ACA Comments at 25, Rogerson Report at 12-14.

[347] *See* ACA Comments at 25, Rogerson Report at 11-12.

whether the defaulting MVPD has purchased service on an individual basis or through a buying group.[348] Moreover, we note that NCTC's general practice of terminating membership, and thus all of the master agreements, of a delinquent member, may reduce the risk of delinquency, which could provide the programmer greater protection than when dealing with an individual MVPD.[349] We invite commenters to address whether the proposed revision to the buying group definition sufficiently protects programmers from financial risks in dealing with buying groups. If not, what additional measures are needed to protect programmers from financial risk? Should we codify NCTC's practice of terminating membership and all of the master agreements of a delinquent member? Do other buying groups utilize this same practice?

89. We further propose to revise the definition of "buying group" to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership. As ACA submits, "[b]uying groups play an extremely important role in today's marketplace, for both small and medium-sized MVPDs," because they provide "significantly lower license fees for [their] members than these MVPDs could obtain through direct deals with programmers."[350] Although a buying group would presumably benefit from increasing its membership in order to obtain better deals from programmers, we are aware of allegations in recent years that NCTC has denied membership to certain MVPDs.[351] In light of the significance of buying groups in the marketplace today and Congress's recognition of the importance of buying groups for small MVPDs, we propose to require that a "buying group" eligible to receive the benefits of the non-discrimination provision of the program access rules may not unreasonably deny membership to any MVPD requesting membership. Under this proposal, a buying group would not be required to accept all members. Rather, it would only be prohibited from "unreasonably" denying membership. For example, if an MVPD seeking membership has a history of defaulting on its payments for programming, or if there are legitimate antitrust reasons for denying membership to a particular MVPD, then the buying group's denial of membership would not be "unreasonable." Upon being denied membership, an MVPD could file a Petition for Declaratory Ruling that the buying group no longer qualifies as a "buying group" as defined in Section 76.1000(c) because it has "unreasonably" denied the MVPD membership. The central issue in the Declaratory Ruling proceeding would be whether the buying group's conduct in denying membership was "unreasonable." If the Commission finds that the buying group's conduct was "unreasonable," the buying group would no longer be eligible to receive the

[348] *See* ACA Comments at 25, Rogerson Report at 14. ACA states that the lag after which a programmer becomes aware that an MVPD has ceased making payments is generally about the same regardless of whether the programmer contracts directly with the MVPD or whether it contracts with the MVPD through NCTC. In both cases, the delinquent MVPD may receive between 30 and 60 days of "free" programming before the programmer becomes aware that the MVPD has ceased paying its bills and is able to cut off programming. *See* ACA Comments at 25, Rogerson Report at 12.

[349] *See* ACA Comments at 26, Rogerson Report at 13.

[350] ACA Comments at 12, NCTC Declaration at 2.

[351] *See* Sarah Reedy, *NCTC to Lift Membership Moratorium, But Are Telcos Eligible?* (Sept. 5, 2008), available at http://connectedplanetonline.com/iptv/news/nctc-membership-moratorium-lifted-0905/ (stating that NCTC had a moratorium on new members from 2005 to January 2009); *see also Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System v. National Cable Television Cooperative, Inc. et. al,* 26 FCC Rcd 7690 (MB 2011) ("*LUS v. NCTC*"). In *LUS v. NCTC*, an MVPD filed a complaint against NCTC and various cable operators that had employees serving on NCTC's Board of Directors, alleging that NCTC's denial of membership constituted an "unfair act" of a cable operator that "significantly hindered" the MVPD in violation of Section 628(b) of the Act. *See LUS v. NCTC*, 26 FCC Rcd at 7692, ¶¶ 6-7. The complaint was subsequently dismissed at LUS's request after the parties reached a settlement. *See Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System v. CableOne, Inc. et. al*, 27 FCC Rcd 5030, 5031, ¶ 2 (MB 2012).

benefits of the non-discrimination provision of the program access rules. We seek comment on this proposal.

90. We invite commenters to discuss the potential costs and benefits of each of the proposed revisions of the buying group definition. To the extent possible, we encourage commenters to quantify any costs and benefits and submit supporting data. Commenters that propose an alternative approach should similarly provide data regarding the costs and benefits of the alternative approach.

2. Participation of Buying Group Members in Master Agreements

91. ACA also urges the Commission to revise the program access rules to prohibit cable-affiliated programmers from unreasonably preventing particular members of a buying group from opting into a master agreement.[352] ACA contends that, while the program access rules prohibit unfair methods of competition and discriminatory practices, including selective refusals to license, these rules do not explicitly restrain the ability of a cable-affiliated programmer to unreasonably prevent particular members of a buying group from participating in a master agreement, even if the member normally purchases a substantial share of its programming from the buying group.[353] ACA asserts that if a cable-affiliated programmer had the right to arbitrarily exclude any buying group member that it wished from a master agreement, the requirement that cable-affiliated programmers negotiate non-discriminatory agreements with buying groups could be rendered meaningless.[354]

92. To remedy its concern, ACA recommends that the Commission adopt clear and easily verifiable standards for determining when a buying group member is presumptively allowed to participate in a master agreement with a cable-affiliated programmer.[355] Specifically, ACA suggests that the Commission establish a "safe harbor" subscriber level for buying group member MVPDs to participate in a master agreement.[356] Under ACA's proposed approach, a buying group member MVPD with no more than the "safe harbor" number of subscribers would be presumptively entitled to participate in master agreements between the programmer and the buying group.[357] A buying group member MVPD which has more than the safe harbor number of subscribers would also be entitled to participate if it demonstrates that it incurs some specified minimum share of its total expenditures on programming through the buying group.[358] Further, when an expiring master agreement is up for renewal, buying group members participating in the expiring agreement would have the right to participate in the renewed agreement.[359] ACA states that, as a consequence of this safe harbor, it would be a violation of the Section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that regularly participates in a master agreement.[360] Although not mentioned by ACA, consistent with Section 628(c)(2)(B), a cable-affiliated programmer could refuse to

[352] *See* ACA Comments at 27-28, Rogerson Report at 15; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 9. A "master agreement" is the affiliation agreement NCTC negotiates with a programmer that its members may opt into.

[353] *See* ACA Comments at 27-28, Rogerson Report at 15; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 9.

[354] *See* ACA Comments at 27-28, Rogerson Report at 15.

[355] *See* ACA Comments at 28, Rogerson Report at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 9.

[356] *See* ACA Comments at 28-29, Rogerson Report at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 12.

[357] *See* ACA Comments at 28-29, Rogerson Report at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 12.

[358] *See* ACA Comments at 29, Rogerson Report at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 12.

[359] *See* ACA Comments at 29, Rogerson Report at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 12.

[360] *See* ACA Comments at 29, Rogerson Report at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 12.

deal with a buying group member for a legitimate business reason, such as the distributor's history of defaulting on other programming contracts.[361]

93. We seek comment generally on the need for a safe harbor for buying group participation in master agreements and, more specifically, on ACA's proposed safe harbor. Although several commenters make generalized allegations that cable-affiliated programmers have excluded particular buying group members from participating in master agreements negotiated with the buying group,[362] we have not received information regarding specific instances in which such exclusions have occurred. We seek detailed information on the extent to which the exclusion of particular buying group members from participation in master agreements has occurred in the past or is occurring now. To the extent that some buying group members are being excluded from participating in master agreements, why are they being excluded?

94. If we determine that it is necessary to establish a safe harbor for buying group participation in master agreements, what subscriber level should we establish as the safe harbor? ACA suggests that we set the safe harbor subscriber number at 3 million subscribers.[363] Is this an appropriate safe harbor subscriber number? Commenters that recommend a specific safe harbor subscriber number should explain the basis for their recommendation. Further, under ACA's suggested approach, a buying group member with more than the safe harbor number of subscribers would be entitled to participate in a master agreement if it demonstrates that it incurs some specified minimum share of its total expenditures on programming through the buying group. What minimum share of programming expenditures should such a buying group member have to incur through the buying group in order to be entitled to participate in a master agreement and over what period of time? ACA suggests that we require a buying group member with more than the safe harbor number of subscribers to demonstrate that the share of programming that it licenses through the buying group is not significantly smaller than the average share of programming that other buying group members license through the buying group.[364] We seek comment on this proposal. What share of programming should be considered "significantly smaller" than

[361] *See 1993 Program Access Order*, 8 FCC Rcd at 3412-13, ¶ 116.

[362] *See* ACA Comments, NCTC Declaration at 2 ("The largest four members of the NCTC do not currently license substantial amounts of programming through the NCTC, often due to the insistence of the programmer and over the strong objection of NCTC."); Cox Reply Comments at 3 n.10 ("Cox has firsthand experience with programmers refusing to permit it to opt into agreements despite Cox's membership in the [NCTC]."); OPASTCO/NTCA Reply Comments at 5 n.17 ("Furthermore, a number of small MVPDs . . . may still be restricted by programmer requirements that prohibit the MVPD from obtaining content through a buying group. In some cases, this requirement persists even beyond the expiration date of the content access agreement.").

[363] *See* Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (August 31, 2012), Attachment at 4 ("ACA August 31, 2012 *Ex Parte* Letter"); *see also* ACA August 2, 2012 *Ex Parte* Letter, Attachment at 12. ACA explains that the four largest NCTC members, which do not currently license substantial amounts of programming through NCTC, each have more than 3 million subscribers, while the remaining members in the group of the largest 25 members, which do license substantial amounts of programming through NCTC, currently have less than 1.5 million subscribers. *See id.* at 11; *see also* ACA Comments, Rogerson Report at 16 (stating that the safe harbor level should be set so that MVPDs that regularly purchase programming through NCTC are included in the safe harbor). ACA also states that its proposed safe harbor is consistent with the approach the Commission took in establishing an arbitration remedy for small and medium-sized MVPDs in the *Comcast/NBCU Order*. *See* ACA Comments at 29, Rogerson Report at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 13; *see also Comcast/NBCU Order*, 26 FCC Rcd at 4262, ¶ 58 and 4368, Appendix A, Condition VII.D.1 (specifying that MVPDs with 1.5 million or fewer subscribers may choose to appoint an independent agent to bargain and arbitrate collectively on their behalf for access to Comcast-NBCU affiliated programming).

[364] *See* ACA August 31, 2012 *Ex Parte* Letter, Attachment at 4.

the average share for purposes of this proposal? Over what period of time should we measure the "average share" of programming that other buying group members license through the buying group? In addition, we seek comment on ACA's proposal that, when an expiring master agreement is up for renewal, buying group members participating in the expiring agreement would have the right to participate in the renewed agreement. We also invite commenters to suggest any alternatives to ACA's proposed safe harbors and explain why the alternative is preferable or less burdensome. For example, would it be preferable to simply require that, if a cable-affiliated programmer enters into a master agreement with a buying group, all buying group members have a right to participate in the master agreement? What are the potential costs and benefits of ACA's safe harbor approach and any alternative proposals? Commenters should quantify any potential costs and benefits to the extent possible and provide supporting data.

3. Standard of Comparability for Buying Groups Regarding Volume Discounts

95. The Commission has explained that a complainant MVPD alleging program access discrimination must make a *prima facie* showing that there is a difference between the rates, terms, or conditions charged or offered by a cable-affiliated programmer to the complainant MVPD and to a "competing distributor."[365] The Commission has explained that buying groups that are "fundamentally national in operation" may make a comparison to the rates, terms, or conditions charged or offered by a cable-affiliated programmer to a "national competitor."[366] Once the complainant MVPD establishes a *prima facie* case of discrimination, the defendant programmer must demonstrate that the difference in prices, terms, and conditions is justified by the four factors set forth in Section 628(c)(2)(B)(i)-(iv) of the Act.[367] One of those factors allows programmers to use volume-related justifications to establish price differentials.[368] If the programmer believes that the complainant MVPD and the "competing distributor" are not sufficiently similar, and thus cannot be realistically compared, it can state its reasons for this conclusion and submit an alternative contract for comparison with another more "similarly situated"

[365] *See 1993 Program Access Order*, 8 FCC Rcd at 3400-01, ¶ 96 and 3416, ¶ 125; *see also* 47 C.F.R. § 76.1003(c)(4).

[366] Buying groups that are "fundamentally national in operation may make initial comparisons with respect to vendors' contracts with a national competitor, provided that the complaint includes a justification for that comparison." *1993 Program Access Order*, 8 FCC Rcd at 3400-01, ¶ 96 n.158; *see also id*. at 3412, ¶ 115 n.195 ("[O]ur rules for identifying 'competing' distributors will treat a particular buying group as a single local, regional, or national distributor depending upon the fundamental nature of its operation."). The Commission has explained that buying groups that are "fundamentally local in operation must draw comparisons with respect to competitors that have some overlap in actual or proposed service area." *Id.* at 3400-01, ¶ 96 n.158.

[367] *See* 47 U.S.C. § 548(c)(2)(B)(i)-(iv); 47 C.F.R. § 76.1002(b)(1)-(4); *see also* 47 C.F.R. § 76.1003(e)(3); *1993 Program Access Order*, 8 FCC Rcd at 3401-02, ¶ 99 and 3417, ¶ 127.

[368] *See* 47 U.S.C. § 548(c)(2)(B)(iii) (providing that it is not impermissibly discriminatory for a satellite-delivered, cable-affiliated programmer to "establish[] different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor"); 47 C.F.R. § 76.1002(b)(3) note ("Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.").

alternative MVPD.[369] The Commission's rules provide that the analysis of whether an alternative MVPD is properly comparable to the complainant includes consideration of, but is not limited to, the following factors: (i) whether the alternative MVPD operates within a geographic region proximate to the complainant; (ii) whether the alternative MVPD has roughly the same number of subscribers as the complainant; and (iii) whether the alternative MVPD purchases a similar service as the complainant.[370] Moreover, the Commission's rules provide that the alternative MVPD "must use the same distribution technology as the 'competing' distributor with whom the complainant seeks to compare itself."[371]

96. ACA proposes that we amend our rules to clarify that the standard to be applied in determining whether buying groups are being discriminated against is the same as that applied to an individual MVPD providing the same number of subscribers to the programmer.[372] In other words, ACA states, for purposes of determining whether prices offered to a buying group are discriminatory, the buying group should be considered "similarly situated" to an individual MVPD offering the programmer the same number of subscribers.[373] According to ACA, "the utility of the program access rules has been dramatically undercut for buying groups because the Commission has never established a clear standard upon which a buying group is to be compared for purposes of determining whether it is being discriminated against by a cable-affiliated programmer."[374]

97. We invite comment on ACA's proposal. In particular, we seek comment on whether and how any perceived lack of clarity regarding the standard of comparability for buying groups has affected negotiations between buying groups and cable-affiliated programmers on volume discounts or has discouraged buying groups from filing program access complaints. We note, in this regard, that neither Section 628 nor the Commission's rules distinguish between individual MVPDs and buying groups in describing the justifications for volume discounts.[375] Therefore, it is arguably already clear that a buying group would be compared to an individual MVPD providing the same number of subscribers to the programmer. Moreover, in the *1993 Program Access Order*, the Commission established the conditions that a buying group must meet "in order to benefit from treatment as a single entity for purposes of

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[369] *See 1993 Program Access Order*, 8 FCC Rcd at 3401-02, ¶¶ 98-99 and 3417, ¶ 127; *see also* 47 C.F.R. § 76.1003(e)(3)(iii).

[370] *See* 47 C.F.R. § 76.1000(j); *1993 Program Access Order*, 8 FCC Rcd at 3401-02, ¶ 99; *id*. at 3417-18, ¶ 127 n.224 ("[T]he analysis of whether another MVPD is similarly situated will involve a consideration of geographic region (proximity), number of subscribers, date of entry of contract, type of service purchased, and specific terms related to distinct attributes of the purchasers or secondary transactions involved in the programming sale itself.").

[371] 47 C.F.R. § 76.1000(j); *see 1993 Program Access Order*, 8 FCC Rcd at 3401-02, ¶ 99 and 3417-18, ¶ 127; *id*. at 3402, ¶ 99 n.161 ("We emphasize that any alternative contract submitted by a defendant programmer must involve a distributor that uses the same technology as the 'competing' distributor identified by the complainant as the recipient of more favorable treatment. In this manner, we may properly compare the prices charged to each distributor in order to ensure that the price differential identified by the complainant does not occur as a result of a vendor's systematic discrimination against a particular technology relative to cable operators.").

[372] *See* ACA Comments at 30, Rogerson Report at 18; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 14; *see also* Mediacom Reply Comments at 9-10 ("Mediacom also endorses ACA's recommendation that the Commission clarify that . . . the same discounted rates available to an individual MVPD of a certain size must be made available to members of a buying group that represents a comparable number of subscribers in the aggregate.").

[373] *See* ACA Comments at 31.

[374] *Id.* at 30.

[375] *See* 47 U.S.C. § 548(c)(2)(B)(iii); 47 C.F.R. § 76.1002(b)(3) & Note (both describing the volume-related justifications that may be used to establish price differentials); *see also* 47 C.F.R. § 76.1000(e) (defining "MVPD" to include "buying groups").

subscriber volume."[376] The Commission therein stated that "[v]endors can extend [to buying groups] the same volume discounts based on number of subscribers that they would ordinarily extend to single entities of comparable size provided that such discounts are offered in a nondiscriminatory fashion."[377] Thus, to the extent that we adopt the revised definition of "buying group" proposed by ACA,[378] we seek comment on whether it is also necessary to revise the rules to establish an explicit standard of comparability. Are there differences between individual MVPDs and buying groups that would argue against the standard of comparability advocated by ACA? As discussed above, the Commission's analysis of whether MVPDs are "similarly situated" for purposes of a program access discrimination complaint extends beyond consideration of whether MVPDs offer roughly the same number of subscribers to include other factors, such as the geographic region where the MVPDs operate, the services purchased, and the date of their contracts with the defendant programmer.[379] What impact, if any, do these and other factors have on the standard of comparability advocated by ACA?

98. Moreover, as discussed above, a complainant MVPD alleging program access discrimination must make a *prima facie* showing of a differential in the price, terms, or conditions offered or charged to the complainant MVPD and to a "competing distributor."[380] In the case of a national buying group, the comparison is made to a "national competitor."[381] We seek comment on how this requirement impacts discrimination complaints brought by national buying groups and how, if at all, this requirement should be modified for discrimination complaints filed by national buying groups. For example, are there any "national competitors," other than DBS operators, to which a national buying group can make a comparison? If only a DBS operator qualifies as a "national competitor," but a defendant programmer believes that a DBS operator is not comparable to the national buying group, the defendant programmer may submit an alternative contract for comparison with another more "similarly situated" alternative MVPD.[382] As discussed above, however, the Commission's rules provide that the alternative MVPD "must use the same distribution technology as the 'competing' distributor with whom the complainant seeks to compare itself."[383] If only a DBS operator can qualify as a "competing distributor" for a national buying group, does this limit the alternative MVPDs that can qualify as "similarly situated" to only other DBS operators?

99. ACA further proposes that we make clear that a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the master agreement.[384] Under this proposal, a cable-affiliated programmer would violate Section 628(c)(2)(B)'s prohibition on discriminatory practices if it fails or refuses to offer a non-discriminatory schedule of prices based on the number of subscribers that members of the buying group

[376] *See 1993 Program Access Order,* 8 FCC Rcd at 3411, ¶ 114.

[377] *Id.*

[378] *See supra* ¶ 87.

[379] *See supra* ¶ 95.

[380] *See id*.

[381] *See id*.

[382] *See id.*

[383] 47 C.F.R. § 76.1000(j); *see supra* ¶ 95.

[384] *See* ACA Comments at 32, Rogerson Report at 18.

could provide if they chose to opt into the master agreement.[385] ACA explains that under the current NCTC model, NCTC negotiates the deal with the programmer and then its members decide whether to opt into the deal.[386] Thus, at the time of negotiation, neither NCTC nor the programmer knows exactly which NCTC members will take their programming through NCTC — and therefore neither party knows the precise number of subscribers that NCTC will provide.[387] ACA maintains that its proposal "will solve the 'chicken and egg' problem that might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high, even though the license fees would go down if the members decided to opt in."[388] We seek comment on the benefits and burdens of ACA's proposal. To what extent has the "chicken and egg" problem described above hampered negotiations between buying groups and programmers? If, at the time of negotiation, neither the buying group nor the programmer knows precisely which buying group members will participate in the agreement, how are volume discounts calculated for buying groups? Has past participation been a reliable indicator of which buying group members are likely to opt into a master agreement? Additionally, we seek comment on whether the Commission has the authority under Section 628 or some other provision of the Act to require programmers to provide buying groups generally applicable rate schedules for differing subscribership levels.[389]

100. Finally, we seek comment on ACA's request that we clarify that the standard of comparability applies for purposes of evaluating all terms and conditions of the agreement, not just the price.[390] As discussed above,[391] to the extent that we adopt the revised definition of "buying group" proposed by ACA,[392] is this proposed clarification necessary? We also invite commenters to analyze the potential costs and benefits of each of ACA's proposals relating to the standard of comparability for buying groups, as well as any alternative proposals, quantify any costs and benefits of the proposals to the extent possible, and submit appropriate supporting data.

IV. ORDER ON RECONSIDERATION IN MB DOCKET NO. 07-29

A. Background

101. For the reasons discussed below, we grant in part and deny in part a Petition for Reconsideration of the *2007 Extension Order* filed by Fox Entertainment Group, Inc. ("Fox") pertaining to the Commission's program access discovery procedures. In the *2007 Extension Order*, the Commission revised these procedures to "ensure that the Commission has the information necessary to expeditiously resolve program access complaints."[393] The Commission codified its requirement that a respondent must attach to its answer all documents that it expressly references or relies upon in defending

[385] *See* ACA Comments at 33.

[386] *See id.* at 32.

[387] *See id.*

[388] *Id.*, Rogerson Report at 18.

[389] *See* Comcast Reply Comments at 22 ("[R]equiring a rate schedule for varying levels of potential subscribership is simply not contemplated, and certainly not required, under Section 628(c) or any other portion of the program access rules — nor should it be. What is at issue here is video programming — not transmission services that must be tariffed by common carriers.").

[390] *See* ACA Comments at 33, Rogerson Report at 18.

[391] *See supra* ¶ 97.

[392] *See supra* ¶ 87.

[393] *2007 Extension Order*, 22 FCC Rcd at 17851, ¶ 95.

a program access claim.[394] In addition, the Commission expanded the discovery procedures to permit party-to-party discovery.[395] Under the expanded discovery procedures, parties to a program access complaint may serve requests for discovery directly on opposing parties and file a copy of the request with the Commission.[396] The respondent has the opportunity to object to any request for documents that are not in its control or relevant to the dispute, and the obligation to produce the documents is suspended until the Commission rules on the objection.[397] Recognizing that the expanded discovery approach requires the submission of confidential and competitively sensitive information, the Commission also revised the standard protective order for use in program access complaint proceedings to ensure that confidential business information is not improperly used for competitive business purposes.[398] Specifically, the Commission modified the language of the protective order to reflect that any counsel or other persons, including in-house counsel, that are involved in "competitive decision-making" are prohibited from access to confidential material.[399]

102. Fox filed a petition for reconsideration of the *2007 Extension Order*, arguing that the Commission's decision to permit party-to-party discovery constituted an unexplained departure from agency policy in contravention of the Administrative Procedure Act.[400] AT&T and DISH filed oppositions to Fox's petition for reconsideration,[401] and Time Warner Inc. filed a reply in support of Fox's petition.[402]

B. Discussion

103. We reject Fox's argument that the Commission failed to adequately explain its decision to permit party-to-party discovery. Fox asserts that the Commission departed without explanation from the *1998 Program Access Order*,[403] where the Commission declined to permit party-directed discovery

[394] *See id.* at 17852, ¶ 96.

[395] *See id.* at 17852, ¶¶ 97-98.

[396] *See id.* at 17852, ¶ 98; *see also* 47 C.F.R. § 76.1003(j). The Commission noted that the existing discovery rules allow the Commission staff to order production of any documents necessary to the resolution of a program access complaint and stated that it would retain this process. *See 2007 Extension Order*, 22 FCC Rcd at 17852, ¶ 97; *see also* 47 C.F.R. § 76.7(f).

[397] *See 2007 Extension Order*, 22 FCC Rcd at 17852, ¶ 98; *see also* 47 C.F.R. § 76.1003(j).

[398] *See 2007 Extension Order*, 22 FCC Rcd at 17854, ¶ 101.

[399] *See id.* at 17854, ¶ 101, and 17894-99, Appendix E. The Commission defined "competitive decision-making" to include "any activities, association, or relationship with any person, including the complainant, client, or any authorized representative, that involves rendering advice or participation in any or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor." *Id.* at 17854, ¶ 101, and 17896, Appendix E, ¶ 7(d).

[400] *See* Petition for Reconsideration of Fox Entertainment Group, Inc., MB Docket No. 07-29, filed Nov. 5, 2007, at 2 ("Fox Petition").

[401] *See* Opposition of AT&T Inc. to Petition for Reconsideration of Fox Entertainment Group, Inc., MB Docket No. 07-29, filed Mar. 6, 2008 ("AT&T Opposition"); Opposition of EchoStar Satellite L.L.C. to Petition for Reconsideration of Fox Entertainment Group, Inc., MB Docket No. 07-29, filed Mar. 6, 2008 ("DISH Opposition").

[402] *See* Reply of Time Warner Inc. in Support of Petition for Reconsideration of Fox Entertainment Group, Inc., MB Docket No. 07-29, filed Mar. 17, 2008 ("Time Warner Reply").

[403] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822 (1998) ("*1998 Program Access Order*").

out of concern that it could result in disputes over the production of documents and lengthen resolution times for program access complaints.[404] We disagree. The Commission carefully weighed commenters' arguments in support of and in opposition to expanded discovery[405] and concluded that "expanded discovery will improve the quality and efficiency of the Commission's resolution of program access complaints."[406] In this regard, a number of non-incumbent MVPDs raised concerns that documents necessary for complainants to establish discrimination, including programmers' carriage contracts, are not made available in complaint proceedings.[407] The Commission agreed with these commenters "that the availability of programmers' carriage contracts, subject to confidential treatment, [is] essential for determining whether the programmer is discriminating in price, terms and conditions."[408] The Commission thus found that "it would be unreasonable for a respondent not to produce all the documents requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute."[409] As DISH notes in its opposition, the record in this proceeding reflected ongoing concerns from MVPDs about the availability of relevant documents.[410] Moreover, DISH states that the Commission also had "an additional ten years of experience with the program access complaint process and discovery rules from which to determine that the existing discovery rules were insufficient."[411] Accordingly, the Commission reasonably concluded that party-directed discovery will facilitate the expeditious resolution of program access complaints by ensuring that all relevant documents are available to Commission staff and the parties, without the need for the Commission to take action to order the production of such documents. The modifications to the discovery rules were thus appropriate and adequately supported.

104. Contrary to Fox's arguments, the Commission also considered concerns raised by commenters that party-controlled discovery could give rise to overly broad discovery requests and "fishing expeditions" for confidential and competitively-sensitive information, which could lead to disputes over discovery and prolong resolution of program access complaints.[412] The Commission adopted several safeguards to address these concerns. For example, the Commission determined that parties should have the opportunity to object to any request for documents that are not in their control or relevant to the dispute and that the obligation to produce the documents would be suspended until the Commission rules on the objection.[413] Moreover, the Commission modified the standard protective order to further limit the individuals who may access competitively sensitive documents, thereby ensuring that confidential business information is not improperly used for competitive business purposes.[414] The Commission emphasized that it has full authority to impose sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information

[404] *See* Fox Petition at 2-3 (*citing 1998 Program Access Order*, 13 FCC Rcd at 15829, ¶ 54).

[405] *See 2007 Extension Order*, 22 FCC Rcd at 17850-51, ¶¶ 92-94.

[406] *Id.* at 17852, ¶ 97.

[407] *See id.* at 17850-51, ¶¶ 85, 92-93.

[408] *Id.* at 17852, ¶ 97.

[409] *Id*. (footnote omitted).

[410] *See* DISH Opposition at 3.

[411] *Id*.

[412] *See 2007 Extension Order*, 22 FCC Rcd at 17851, ¶ 94.

[413] *See id.* at 17852, ¶ 98.

[414] *See id.* at 17854, ¶ 101.

in Commission proceedings.[415] Further, the Commission cautioned that it intends to vigorously enforce any transgressions of the provisions of its protective orders.[416]

105. We are unpersuaded by Fox's assertion that, notwithstanding these safeguards, expanded discovery "is virtually certain to lengthen significantly the time it takes for the Commission to resolve program access complaints" because the Commission will have to address each disputed discovery demand.[417] Because each party to a program access dispute must respond to discovery requests from the other party, the parties have mutual incentives to avoid overbroad requests and to come to an agreement on the scope of discovery. Indeed, in program access complaint proceedings that have gone to discovery since the expanded discovery rules have been in effect, the parties have generally settled discovery disputes without Commission intervention and, to the extent that they have been unable to resolve discrete issues on their own, the Commission has quickly resolved these issues.[418]

106. Fox also argues that the expanded discovery process fails to adequately protect highly confidential and competitively sensitive documents and urges the Commission, if it continues to allow party-directed discovery, to revise the standard protective order to provide more stringent protection of highly confidential information.[419] Fox acknowledges that the Commission revised the standard protective order to prohibit access to confidential information to individuals who are involved in competitive decision-making, but asserts that there is currently no mechanism for ensuring compliance with this requirement in advance.[420] According to Fox, any *ex post facto* sanction imposed by the Commission for violating a protective order could likely never mitigate the damage to a programmer's business if confidential information falls into the hands of a competitor.[421] Fox argues that the Commission should therefore revise the protective order to permit parties to object if they have concerns about the individuals who seek access to confidential information.[422] Under Fox's proposal, an individual seeking access to confidential information would be required to provide at least five business days' notice to a programmer prior to accessing any protected documents to give the programmer the opportunity to object.[423] If there is an objection, access would not be provided until the Commission rules on the objection.[424] Fox also asserts that the Commission should revise the standard protective order to permit parties to limit access to certain highly confidential information to outside counsel,[425] and to provide parties the right to prohibit copying of highly sensitive documents.[426]

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[415] *See id.* at 17855, ¶ 103; *see* 47 C.F.R. § 76.1003(k).

[416] *See 2007 Extension Order*, 22 FCC Rcd at 17855, ¶ 103.

[417] Fox Petition at 5; *see also* Time Warner Reply at 6.

[418] *See, e.g., AT&T v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13213-14, ¶ 9; *Verizon v. MSG/Cablevision (Bureau Order)*, 26 FCC Rcd at 13152-53, ¶ 9.

[419] *See* Fox Petition at 6; *see also* Time Warner Reply at 5.

[420] *See* Fox Petition at 8.

[421] *See id.*

[422] *See id.* Fox states that protective orders used in the context of transfer of control and assignment of license reviews include such a right to object. *See id.* at 9.

[423] *See id.* at 8.

[424] *See id.*

[425] *See id.* at 9 n.28.

[426] *See id.* at 10 n.29.

107. We modify the standard protective order as requested by Fox to include a right to object provision.[427] We note that parties are free to negotiate their own protective orders to include a right to object provision and any other protections they deem necessary,[428] and have done so successfully in program access complaint proceedings that have been initiated since the *2007 Extension Order*.[429] Nevertheless, a right to object provision is commonly included in protective orders, and we agree that adding a right to object provision to the standard protective order will further ensure that confidential information is not improperly used for competitive business purposes. Thus, under the revised standard protective order, an individual seeking access to confidential information will be required to provide at least five business days' notice to the submitting party prior to accessing any protected documents to provide the submitting party the opportunity to object. If the submitting party objects, the individual will not be provided access to the protected documents until the Commission rules on the objection. We decline, however, to modify the standard protective order at this time to permit parties to limit access to certain "highly confidential" information to outside counsel only. Whether certain categories of confidential information require an enhanced level of protection, and therefore should be restricted to outside counsel, depends on the facts presented in an individual adjudication.[430] Moreover, because protective orders commonly restrict copying of only a subset of "highly confidential" documents that are particularly sensitive,[431] we also decline to modify the standard protective order to provide parties the right to prohibit copying of certain documents. Rather, as with the issue of whether certain categories of confidential information require an enhanced level of protection, the issue of whether to preclude copying of certain documents depends on the facts presented in an individual adjudication.

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[427] *See* Appendix I, Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings.

[428] *See Revision of the Commission's Program Carriage Rules, Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11528, ¶ 48 (2011).

[429] *See Sky Angel U.S., LLC v. Discovery Communications, LLC et al,* Order, 27 FCC Rcd 4221, 4221, ¶ 2, and 4225, Protective Order ¶ 9 (MB 2012) ("*Sky Angel v. Discovery*"); *Lafayette Utilities System v. National Cable Television Cooperative, Inc. et al*, Order, 26 FCC Rcd 10274, 10276, ¶ 6, and 10281, Protective Order ¶ 8 (MB 2011); *DISH Network L.L.C. v. Madison Square Garden, Inc. and Madison Square Garden L.P. and Cablevision Systems Corp.*, Order, 25 FCC Rcd 15227, 15227-8, ¶ 2, and 15232, Protective Order ¶ 9 (MB 2010) ("*DISH v. MSG*"); *Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp*., Order, 25 FCC Rcd 3888, 3888, ¶ 2, and 3893, Protective Order ¶ 9 (MB 2010) ("*Verizon v. MSG*"); *WaveDivision Holdings, LLC, Horizon Cable TV, Inc., Stanford University, and the City of San Bruno, California v. Comcast Corp. et al*, Order, 25 FCC Rcd 2231, 2232, ¶ 2, and 2238, Protective Order ¶ 7 (MB 2010) ("*Wave v. Comcast*"); *AT&T Services, Inc. and AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Systems Corp*., Order, 24 FCC Rcd 11258, 11258, ¶ 2, and 11264, Protective Order ¶ 8 (MB 2009) ("*AT&T v. MSG*"); *AT&T Services, Inc. and AT&T California v. Cox Enterprises, Inc. and Cox Communications, Inc.*, Order, 23 FCC Rcd 14176, 14176, ¶ 2, and 14182, Protective Order ¶ 8 (MB 2008) (all including a right to object provision in the protective order) ("*AT&T v. Cox*").

[430] We note that parties in program access complaint proceedings that have been initiated since the *2007 Extension Order* have taken differing approaches in restricting access to confidential information to outside counsel. *Compare Sky Angel v. Discovery*, 27 FCC Rcd 4221, Protective Order ¶ 2f, and *DISH v. MSG*, 25 FCC Rcd at 15231, Protective Order ¶ 2f (each providing that certain confidential information may be designated as "Outside Counsel's Eyes Only") *with Verizon v. MSG*, 25 FCC Rcd at 3892, Protective Order ¶ 6, *Wave v. Comcast,* 25 FCC Rcd at 2237, Protective Order ¶ 4, *AT&T v. MSG*, 24 FCC Rcd at 11263, Protective Order ¶ 5, and *AT&T v. Cox*, 23 FCC Rcd at 14185, Protective Order ¶ 5 (each restricting access to all confidential information to outside counsel).

[431] *See, e.g., Verizon v. MSG*, 25 FCC Rcd at 3893, Protective Order ¶ 8; *Wave v. Comcast,* 25 FCC Rcd at 2237-38, Protective Order ¶ 6; *AT&T v. MSG*, 24 FCC Rcd at 11264, Protective Order ¶ 7; *AT&T v. Cox*, 23 FCC Rcd at 14182, Protective Order ¶ 7.

108. Fox further argues that the Commission should expand the rights of a discovery target to object to the scope of a request for documents.[432] Fox states that the *2007 Extension Order* provides that recipients of a discovery request may object "to any request for documents that are not in its control or relevant to the dispute,"[433] and asserts that this narrow basis for an objection would preclude opposing a demand for materials that are subject to the attorney-client or attorney work product privileges or that represent confidential exchanges between programmers and their accountants or experts.[434] We clarify that the language referenced by Fox, which is codified in Section 76.1003(j) of the Commission's rules,[435] was not intended to preclude the right to assert the attorney-client privilege or the attorney work product privilege for materials subject to a discovery request in a program access complaint proceeding. We amend this rule to reflect this clarification. The work product privilege may also extend to confidential exchanges between programmers and their accountants or experts if these materials are prepared in anticipation of litigation.[436] We note that the adjudicator in a program access complaint proceeding may order the production of documents for which a privilege is asserted for in camera inspection to determine whether the attorney-client or work product privileges apply.

109. Finally, Fox asserts that the Commission should consider imposing sanctions against program access complainants that make frivolous discovery requests for information that is clearly not relevant or that is outside the scope of the complaint proceeding. As discussed above, we think it is unlikely that parties will use discovery to engage in "fishing expeditions." We will, however, take appropriate action if we find that any party to a program access complaint proceeding is abusing the discovery process.

V. PROCEDURAL MATTERS

A. Report and Order in MB Docket Nos. 12-68, 07-18, and 05-192 and Order on Reconsideration in MB Docket No. 07-29

1. Final Regulatory Flexibility Act Analysis

110. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[437] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Report and Order* in MB Docket No. 12-68 *et al.* and *Order on Reconsideration* in MB Docket No. 07-29. The FRFA is set forth in Appendix J.

2. Final Paperwork Reduction Act of 1995 Analysis

111. This *Report and Order* in MB Docket No. 12-68 *et al.* and *Order on Reconsideration* in MB Docket No. 07-29 has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[438] and does not contain any new or modified information collection requirements. In addition, therefore, it does not contain any new or modified "information collection burden for small business

[432] *See* Fox Petition at 10.

[433] *2007 Extension Order*, 22 FCC Rcd at 17852, ¶ 98; *see* 47 C.F.R. § 76.1003(j).

[434] *See* Fox Petition at 10; *see also* Time Warner Reply at 7.

[435] *See* 47 C.F.R. § 76.1003(j).

[436] *See United States v. Nobles,* 425 U.S. 225, 238-39 (1975) (attorney work product extends to material prepared by an attorney's agents).

[437] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[438] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.[439]

3. Congressional Review Act

112. The Commission will send a copy of this *Report and Order* in MB Docket No. 12-68 *et al.* and *Order on Reconsideration* in MB Docket No. 07-29 in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[440]

B. FNPRM in MB Docket No. 12-68

1. Initial Regulatory Flexibility Act Analysis

113. As required by the RFA,[441] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") relating to the *FNPRM* in MB Docket No. 12-68. The IRFA is attached to this *FNPRM* as Appendix K.

2. Paperwork Reduction Act

114. The *FNPRM* in MB Docket No. 12-68 does not contain proposed information collections subject to the PRA.[442] In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.[443]

3. Ex Parte Rules

115. Permit-But-Disclose. The proceeding the *FNPRM* in MB Docket No. 12-68 initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[444] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

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[439] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

[440] *See* 5 U.S.C. § 801(a)(1)(A).

[441] *See* 5 U.S.C. § 603.

[442] Pub. L. No. 104-13.

[443] Pub. L. No. 107-198. *See* 44 U.S.C. § 3506(c)(4).

[444] 47 C.F.R. §§ 1.1200 *et seq.*

4. Filing Requirements

116. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[445] interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS").[446]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

117. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

118. People with Disabilities. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

119. Additional Information. For additional information on this proceeding, contact David Konczal, David.Konczal@fcc.gov, or Kathy Berthot, Kathy.Berthot@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

A. Report and Order in MB Docket Nos. 12-68, 07-18, and 05-192 and Order on Reconsideration in MB Docket No. 07-29

120. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 548, the

[445] *See id*. §§ 1.415, 1.419.

[446] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

Report and Order in MB Docket Nos. 12-68, 07-18, and 05-192 and *Order on Reconsideration* in MB Docket No. 07-29 **IS ADOPTED**.

121. **IT IS FURTHER ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 548, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix C.

122. **IT IS FURTHER ORDERED** that the rules adopted herein **WILL BECOME EFFECTIVE** 30 days after the date of publication in the *Federal Register*.

123. **IT IS FURTHER ORDERED** that, pursuant to sections 4(i), 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, and 310(d), the conditions previously adopted in the *Liberty Media Order* **ARE HEREBY MODIFIED** as set forth in paragraph 72 of the *Report and Order* in MB Docket Nos. 12-68, 07-18, and 05-192 effective 30 days after the date of publication in the *Federal Register*.

124. **IT IS FURTHER ORDERED** that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the Petition for Reconsideration of Fox Entertainment Group, Inc. in MB Docket No. 07-29 **IS GRANTED in part and DENIED in part** as described herein.

125. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order* in MB Docket Nos. 12-68, 07-18, and 05-192 and *Order on Reconsideration* in MB Docket No. 07-29*,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

126. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order* in MB Docket Nos. 12-68, 07-18, and 05-192 and *Order on Reconsideration* in MB Docket No. 07-29 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

B. FNPRM in MB Docket No. 12-68

127. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 548, the *Further Notice of Proposed Rulemaking* in MB Docket No. 12-68 **IS ADOPTED**.

128. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of the *Further Notice of Proposed Rulemaking* in MB Docket No. 12-68*,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters in MB Docket Nos. 12-68, 07-18, and 05-192

Comments:

American Cable Association
AT&T Inc.
Blooston Rural Video Service Providers
Cablevision Systems Corp.
CenturyLink, Inc.
Comcast Corporation and NBCUniversal Media, LLC
Cox Communications, Inc.
DIRECTV, LLC
Discovery Communications, LLC
DISH Network L.L.C.
Free Press
Independent Telephone & Telecommunications Alliance
Interstate Communications, OmniTel Communications, Communications 1 Network, Inc., Farmers Mutual Telephone Coop of Shellsburg, Huxley Communications Cooperative, Hospers Telephone Company, Premier Communications, and Marne & Elk Horn Telephone Company
The Madison Square Garden Company
Mediacom Communications Corporation
National Cable & Telecommunications Association
Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association
Time Warner Cable Inc.
United States Telecom Association
Verizon
Writers Guild of America, West, Inc.

Reply Comments:

American Cable Association
American Public Power Association
AT&T Inc.
Charter Communications Inc.
Comcast Corporation and NBCUniversal Media, LLC
Cox Communications, Inc.
DIRECTV, LLC
DISH Network L.L.C.
The Madison Square Garden Company
Mediacom Communications Corporation
National Cable & Telecommunications Association
Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association
Time Warner Cable Inc.
Time Warner Inc.
Verizon
Walt Disney Company, Viacom, Inc., News Corporation, Time Warner Inc., and CBS Corporation

APPENDIX B

List of Parties in MB Docket No. 07-29

Petitioner:

Fox Entertainment Group, Inc.

Oppositions:

AT&T Inc.
EchoStar Satellite L.L.C.

Replies:

Time Warner Inc.

APPENDIX C

Final Rules

For the reasons discussed in the preamble, Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1002 is amended by revising paragraphs (c)(2), (c)(3), (c)(4), and (c)(5), and removing paragraph (c)(6) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

* * * * *

(c) Exclusive contracts and practices--

(1) * * *

(2) [Reserved]

(3) Specific arrangements: Subdistribution agreements--

(i) Unserved areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992 unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(ii) of this section.

(ii) Limitations on subdistribution agreements in unserved areas. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

* * * * *

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(5) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

* * * * *

(5) Commission approval required. Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable

operator has an attributable interest must submit a "Petition for Exclusivity" to the Commission and receive approval from the Commission to preclude the filing of complaints alleging that an exclusive contract with respect to areas served by a cable operator violates section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section.

(i) The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

(ii) Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

(iii) The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

3. Section 76.1003 is amended by revising paragraphs (e) and (j) and adding new paragraph (m) to read as follows:

§ 76.1003 Program access proceedings.

* * * * *

(e) Answer.

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a) of this part. To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

* * * * *

(j) Discovery. In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute or protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

* * * * *

(m) Deadline for Media Bureau Action on Complaints Alleging a Denial of Programming. For complaints alleging a denial of programming, the Chief, Media Bureau shall release a decision resolving the complaint within six (6) months from the date the complaint is filed.

4. Section 76.1004 is amended by revising paragraph (b) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

* * * * *

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers as follows: No common carrier or its affiliate that provides video programming directly to subscribers shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest, or any satellite broadcasting vendor in which a common carrier or its affiliate has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

5. Section 76.1507 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.1507 Competitive access to satellite cable programming

(a) * * *

(1) * * *

(2) [Reserved]

(3) Section 76.1002(c)(3)(i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992 unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(ii) of this part.

(b) No open video system programming provider in which a cable operator has an attributable interest shall engage in any practice or activity or enter into any understanding or arrangement, including

exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

APPENDIX D

Restated Final Rules Showing Changes Adopted

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1002 is amended by revising paragraph (c) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

* * * * *

(c) Exclusive contracts and practices--

(1) Unserved areas. No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(2) **[Reserved]** ~~Served areas. No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest.~~

(3) Specific arrangements: Subdistribution agreements--

(i) ~~Served~~**Unserved** areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest **for distribution to persons in areas not served by a cable operator as of October 5, 1992**~~, with respect to areas served by a cable operator,~~ unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)**(ii)**~~(iii)~~ of this section.

(ii) Limitations on subdistribution agreements in ~~served~~**unserved** areas. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(**5**~~2~~) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(i) The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

(ii) The effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

(iii) The effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

(iv) The effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

(v) The duration of the exclusive contract.

(5) ~~Prior~~ Commission approval required. Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest ~~seeking to enforce or enter into an exclusive contract in an area served by a cable operator~~ must submit a "Petition for Exclusivity" to the Commission ~~for approval~~**and receive approval from the Commission to preclude the filing of complaints alleging that an exclusive contract with respect to areas served by a cable operator violates section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section**.

(i) The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

(ii) Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is

placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

(iii) The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

~~(6) Sunset provision. The prohibition of exclusive contracts set forth in paragraph (e)(2) of this section shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.~~

* * * * *

3. Section 76.1003 is amended by revising paragraphs (e) and (j) and adding new paragraph (m) to read as follows:

§ 76.1003 Program access proceedings.

* * * * *

(e) Answer.

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint**, provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a) of this part**. To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

* * * * *

(j) Discovery. In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute **or protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure**. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

* * * * *

(m) Deadline for Media Bureau Action on Complaints Alleging a Denial of Programming. For complaints alleging a denial of programming, the Chief, Media Bureau shall release a decision resolving the complaint within six (6) months from the date the complaint is filed.

4. Section 76.1004 is amended by revising paragraph (b) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this section, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company).

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers ~~in such a way~~ **as follows: No common carrier or its affiliate that provides video programming directly to subscribers shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest, or any satellite broadcasting vendor in which a common carrier or its affiliate has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992**~~that such common carrier or its affiliate shall be generally restricted from entering into an exclusive arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest or a satellite broadcast programming vendor in which a common carrier or its affiliate has an attributable interest unless the arrangement pertains to an area served by a cable system as of October 5, 1992, and the Commission determines in accordance with Section § 76.1002(c)(4) that such arrangement is in the public interest~~.

5. Section 76.1507 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.1507 Competitive access to satellite cable programming

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to an operator of an open video system and its affiliate which provides video programming on its open video system, except as limited by paragraph (a) (1)–(3) of this section. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall also apply to any satellite cable programming vendor in which an open video system operator has an attributable interest, except as limited by paragraph (a) (1)–(3) of this section.

(1) Section 76.1002(c)(1) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which an open video system operator has an attributable interest, or any satellite broadcasting vendor in which an open video system operator has an attributable interest for distribution to person in areas not served by a cable operator as of

October 5, 1992.

(2) **[Reserved]** ~~Section 76.1002(c)(2) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with § 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest~~.

(3) Section 76.1002(c)(3)(i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: ~~(i) Unserved areas.~~No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992 **unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(ii) of this part**.

~~(ii) Served areas. No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(iii).~~

(b) No open video system programming provider in which a cable operator has an attributable interest shall ~~:(1) E~~ **e**ngage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

~~(2) Enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.~~

APPENDIX E

Nationwide MVPD Subscribership

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
# (and %) of MVPD subscribers attributable to cable operators	57.9 million[1] (~95%)[2]	68.98 million (78.11%)[3]	65.4 million (67%)[4]	57.2 million (57.4%)[5]
# (and %) of MVPD subscribers attributable to DBS operators	40,000[6]	16.07 million (18.2%)[7]	29.6 million (>30%)[8]	33.97 million (34.1%)[9]

[1] *See 1st Annual Report*, 9 FCC Rcd at 7540, Table 5.1.

[2] At the time the 1992 Cable Act was passed, cable operators served more than 95 percent of all multichannel subscribers. *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 20.

[3] *See 8th Annual Report*, 17 FCC Rcd at 1338; *see also 2002 Extension Order*, 17 FCC Rcd at 12132-33, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1247 (indicating that, at that time, 78 percent of MVPD subscribers received their video programming from a cable operator, representing almost 69 million cable subscribers)).

[4] *See 2007 Extension Order*, 22 FCC Rcd at 17806, ¶ 23 (citing *12th Annual Report*, 21 FCC Rcd at 2507, ¶ 10 and 2617, Table B-1).

[5] *See* SNL Kagan, U. S. Cable Subscriber Highlights, June 2012. The 57.4 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.67 million), then dividing the number of cable subscribers (57.2 million) by the 99.67 million total. This is an estimate, and it excludes certain overbuilders.

[6] *See 1st Annual Report*, 9 FCC Rcd at 7475, ¶ 65.

[7] *See 8th Annual Report*, 17 FCC Rcd at 1338. *But see 2002 Extension Order*, 17 FCC Rcd at 12134, ¶ 23 (citing *8th Annual Report*, 17 FCC Rcd at 1341 (indicating that DirecTV had at the time 11 million subscribers, and EchoStar had 7 million subscribers, for a total of 18 million DBS subscribers)).

[8] *See 2007 Extension Order*, 22 FCC Rcd at 17806, ¶ 23.

[9] The 33.9 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.67 million), then dividing the number of DBS subscribers (33.97 million) by the 99.67 million total. *See* DIRECTV, Inc., SEC Form 8-K (Aug. 2, 2012) (stating that DIRECTV had 19.91 million subscribers at the end of 2Q2012); DISH Network Corporation, SEC Form 8-K (July 19, 2012) (stating that DISH had 14.06 million subscribers at the end of 2Q2012).

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
# (and %) of MVPD subscribers attributable to wireline providers	N/A[10]	60,000 OVS subscribers (0.07%)[11]	~1.9%[12]	8.5 million Verizon/AT&T subscribers (8.5%)[13]
% of MVPD subscribers receiving their video programming from one of the four largest cable MSOs	47.18%[14]	48%[15]	53-60%[16]	43.7%[17]

[10] *See 2002 Extension Order*, 17 RCC Rcd at 12134, ¶ 23 ("In 1996, the Communications Act was amended to allow local exchange carriers to enter the video distribution market within their telephone service areas. . . .").

[11] *See 8th Annual Report*, 17 FCC Rcd at 1338; *see also 2002 Extension Order*, 17 FCC Rcd at 12135, ¶ 23 (citing *8th Annual Report*, 17 FCC Rcd at 1338).

[12] *See 2007 Extension Order*, 22 FCC Rcd at 17807, ¶ 24. According to the *12th Annual Report*, as of June 2005, there were a total of 1.4 million OVS and Broadband Service Provider ("BSP") subscribers, which represented 1.49 percent of MVPD subscribers. *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

[13] *See* AT&T, Inc., SEC Form 8-K (July 24, 2012) (stating that AT&T had 4.1 million U-verse video subscribers at the end of 2Q2012); Verizon Communications, Inc., SEC Form 10-Q (July 30, 2012) (stating that Verizon had 4.4 million FiOS TV video subscribers at the end of 2Q2012). The 8.5 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.67 million), then dividing the number of Verizon and AT&T subscribers (8.5 million) by the 99.67 million total.

[14] *See 1st Annual Report*, 9 FCC Rcd at 7586.

[15] *See 2002 Extension Order*, 17 FCC Rcd at 12133, ¶ 21 (citing *8th Annual Report*, 17 FCC Rcd at 1341).

[16] *See 2007 Extension Order*, 22 FCC Rcd at 17808, ¶ 27.

[17] This figure was calculated by adding the number of subscribers for each of the four largest cable companies in terms of subscribers (Comcast, TWC, Cox, and Charter, a collective total of 43,531,675 subscribers) and dividing by 99.67 million, our estimated number of total MVPD subscribers. *See* SNL Kagan, U. S. Cable Subscriber Highlights, June 2012.

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
% of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs	47.18%[18]	34%[19]	54-56.75%[20]	42.7%[21]

[18] *See 1st Annual Report*, 9 FCC Rcd at 7586. All but one of the ten largest MSOs had attributable ownership interests in at least one programming service. *See id.* at 7526, ¶ 168. The one MSO without attributable ownership interests was not among the top four cable MSOs. *See id.* at 7586.

[19] *See 2002 Extension Order*, 17 FCC Rcd at 12133, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1341).

[20] *See 2007 Extension Order*, 22 FCC Rcd at 17809, ¶ 27.

[21] Four of the top five cable operators in terms of subscribers hold ownership interests in satellite-delivered, national programming networks. *See infra* Appendix F, Table 4 (Comcast, TWC, Cox, and Cablevision). This figure was calculated by adding the number of subscribers for each of these cable operators (a total of 42,519,675 subscribers) and dividing by 99.67 million, our estimated number of total MVPD subscribers. *See* SNL Kagan, U. S. Cable Subscriber Highlights, June 2012.

APPENDIX F

Satellite-Delivered, Cable-Affiliated, National Programming Networks

Table 1

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
# of Top 20 satellite-delivered, national programming networks (as ranked by subscribership) that are cable-affiliated	10 of the Top 25[1]	9 of the Top 20[2]	6 of the Top 20[3]	4 of the Top 20[4] Excluding Comcast-controlled networks: 3 of the Top 20
# of Top 20 satellite-delivered, national programming networks (as ranked by average prime time ratings) that are cable-affiliated	12 of the Top 15[5]	7 of the Top 20[6]	7 of the Top 20[7]	3 of the Top 20[8] Excluding Comcast-controlled networks: 1 of the Top 20
# of cable operators that own programming	10, at least[9]	5[10]	5[11]	6[12]

Table 2 – Top 20 National Cable Networks Ranked by Subscribership[13]

[1] *See 1st Annual Report*, 9 FCC Rcd at 7599.

[2] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1363).

[3] *See 2007 Extension Order*, 22 FCC Rcd at 17803, ¶ 19.

[4] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 30 (listing the following satellite-delivered, cable-affiliated national networks as among the Top 20 in terms of subscribers: Discovery Channel, Weather Channel, and TLC (also listing USA Network, which is subject to program access merger conditions adopted in the *Comcast/NBCU Order*)).

[5] *See 1st Annual Report*, 9 FCC Rcd at 7600.

[6] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1364).

[7] *See 2007 Extension Order*, 22 FCC Rcd at 17803-04, ¶ 19.

[8] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 46 (listing the following satellite-delivered, cable-affiliated national network as among the Top 20 in terms of average prime time ratings: Discovery (also listing USA Network and Syfy, both of which are subject to program access merger conditions adopted in the *Comcast/NBCU Order*)).

[9] *See 1st Annual Report*, 9 FCC Rcd at 7596-98. Four of the top ten cable MSOs had an interest in at least 40 of the 56 satellite-delivered, cable-affiliated, national programming networks existing at that time. *See id*.

[10] *See 2002 Extension Order*, 17 FCC Rcd at 12131, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1310). Four of these were among the seven largest cable MSOs. *See id.*

[11] *See 2007 Extension Order*, 22 FCC Rcd at 17804, ¶ 20 (citing *12th Annual Report*, 21 FCC Rcd at 2620, Table B-3). All of the five were among the six largest cable MSOs. *See id.*

[12] *See infra* Appendix F, Table 4; Appendix G, Table 2 and Table 3.

Network	Owner	Cable-Affiliated?
1. TBS	Time Warner Inc.	No
2. Discovery	Discovery	Yes (Bright House)
3. USA Network	Comcast/NBCU	Yes, but Comcast-controlled and thus subject to merger conditions
4. TNT	Time Warner Inc.	No
5. Weather Channel	Comcast/NBCU (non-controlling)	Yes (Comcast-affiliated)
6. Nickelodeon	Viacom	No
7. Food Network	Scripps/Tribune	No
8. CNN	Time Warner Inc.	No
9. ESPN	Disney	No
10. C-SPAN	C-SPAN	No
11. ESPN2	Disney	No
12. HGTV	Scripps	No
13. Spike TV	Viacom	No
14. TLC	Discovery	Yes (Bright House)
15. A&E	A&E (Disney/Hearst)	No[14]
16. Lifetime	A&E (Disney/Hearst)	No[14]
17. MTV	Viacom	No
18. Comedy Central	Viacom	No
19. Cartoon	Viacom	No
20. History	A&E (Disney/Hearst)	No[14]

[13] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 30.

[14] As discussed above, Comcast has sold its interest in A&E. *See supra Order* at ¶¶ 14, 26.

Table 3 – Top 20 National Cable Networks Ranked by Average Prime Time Ratings[15]

Network	Owner	Cable-Affiliated?
1. USA Network	Comcast/NBCU	Yes, but Comcast-controlled and thus subject to merger conditions
2. Disney Channel	Disney	No
3. ESPN	Disney	No
4. Nickelodeon	Viacom	No
5. TNT	Time Warner Inc.	No
6. Fox News	Fox	No
7. TBS	Time Warner Inc.	No
8. History	A&E (Disney/Hearst)	No[16]
9. A&E	A&E (Disney/Hearst)	No[16]
10. Cartoon	Viacom	No
11. ABC Family	Disney	No
12. HGTV	Scripps	No
13. FX Network	Fox	No
14. Syfy	Comcast/NBCU	Yes, but Comcast-controlled and thus subject to merger conditions
15. Discovery	Discovery	Yes (Bright House)
16. truTV	Time Warner Inc.	No
17. CNN	Time Warner Inc.	No
18. Lifetime	A&E (Disney/Hearst)	No[16]
19. Lifetime Movie Network	A&E (Disney/Hearst)	No[16]
20. Food Network	Scripps/Tribune	No

[15] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 46.

[16] As discussed above, Comcast has sold its interest in A&E. *See supra Order* at ¶¶ 14, 26.

Table 4 – List of Cable-Affiliated, Satellite-Delivered, National Programming Networks

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Cablevision (10)[17]	AMC (owned by AMC Networks Inc.) AMC HD Fuse (owned by MSG) Fuse HD Independent Film Channel (owned by AMC Networks Inc.) Independent Film Channel HD Sundance Channel (owned by AMC Networks Inc.) Sundance Channel HD WE tv (owned by AMC Networks Inc.) WE tv HD
Comcast (43)[18]	Comcast-controlled networks (30)[19] Bravo Bravo HD Chiller Chiller HD CNBC CNBC HD CNBC World E! Entertainment Television E! Entertainment Television HD G4 G4 HD Golf Channel Golf Channel HD MSNBC MSNBC HD Mun2 Oxygen Oxygen HD Cloo (formerly Sleuth) Syfy Syfy HD

[17] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 70, 74, 303; SNL Kagan, Cable Network Ownership (July 2011).

[18] *See Comcast/NBCU Order*, 26 FCC Rcd at 4410-18, Appendix D; *GE/Comcast/NBCU Application* at 19-20, 30-31; SNL Kagan, Cable Network Ownership (July 2011); SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 68.

[19] *See supra Order*, n.89 (explaining that Comcast-controlled networks are subject to program access merger conditions adopted in the *Comcast/NBCU Order*).

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Comcast (continued)	Comcast-controlled networks (continued) The Style Network The Style Network HD Universal HD Universal Sports Universal Sports HD USA Network USA Network HD NBC Sports Network (formerly Versus) NBC Sports Network HD Comcast-affiliated (but not controlled) networks (13)[20] Current TV[21] FEARnet[22] FEARnet HD[22] MusicChoice[23] NHL Network[24] NHL Network HD[24] Shop NBC[25] TV One[26] TV One HD[26] PBS Kids Sprout[27] PBS Kids Sprout HD[27] The Weather Channel[28] The Weather Channel HD[28]

[20] *See Order*, n.89 (explaining that Comcast-affiliated networks are not subject to the program access conditions adopted in the *Comcast/NBCU Order*, but are subject to the program access rules, including the exclusive contract prohibition).

[21] *See GE/Comcast/NBCU Application* at 20 (stating that Comcast has a 10 percent interest in Current Media); *see also Comcast/NBCU Order*, 26 FCC Rcd at 4415, Appendix D.

[22] *See* Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 31 percent interest in FEARNet); *GE/Comcast/NBCU Application* at 20; *see also Comcast/NBCU Order*, 26 FCC Rcd at 4414, Appendix D.

[23] *See* Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 12 percent interest in MusicChoice); *GE/Comcast/NBCU Application* at 20.

[24] *See GE/Comcast/NBCU Application* at 20 (stating that Comcast has a 15.6 percent interest in NHL Network); *see also Comcast/NBCU Order*, 26 FCC Rcd at 4415, Appendix D.

[25] *See Comcast/NBCU Order*, 26 FCC Rcd at 4411, Appendix D; *GE/Comcast/NBCU Application* at 31; ValueVision Media, Inc., SEC Form 10-Q (Sept. 8, 2011), at 12.

[26] *See* Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 34 percent interest in TV One); *GE/Comcast/NBCU Application* at 20; *see also Comcast/NBCU Order*, 26 FCC Rcd at 4414, Appendix D.

[27] *See* Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 40 percent interest in PBS KIDS Sprout); *GE/Comcast/NBCU Application* at 20; *see also Comcast/NBCU Order*, 26 FCC Rcd at 4414, Appendix D.

[28] *See* Comcast 2011 SEC Form 10-K at 12 (stating that NBCU has a 25 percent interest in The Weather Channel); *GE/Comcast/NBCU Application* at 31; *see also Comcast/NBCU Order*, 26 FCC Rcd at 4411, Appendix D.

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Bright House (through affiliation with Discovery)[29] (22)	Animal Planet Animal Planet HD Discovery Discovery HD Discovery en Español Discovery Familia Discovery Fit & Health Velocity (HD only) Investigation Discovery Investigation Discovery HD Military Channel Planet Green Planet Green HD Science Science HD TLC TLC HD OWN: Oprah Winfrey Network OWN: Oprah Winfrey Network HD The Hub The Hub HD 3net (3D)
Cox (2)[30]	Travel Channel Travel Channel HD

[29] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 69; SNL Kagan, Cable Network Ownership (July 2011); *see also Liberty Media Order,* 23 FCC Rcd at 3300-02, ¶¶ 78-80 (explaining that Discovery is a cable-affiliated programmer due to its affiliation with Advance-Newhouse, which holds an attributable interest in a cable system).

[30] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 70; SNL Kagan, Cable Network Ownership (July 2011).

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Other[31] (23)	MLB Network (affiliated with Comcast, Cox, TWC)[32] MLB Network HD (affiliated with Comcast, Cox, TWC)[32] iN DEMAND L.L.C. (21)[33] iN Demand 1, 2, 3, 4, 5, 6 and 7 Hot Choice Hot Choice HD NBA League Pass NBA League Pass HD MLS Direct Kick MLS Direct Kick HD MLB Extra Innings MLB Extra Innings HD NHL Center Ice NHL Center Ice HD GameHD Game2HD Team HD HDPPV

[31] These networks are affiliated with more than one cable operator.

[32] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 67, 405. Because Comcast has a less than 50 percent interest in MLB Network, we consider MLB Network for purposes of the estimates in this *Order* to be a "Comcast-affiliated" network, and not a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra Order*, n.89; *GE/Comcast/NBCU Application* at 20 (stating that Comcast has a 8.3 percent interest in MLB Network).

[33] *See TWC/Insight Application* at Exhibit F (listing national programming services owned by iN DEMAND). iN DEMAND is affiliated with Comcast, Cox, TWC, and Bright House Networks. *See About iN DEMAND – Ownership*, available at http://www.indemand.com/business/business-overview/about/ownership.php. For the reasons discussed above, for purposes of the estimates in this *Order*, we consider the iN DEMAND networks to be "Comcast-affiliated" networks, and not "Comcast-controlled" networks subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra Order*, n.89.

APPENDIX G

Cable-Affiliated, Regional Sports Networks

Table 1

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
# of RSNs	N/A[1]	28[2]	39[3]	108 (SD and HD; including terrestrially and satellite-delivered)[4]
# (and %) of cable-affiliated RSNs	N/A[5]	24 (86%)[6]	18 (46%)[7]	32 (SD and HD; satellite-delivered only) (30%)[8] Excluding Comcast-controlled networks: 18 out of 108 (17%)

[1] In 1998, there were 27 regional sports programming services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24439-41 (1998) ("*5th Annual Report*").

[2] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56).

[3] *See 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 21.

[4] *See NPRM*, 27 FCC Rcd at 3429, ¶ 28 n.98 (explaining that previous RSN estimates did not consider SD and HD RSNs separately); SNL Kagan, Media Trends (2011 Edition), at 70-74; SNL Kagan, RSN Subscribers (August 26, 2011); *GE/Comcast/NBCU Application* at 21; *TWC/Insight Application* at 3-4 and Exhibit F; *see also 13th Annual Report*, 24 FCC Rcd at 551, ¶ 21 (43 RSNs as of June 2006).

[5] In 1998, 22 of the regional sports programming services (82 percent) were affiliated with at least one cable MSO. *See 5th Annual Report*, 13 FCC Rcd at 24439-41.

[6] *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing *8th Annual Report*, 17 FCC Rcd at 1354-56).

[7] *See 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22.

[8] *See infra* Appendix G, Table 2; SNL Kagan, Media Trends (2011 Edition), at 70-74; *see also 13th Annual Report*, 24 FCC Rcd at 551, ¶ 21 (19 out of 43 RSNs (44 percent) were cable-affiliated as of June 2006).

Table 2 – List of Satellite-Delivered, Cable-Affiliated, Regional Sports Networks[9]

Cable Operator	Affiliated, Satellite-Delivered RSN[10]
Bright House Networks (2)	Bright House Sports Network[11] Bright House Sports Network HD[11]
Cablevision (2)[12]	MSG MSG Plus
Comcast (20)[13]	Comcast-controlled RSNs (14)[14] Cable Sports Southeast (Comcast, Charter)[15] Cable Sports Southeast HD (Comcast, Charter)[15] Comcast SportsNet California Comcast SportsNet California HD Comcast SportsNet Mid-Atlantic Comcast SportsNet Mid-Atlantic HD[16] Comcast SportsNet New England Comcast SportsNet New England HD Comcast SportsNet Northwest Comcast SportsNet Northwest HD Comcast Sports Southwest Comcast Sports Southwest HD Comcast SportsNet Bay Area[17] Comcast SportsNet Bay Area HD[17]

[9] This list is provided for illustrative purposes only. Inclusion or exclusion of a network should not be read to state or imply any position as to whether the network qualifies as an "RSN" as defined by the Commission.

[10] *See* SNL Kagan, Media Trends (2011 Edition), at 70-74; *GE/Comcast/NBCU Application* at 21.

[11] *See Media Bureau RSN Report* at ¶ 16 n.52; *Bright House Customers to See Exclusive Coverage of Top College Basketball Games*, available at http://brighthouse.com/corporate/about/738.htm. We do not have information as to whether Bright House Sports Network and Bright House Sports Network HD are satellite-delivered or terrestrially delivered. For purposes of this *Order*, we assume these networks are satellite-delivered. *See supra Order*, n.110.

[12] *See Cablevision July 11 Letter* at 1.

[13] *See Comcast July 11 Letter* at 2.

[14] *See supra Order*, n.89 (explaining that Comcast-controlled networks are subject to program access merger conditions adopted in the *Comcast/NBCU Order*).

[15] Because Comcast has a 50 percent or greater interest in Cable Sports Southeast, we consider Cable Sports Southeast for purposes of the estimates in this *Order* to be a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra Order*, n.89; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 81 percent interest in Comcast/Charter Sports Southeast).

[16] Comcast states that Comcast SportsNet Mid-Atlantic HD is moving from terrestrial to satellite delivery in December 2012. *See Comcast July 11 Letter* at 2 n.5.

[17] Because Comcast has a 50 percent or greater interest in Comcast SportsNet Bay Area, we consider Comcast SportsNet Bay Area for purposes of the estimates in this *Order* to be a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra Order*, n.89; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 67 percent interest in Comcast SportsNet Bay Area).

Cable Operator	Affiliated, Satellite-Delivered RSN
Comcast (continued)	Comcast-affiliated (but not controlled) RSNs (6)[18] Comcast SportsNet Chicago[19] Comcast SportsNet Chicago HD[19] Comcast SportsNet Houston[20] Comcast SportsNet Houston HD[20] Midco Sports Network[21] Midco Sports Network HD[21]
Cox (2)	Cox Sports Television (New Orleans)[22] Cox Sports Television HD (New Orleans)[22]
Time Warner Cable (4)[23]	Time Warner Cable SportsNet[24] Time Warner Cable SportsNet HD[24] Time Warner Cable Deportes[24] Time Warner Cable Deportes HD[24]

[18] *See supra Order*, n.89 (explaining that Comcast-affiliated networks are not subject to the program access conditions adopted in the *Comcast/NBCU Order*, but are subject to the program access rules, including the exclusive contract prohibition).

[19] Because Comcast has a less than 50 percent interest in Comcast SportsNet Chicago, we consider Comcast SportsNet Chicago for purposes of the estimates in this *Order* to be a "Comcast-affiliated" network, and not a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra Order*, n.89; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 30 percent interest in Comcast SportsNet Chicago).

[20] Comcast SportsNet Houston is scheduled to launch in 2012, featuring the games of the Houston Astros (of MLB) and the Houston Rockets (of the NBA). *See Go Back to the Future When the Astros and Rockets Launch Their Channel, It Likely Will Remind Viewers of HSE* (Nov. 8, 2010), available at http://www.chron.com/sports/rockets/article/Astros-Rockets-network-likely-to-resemble-old-1705389.php. Because Comcast will have a less than 50 percent interest in Comcast SportsNet Houston, we consider Comcast SportsNet Houston for purposes of the estimates in this *Order* to be a "Comcast-affiliated" network, and not a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See id.*; Comcast 2011 SEC Form 10-K at 8; *see also supra Order*, n.89. We do not have information as to whether Comcast SportsNet Houston and Comcast SportsNet Houston HD will be satellite-delivered or terrestrially delivered. For purposes of this *Order*, we assume these networks will be satellite-delivered. *See supra Order*, n.110.

[21] We do not have information as to whether Midco Sports Network and Midco Sports Network HD are satellite-delivered or terrestrially delivered. For purposes of this *Order*, we assume these networks are satellite-delivered. *See supra Order*, n.110.

[22] We do not have information as to whether Cox Sports Television and Cox Sports Television HD are satellite-delivered or terrestrially delivered. For purposes of this *Order*, we assume these networks are satellite-delivered. *See supra Order*, n.110.

[23] *See TWC July 11th Letter* at 2; *see also Media Bureau RSN Report* at ¶ 16 n.52; *TWC/Insight Application* at 3-4 and Exhibit F.

[24] TWC recently announced that it will launch four RSNs (including both SD and HD) in 2012 featuring the games of the Los Angeles Lakers (of the NBA), including the first Spanish-language RSN. *See Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season* (Feb. 14, 2011), available at http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight. We do not have information as to whether these RSNs will be satellite-delivered or terrestrially delivered. For purposes of this *Order*, we assume these networks are satellite-delivered. *See supra Order*, n.110.

Cable Operator	Affiliated, Satellite-Delivered RSN
Other (2)	SportsNet New York (Comcast, TWC)[25] SportsNet New York HD (Comcast, TWC)[25]

Total satellite-delivered, cable-affiliated RSNs (other than Comcast-controlled RSNs): 18
Total satellite-delivered, Comcast-controlled RSNs: 14
TOTAL: 32

[25] Because Comcast has a less than 50 percent interest in SportsNet New York, we consider SportsNet New York for purposes of the estimates in this *Order* to be a "Comcast-affiliated" network, and not a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra Order*, n.89; Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 8 percent interest in SportsNet New York); *GE/Comcast/NBCU Application* at 21.

Table 3 – List of Terrestrially Delivered, Cable-Affiliated, Regional Sports Networks[26]

Cable Operator	Affiliated, Terrestrially Delivered RSN[27]
Cablevision (2)[28]	MSG HD MSG Plus HD
Comcast (4)[29]	Comcast-controlled RSNs (4)[30] Comcast SportsNet Philadelphia Comcast SportsNet Philadelphia HD The Comcast Network (Philadelphia) The Comcast Network HD (Philadelphia)
Cox (2)	Channel 4 San Diego Channel 4 San Diego HD
Time Warner Cable (16)[31]	Metro Sports (Kansas City) Metro Sports HD (Kansas City) OC Sports (Hawaii) OC Sports HD (Hawaii) Source 16/Racer TV (Southern Kentucky) TWC Sports (Albany) TWC Sports HD (Albany) TWC Sports (Syracuse) TWC Sports HD (Syracuse) TWC SportsNet (Buffalo) TWC SportsNet HD (Buffalo) TWC SportsNet (Rochester) TWC SportsNet HD (Rochester) TWC Sports 32 (Wisconsin) TWC Sports 32 HD (Wisconsin) Texas Channel (Texas)

Total terrestrially delivered, cable-affiliated RSNs (other than Comcast-controlled RSNs): 20
Total terrestrially delivered, Comcast-controlled RSNs: 4
TOTAL: 24

[26] This list is provided for illustrative purposes only. Inclusion or exclusion of a network should not be read to state or imply any position as to whether the network qualifies as an "RSN" as defined by the Commission.

[27] *See* SNL Kagan, Media Trends (2011 Edition), at 70-74; *GE/Comcast/NBCU Application* at 21.

[28] *See Cablevision July 11 Letter* at 1.

[29] *See Comcast July 11 Letter* at 2.

[30] *See supra Order*, n.89 (explaining that Comcast-controlled networks are subject to program access merger conditions adopted in the *Comcast/NBCU Order*).

[31] *See TWC July 11 Letter* at 2.

Table 4 – List of Unaffiliated, Regional Sports Networks[32]

Altitude Sports Network
Altitude Sports Network HD
Big Ten Network
Big Ten Network HD
Fox Sports Arizona
Fox Sports Arizona HD
Fox Sports Carolinas
Fox Sports Carolinas HD
Fox Sports Detroit
Fox Sports Detroit HD
Fox Sports Florida
Fox Sports Florida HD
Fox Sports Midwest
Fox Sports Midwest HD
Fox Sports North
Fox Sports North HD
Fox Sports Ohio
Fox Sports Ohio HD
Fox Sports Prime Ticket
Fox Sports Prime Ticket HD
Fox Sports South
Fox Sports South HD
Fox Sports Southwest
Fox Sports Southwest HD
Fox Sports Tennessee
Fox Sports Tennessee HD
Fox Sports West
Fox Sports West HD
Fox Sports Wisconsin
Fox Sports Wisconsin HD
Longhorn Network
Longhorn Network HD
MASN
MASN HD
NESN
NESN HD
PAC-12 Network
PAC-12 Network HD

[32] *See* SNL Kagan, Media Trends (2011 Edition), at 70-74. This list is provided for illustrative purposes only. Inclusion or exclusion of a network should not be read to state or imply any position as to whether the network qualifies as an "RSN" as defined by the Commission.

Root Sports Northwest (formerly DIRECTV Sports Net Northwest)
Root Sports Northwest HD
Root Sports Pittsburgh (formerly DIRECTV Sports Net Pittsburgh)
Root Sports Pittsburgh HD
Root Sports Rocky Mountain (formerly DIRECTV Sports Net Rocky Mountain)
Root Sports Rocky Mountain HD
SportSouth
SportSouth HD
Sports Time Ohio
Sports Time Ohio HD
Sun Sports
Sun Sports HD
YES Network
YES Network HD

TOTAL: 52

APPENDIX H

Potential Amendments to the Program Access Rules Based on the *FNPRM*

The Federal Communications Commission proposes to amend Part 76 of Title 47 of the Code of Federal Regulations (CFR) as follows:

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Amend Section 76.1000 by revising paragraphs (c)(1) and (c)(3), adding new paragraph (c)(4), and revising paragraph (j) to read as follows:

§ 76.1000 Definitions.

* * * * *

(c) Buying groups. The term "buying group" or "agent," for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) **(i)** Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members**,** or **(ii)** whose members, as contracting parties, agree to joint and several liability**, or (iii) maintains liquid cash or credit reserves (*i.e.*, cash, cash equivalents, or letters or lines of credit) equal to cover the cost of one month's programming for all buying group members, or (iv) agrees to assume liability to forward to the appropriate programmer all fees due and received from its members for payment under a programming contract**; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group**; and**

(4) Does not unreasonably deny membership to any multichannel video programming distributor that requests membership.

* * * * *

(j) Similarly situated. The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor or by a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1)(ii), that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of § 76.1001(a) or § 76.1002(b) has occurred. The analysis of whether an alternative multichannel video programming distributor is properly comparable to the complainant includes consideration of, but is not limited to, such factors as

whether the alternative multichannel video programming distributor operates within a geographic region proximate to the complainant, has roughly the same number of subscribers as the complainant, and purchases a similar service as the complainant. Such alternative multichannel video programming distributor, however, must use the same distribution technology as the "competing" distributor with whom the complainant seeks to compare itself. **For purposes of determining the size of a volume discount applicable to a buying group, a buying group will be considered similarly situated to an alternative multichannel video programming distributor with approximately the same number of subscribers for the programming as expected to be supplied by the buying group.**

* * * * *

2. Amend Section 76.1002 by revising the Note to paragraph (b)(3) and adding new paragraph (g) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

* * * * *

(b) Discrimination in prices, terms or conditions. No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors. Nothing in this subsection, however, shall preclude:

(1) The imposition of reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

Note 1: Vendors are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability, although any such distinctions must be applied for reasons for other than a multichannel video programming distributor's technology. Vendors are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

Note 2: Vendors may establish price differentials based on factors related to offering of service, or difference related to the actual service exchanged between the vendor and the distributor, as manifested in standardly applied contract terms based on a distributor's particular characteristics or willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Such factors include, but are not limited to, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; meeting competition at the distributor level; and other legitimate factors as standardly applied in a technology neutral fashion.

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming, satellite broadcast programming, or terrestrial cable programming;

Note: Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in costs, or additional costs, incurred

for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies. A price differential for a program service may not be based on a distributor's retail costs in delivering service to subscribers unless the program vendor can demonstrate that subscribers do not or will not benefit from the distributor's cost savings that result from a lower programming price.

(3) The establishment of different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

Note: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership. **Vendors may not use volume-related justifications to establish price differentials between a buying group and an alternative multichannel video programming distributor that has approximately the same number of subscribers for the programming as expected to be supplied by the buying group.**

(4) Entering into exclusive contracts in areas that are permitted under paragraphs (c)(2) and (c)(4) of this section.

* * * * *

(g) *Buying Groups.*

(1) *Right to Participate in Buying Group Programming Contracts.* No satellite cable programming vendor in which a cable operator has an attributable interest or satellite broadcast programming vendor may unreasonably interfere with or prevent a member of a buying group from participating in a programming contract in which a buying group signs as a contracting party as a representative of its members if: (i) the member has no more than three million subscribers; or (ii) the share of programming that the member licenses through the buying group is not significantly smaller than the average share of programming that other members of the buying group license through the buying group. Upon the expiration of a satellite cable programming or satellite broadcast programming contract which a buying group signs as a contracting party as a representative of its members, all buying group members participating in the expiring programming contract shall be presumptively entitled to participate in the renewed programming contract.

(2) *License Fee Schedule.* A programming vendor must offer a programming contract to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, provided that it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the programming contract.

APPENDIX I

Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	Docket No. _____
[Name of Proceeding]	)	

PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents filed in this proceeding or obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act ("FOIA") or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 7.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

3. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

4. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information. By designating information as Confidential Information, a Submitting Party signifies that it has determined in good faith that the information should be subject to protection under FOIA, the Commission's implementing rules, and this Protective Order.

5. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. Commission Access to Confidential Information. Confidential Information shall be made available to Commission staff and Commission consultants. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. Disclosure. Subject to the requirements of Paragraph 9, Confidential Information may be reviewed by counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Subject to the requirements of Paragraph 9, counsel to a Reviewing Party or such other person designated by the Reviewing Party may disclose Confidential Information to other Authorized Representatives only after advising such Authorized Representatives of the terms and obligations of the Order and provided that the Authorized Representatives have signed the Declaration and served it appropriately in accordance with paragraph 9, and the Authorized Representatives are of the type of persons listed in subparagraphs 8.a., b., and c.

8. Authorized Representatives shall be limited to:

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Authorized Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. Procedures for Obtaining Access to Confidential Information. In all cases where access to Confidential Information is permitted pursuant to paragraph 7, before reviewing or having access to any Confidential Information, each person seeking such access shall execute the Declaration in Attachment A and file it with the Commission and serve it upon the Submitting Party through their counsel, so that the Declaration is received by the Submitting Party at least five (5) business days prior to such person's reviewing or having access to Confidential Information. Each Submitting Party shall have an opportunity to object to the disclosure of its Confidential Information to any such person. Any objection must be filed at the Commission and served on counsel for such person within three (3) business days after receipt of that person's Declaration. Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Confidential Information. If there is no objection or once such objection is resolved, the Submitting Party shall make such material available for review as set forth in Paragraph 10.

10. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

11. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

12. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with Paragraphs 11 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not

to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

17. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

19. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j); 47 C.F.R. §§ 0.457(d) and 76.1003(k); and Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

Attachment A to Standard Protective Order

DECLARATION

In the Matter of	)	
	)	
[Name of Proceeding]	)	Docket No._____
	)	

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Authorized Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) _____

(printed name) _____

(representing) _____

(title) _____

(employer) _____

(address) _____

(phone) _____

(date) _____

APPENDIX J

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* ("NPRM") in MB Docket Nos. 12-68, 07-18, and 05-192.[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA.[3] The Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association (collectively, "OPASTCO/NTCA") filed comments directed toward the IRFA and these comments are discussed below.[4] This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

2. In areas served by a cable operator, Section 628(c)(2)(D) of the Communications Act of 1934, as amended (the "Act"), generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor (the "exclusive contract prohibition").[5] The exclusive contract prohibition applies to all satellite-delivered, cable-affiliated programming and preemptively bans all exclusive contracts for such programming with cable operators, regardless of the popularity of the programming at issue.[6] The exclusive contract prohibition applies only to programming that is delivered via satellite; it does not apply to programming delivered via terrestrial facilities.[7] In Section 628(c)(5) of the Act, Congress provided that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[8] On two previous occasions, first in 2002[9] and again in 2007,[10]

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq*., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *See NPRM*, 27 FCC Rcd at 3507, Appendix E, ¶ 1.

[3] *See id.*

[4] *See* OPASTCO/NTCA Reply Comments at 4.

[5] *See* 47 U.S.C. § 548(c)(2)(D).

[6] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3377-78, ¶¶ 47-49 (1993); *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1930, ¶ 62 (1994).

[7] Section 628(c)(2)(D) pertains only to "satellite cable programming" and "satellite broadcast programming." *See* 47 U.S.C. § 548(c)(2)(D). Both terms are defined to include only programming transmitted or retransmitted by satellite for reception by cable operators. *See* 47 U.S.C. § 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. § 605); *id*. § 548(i)(3). We refer to "satellite cable programming" and "satellite broadcast programming" collectively as "satellite-delivered programming."

[8] 47 U.S.C. § 548(c)(5).

[9] *See 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:* (continued….)

the Commission renewed the prohibition for five years, with the latest extension expiring on October 5, 2012. The *NPRM* initiated the third review of the necessity of the exclusive contract prohibition.

3. The *Report and Order* concludes that the exclusive contract prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. Accordingly, the Commission declines to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date. Post-sunset, the Commission will rely on existing protections provided by the program access rules to protect multichannel video programming distributors ("MVPDs") in their efforts to compete in the video distribution market, including the case-by-case consideration of exclusive contracts pursuant to Section 628(b) of the Act.

4. The *Report and Order* extends the case-by-case complaint process previously adopted to address Section 628(b) complaints involving terrestrially delivered, cable-affiliated programming to Section 628(b) complaints challenging exclusive contracts involving satellite delivered, cable-affiliated programming. Under this case-by-case process, the complainant will have the burden of proving that the exclusive contract (i) is "unfair" based on the facts and circumstances presented; and (ii) has the "purpose or effect" of "significantly hindering or preventing" the MVPD from providing satellite cable programming or satellite broadcast programming in violation of Section 628(b). There will be a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated Regional Sports Network ("RSN") has the purpose or effect set forth in Section 628(b). A defendant may overcome this presumption by demonstrating that the exclusive contract does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming. The Commission will analyze the HD version of a network separately from the SD version of the network in evaluating whether an exclusive contract involving satellite-delivered programming has the purpose or effect set forth in Section 628(b). In cases involving an RSN, there will be a rebuttable presumption that an exclusive contract involving the HD version of the RSN results in significant hindrance even if the complainant offers the SD version of the RSN to subscribers. In addition to claims under Section 628(b) of the Act, additional causes of action under Section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under Section 628(c)(2)(A) and claims alleging discrimination under Section 628(c)(2)(B).

5. The *Report and Order* retains the exclusivity petition process, whereby a cable operator or satellite-delivered, cable-affiliated programmer may file a Petition for Exclusivity seeking Commission approval for an exclusive contract involving satellite-delivered, cable-affiliated programming by demonstrating that the contract serves the public interest. Grant of a Petition for Exclusivity will immunize an exclusive contract from potential complaints alleging a violation of Section 628(c)(2)(B) of the Act, as required by the terms of Section 628(c)(2)(B)(iv).

6. Finally, the *Report and Order* adopts a 45-day answer period for complaints alleging a violation of Section 628(b); establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming; eliminates restrictions on subdistribution agreements involving satellite-delivered, cable-affiliated programming in served areas; determines that the rules applicable post-sunset to exclusive contracts between cable

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Sunset of Exclusive Contract Prohibition, Report and Order, 17 FCC Rcd 12124, 12132, ¶ 20 (2002) ("*2002 Extension Order*").

[10] *See 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, 22 FCC Rcd 17791 (2007) ("*2007 Extension Order*"), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("*Cablevision I*").

operators and satellite-delivered, cable-affiliated programmers will apply equally to common carriers and Open Video Systems; and modifies the exclusivity conditions set forth in the *Liberty Media Order*[11] to conform those conditions to the Commission's decision to decline to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date.

7. The *Order on Reconsideration* in MB Docket No. 07-29 (i) affirms the expanded discovery procedures for program access complaints adopted in the *2007 Extension Order*; (ii) modifies the standard protective order for use in program access complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (iii) clarifies that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

8. OPASTCO/NTCA filed comments specifically directed toward the IRFA. In addition, several other commenters addressed the effects of the expiration of the exclusive contract prohibition on small businesses in their comments. OPASTCO/NTCA argues that expiration of the exclusive contract prohibition would have a particularly harmful impact on small and rural MVPDs, which lack the resources to produce alternative programming or engage in effective counter-measures.[12] Therefore, OPASTCO/NTCA argues, "it is particularly imperative to extend the exclusive contract prohibition to avoid the disproportionate consequences that the rule's expiration would impose on the markets served by small MVPDs."[13] Several commenters also argue that small MVPDs do not have the resources to litigate complaints involving exclusive contracts on a case-by-case basis.[14]

9. The *Report and Order* concludes that the case-by-case approach for considering exclusive contracts will be sufficient to protect MVPDs, including small, rural, and new entrant MVPDs, in their efforts to compete. The *Report and Order* also finds that the following additional factors will mitigate the risk of any potentially adverse impact of the expiration of the exclusive contract prohibition: (i) a significant percentage of satellite-delivered, cable-affiliated programming is subject until January 2018 to program access merger conditions adopted in the *Comcast/NBCU Order*, which require Comcast/NBCU to make these networks available to competitors even after the expiration of the exclusive contract prohibition; (ii) the Commission expects that any enforcement of exclusive contracts in the near term will be limited by the terms of existing affiliation agreements; (iii) even after the expiration of the exclusive contract prohibition, a satellite-delivered, cable-affiliated programmer's refusal to license its content to a particular MVPD (such as a small, rural, or new entrant MVPD), while simultaneously licensing its content to other MVPDs competing in the same geographic area, will continue to be a violation of the discrimination provision in Section 628(c)(2)(B), unless the programmer can establish a "legitimate business reason" for the conduct in response to a program access complaint challenging the conduct; and (iv) if the expiration of the exclusive contract prohibition results in harm to consumers or competition, the Commission has statutory authority pursuant to Section 628(b) of the Act to take

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[11] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, News Corporation. and The DIRECTV Group, Inc., Transferors, to Liberty Media Corporation., Transferee,* Memorandum Opinion and Order, 23 FCC Rcd 3265, 3340-41, Appendix B, § III (2008).

[12] *See* OPASTCO/NTCA Reply Comments at 4; *see also* OPASTCO/NTCA Comments at 5; Blooston Rural Video Providers at 6; USTelecom at 14-15.

[13] OPASTCO/NTCA Reply Comments at 4.

[14] *See* CenturyLink Comments at 19-20; ITTA Comments at 2-3, 7 n.17, 9-10; Iowa Telco Comments at 5; OPASTCO/NTCA Comments at 7; USTelecom Comments at 13-14.

remedial action by adopting rules, including a prohibition on certain types of exclusive contracts involving cable-affiliated programming, to address these concerns.

10. Moreover, the *Report and Order* notes that certain factors will help to minimize the costs of the complaint process. The *Report and Order* establishes a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b). This presumption will reduce costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and empirical evidence on RSNs. Moreover, the *Report and Order* establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. In addition, to the extent that MVPDs are concerned with the costs of pursuing a program access complaint, they may seek to join with other MVPDs in pursuing a complaint.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

11. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[15] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[16] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[17] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[18] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

12. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[19] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[20] Under this category, the SBA deems a wireline business to be small if it

[15] 5 U.S.C. § 604(a)(4).

[16] 5 U.S.C. § 601(6).

[17] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[18] 15 U.S.C. § 632.

[19] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[20] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

has 1,500 or fewer employees.[21] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[22]

13. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[23] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[24]

14. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[25] Industry data indicate that all but ten cable operators nationwide are small under this size standard.[26] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[27] Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000-19,999 subscribers.[28] Thus, under this standard, most cable systems are small.

15. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[29] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[30] Industry data indicate that all

[21] *See id.*

[22] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[23] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[24] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[25] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[26] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[27] 47 C.F.R. § 76.901(c).

[28] *See* TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

[29] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[30] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

but nine cable operators nationwide are small under this subscriber size standard.[31] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[32] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

16. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[33] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[34] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[35] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network).[36] Each currently offers subscription services. DIRECTV[37] and DISH Network[38] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

17. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[39] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[40] Census Bureau data for

[31] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[32] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[33] *See* 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 12, above.

[34] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[35] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[36] S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Annual Report, FCC 12-81, ¶ 31 (2012) ("*14th Annual Report*").

[37] As of December 2010, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 19% of MVPD subscribers nationwide. *See id.* at Table 5; *see also supra* App. E at n. 9.

[38] As of December 2010, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 14% of MVPD subscribers nationwide. *See 14th Annual Report* at Table 5; *see also supra* App. E at n. 9.

[39] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[40] *See id*.

2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[41]

18. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[42] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[43] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[44]

19. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[45] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[46] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[47] After adding the number of small business auction licensees to the number of incumbent licensees not

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[41] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[42] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[43] *See id*.

[44] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[45] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

[46] 47 C.F.R. § 21.961(b)(1).

[47] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[48] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[49] Auction 86 concluded in 2009 with the sale of 61 licenses.[50] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

20. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[51] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[52] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[53] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[54]

21. *Fixed Microwave Services.* Microwave services include common carrier,[55] private-operational fixed,[56] and broadcast auxiliary radio services.[57] They also include the Local Multipoint

[48] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[49] *Id.* at 8296.

[50] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[51] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

[52] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[53] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[54] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[55] *See* 47 C.F.R. Part 101, Subparts C and I.

Distribution Service (LMDS),[58] the Digital Electronic Message Service (DEMS),[59] and the 24 GHz Service,[60] where licensees can choose between common carrier and non-common carrier status.[61] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[62] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[63] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[64] Of those 1,383, 1,368 had fewer than 1000 employees, and 15 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

22. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[65] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[66] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[67] The SBA has developed a small business size standard for this

[56] *See* 47 C.F.R. Part 101, Subparts C and H.

[57] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[58] *See* 47 C.F.R. Part 101, Subpart L.

[59] *See* 47 C.F.R. Part 101, Subpart G.

[60] *See id.*

[61] *See* 47 C.F.R. §§ 101.533, 101.1017.

[62] 13 C.F.R. § 121.201, 2007 NAICS code 517210.

[63] *See id*. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[64] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009); http://www.census.gov/econ/industry/ec07/a517210.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[65] 47 U.S.C. § 571(a)(3)-(4); *see Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("*13th Annual Report*").

[66] *See* 47 U.S.C. § 573.

[67] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

category, which is: all such firms having 1,500 or fewer employees.[68] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[69] In addition, we note that the Commission has certified approximately 42 OVS operators, with some now providing service.[70] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[71] Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. The Commission does not have financial or employment information regarding the other entities authorized to provide OVS, some of which may not yet be operational. Thus, up to 41 of the OVS operators may qualify as small entities.

23. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[72] The SBA has developed a small business size standard for this category, which is: all such firms having $15 million dollars or less in annual revenues.[73] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year.[74] Of that number, 325 operated with annual revenues of $ 9,999,999 dollars or less.[75] Seventy-one (71) operated with annual revenues of between $10 million and $100 million or more.[76] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

24. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500

[68] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[69] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[70] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[71] *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[72] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[73] 13 C.F.R. § 121.201, 2007 NAICS code 515210.

[74] *See* http://www.census.gov/econ/industry/ec07/a515210.htm (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

[75] *Id*.

[76] *Id*.

or fewer employees), and "is not dominant in its field of operation."[77] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[78] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

25. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[79] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[80] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[81] Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[82]

26. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[83] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[84] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

27. *Motion Picture and Video Production*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and

[77] 15 U.S.C. § 632.

[78] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[79] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[80] *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) ("*Trends in Telephone Service*").

[81] *See id*.

[82] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[83] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[84] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

distributing motion pictures, videos, television programs, or television commercials."[85] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[86] To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.[87] Of these, 8995 had annual receipts of $24,999,999 or less, and 100 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[88] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

28. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[89] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[90] To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.[91] Of these, 434 had annual receipts of $24,999,999 or less, and 16 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[92] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements

29. Following the expiration of the exclusive contract prohibition, the Commission will rely on existing protections in the program access rules to protect MVPDs in their efforts to compete in the video distribution market. An MVPD will have the option to file a complaint with the Commission alleging that an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer involving satellite-delivered, cable-affiliated programming violates Section 628(b) of the Act. The *Report and Order* extends the case-by-case complaint process previously adopted by the

[85] U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[86] 13 C.F.R. § 121.201, 2007 NAICS code 512110.

[87] *See* http://www.census.gov/econ/industry/ec07/a51211.htm (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

[88] *Id.*

[89] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[90] 13 C.F.R. § 121.201, 2007 NAICS code 512120.

[91] *See* http://www.census.gov/econ/industry/ec07/a51212.htm (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

[92] *Id.*

Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming that allegedly violate Section 628(b) to Section 628(b) complaints challenging exclusive contracts involving satellite-delivered, cable-affiliated programming. In addition to claims under Section 628(b) of the Act, additional causes of action under Section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under Section 628(c)(2)(A) and claims alleging discrimination under Section 628(c)(2)(B). The *Report and Order* also adopts a 45-day answer period in complaint proceedings alleging a violation of Section 628(b) and establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. Moreover, the *Order on Reconsideration* (i) modifies the standard protective order for use in program access complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (ii) clarifies that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

30. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[93] The *NPRM* invited comment on issues that had the potential to have significant impact on some small entities.[94]

31. In the *Report and Order*, the Commission declines to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date. The Commission will instead rely on existing protections in the program access rules to protect MVPDs, including small entities, in their efforts to compete in the video distribution market. Small MVPDs will have the option to file a complaint alleging that an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer involving satellite-delivered, cable-affiliated programming violates Section 628(b) of the Act. In addition to claims under Section 628(b) of the Act, additional causes of action under Section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under Section 628(c)(2)(A) and claims alleging discrimination under Section 628(c)(2)(B).

32. The *Report and Order* notes that certain factors will help to minimize the costs of the complaint process. The *Report and Order* establishes a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b). This presumption will reduce costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and empirical evidence on RSNs. Moreover, the *Report and Order* establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. To the extent that MVPDs are concerned with the costs of pursuing a program access complaint, they may seek to join with other MVPDs in pursuing a complaint.

[93] 5 U.S.C. § 603(c)(1) – (c)(4).

[94] *See NPRM*, 27 FCC Rcd at 3507, Appendix E, ¶ 1.

33. Finally, the *Report and Order* revises the procedural rules for program access complaints to adopt a 45-day answer period for complaints alleging a violation of Section 628(b). The standard answer period for other program access complaints is only 20 days. Small entities may benefit from a lengthier 45-day period within which to file an answer.

34. The *Order on Reconsideration* (i) modifies the standard protective order for use in program access complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (ii) clarifies that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure. Small entities may benefit from having the right to object to the disclosure of confidential information.

F. Report to Congress

35. The Commission will send a copy of the *Report and Order* in MB Docket Nos. 12-68, 07-18, and 05-192, and *Order on Reconsideration* in MB Docket No. 07-29, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[95] In addition, the Commission will send a copy of the *Report and Order* in MB Docket Nos. 12-68, 07-18, and 05-192, and *Order on Reconsideration* in MB Docket No. 07-29, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* in MB Docket Nos. 12-68, 07-18, and 05-192, the *Order on Reconsideration* in MB Docket No. 07-29, and FRFA (or summaries thereof) will also be published in the *Federal Register*.[96]

[95] *See* 5 U.S.C. § 801(a)(1)(A).

[96] *See* 5 U.S.C. § 604(b).

APPENDIX K

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* ("*FNPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *FNPRM*. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

129. We seek comment in the *FNPRM* on whether to establish a rebuttable presumption that an exclusive contract for a cable-affiliated Regional Sports Network ("RSN") (regardless of whether it is terrestrially delivered or satellite-delivered) is an "unfair act" under Section 628(b) of the Communications Act of 1934, as amended (the "Act").[4] Under the case-by-case process for complaints alleging that an exclusive contract violates Section 628(b), the complainant has the burden of proving that the exclusive contract at issue (i) is an "unfair act" and (ii) has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming. With respect to the second element, the Commission has established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming, as set forth in Section 628(b). With respect to the first element (the "unfair act" element), however, the Commission has not established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN is an "unfair act." The *FNPRM* seeks comment on whether to establish this rebuttable presumption.

2. We also seek comment in the *FNPRM* on whether to establish a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint. The Commission previously established a process whereby a complainant may seek a standstill of an existing programming contract during the pendency of a complaint.[5] The complainant has the burden of proof to demonstrate how grant of the standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay. The *FNPRM* seeks comment on whether to establish a rebuttable presumption that a complainant is entitled to a standstill when challenging an exclusive contract involving a cable-affiliated RSN.

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] *See* 47 U.S.C. § 548(b).

[5] *See* 47 C.F.R. § 76.1003(l).

3. The *FNPRM* also seeks comment on whether to establish rebuttable presumptions with respect to the "unfair act" element and/or the "significant hindrance" element of a Section 628(b) claim challenging an exclusive contract involving a cable-affiliated "national sports network" (regardless of whether it is terrestrially delivered or satellite-delivered). We also seek comment in the *FNPRM* on whether the Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates Section 628(b) (or, potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network violates Section 628(b) (or Section 628(c)(2)(B)).

4. We also solicit comment on modifications to the program access rules relating to buying groups proposed by the American Cable Association ("ACA") in its comments on the *Notice of Proposed Rulemaking* in MB Docket Nos. 12-68, 07-18, and 05-182.[6] ACA asserts that revisions to the program access rules are needed to ensure that buying groups utilized by small and medium-sized multi-channel video programming distributors ("MVPDs") can avail themselves of the non-discrimination protections of the program access rules.[7] ACA seeks three modifications to the program access rules: (i) the revision of the definition of "buying group" to accurately reflect the level of liability assumed by buying groups under current industry practices; (ii) the establishment of standards for the right of buying group members to participate in their group's master licensing agreements; and (iii) the establishment of a standard of comparability for a buying group regarding volume discounts.[8] In addition to ACA's proposed modifications, we propose to revise our definition of "buying group" to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership.

5. Buying groups play an important role in the market for video programming distribution, both for small and medium-sized MVPDs and for programmers.[9] A buying group negotiates master agreements with video programmers that its MVPD members can opt into and then acts as an interface between its members and the programmers so that the programmers are able to deal with a single entity.[10] Thus, a buying group is generally able to obtain lower license fees for its members than they could obtain through direct deals with the programmers, and lower transaction costs for programmers by enabling them to deal with a single entity, rather than many individual MVPDs, for their negotiations and fee collections.[11] Because small and medium-sized MVPDs rely on buying groups as the primary means by

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[6] *See Revision of the Commission's Program Access Rules et al.*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012).

[7] *See* Comments of American Cable Association (June 22, 2012) at 11-12 ("ACA Comments"); Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (August 2, 2012), Attachment at 5 ("ACA August 2, 2012 *Ex Parte* Letter"); *see also* Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (August 31, 2012) ("ACA August 31, 2012 *Ex Parte* Letter").

[8] *See* ACA Comments at 15; ACA August 2, 2012 *Ex Parte* Letter at 2.

[9] *See* ACA Comments at 12.

[10] *See id.* at 16; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 3.

[11] *See* ACA Comments at 12, Appendix A, Report of William P. Rogerson, Professor of Economics, Northwestern University ("Rogerson Report"), at 9; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 3; *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3411, ¶ 114 (1993) ("*1993 Program Access Order*") ("We agree with commenters that buying groups or purchasing agents can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute.").

which they purchase their programming, small and medium-sized MVPDs are only protected under the program access rules to the extent that buying groups are given the same protection in their dealings with cable-affiliated programmers as individual MVPDs are given.[12] The non-discrimination protections of Section 628(c)(2)(B) of the Communications Act of 1934, as amended (the "Act") explicitly apply to buying groups.[13] Further, the Commission's rules extend the non-discrimination protections of the program access rules to buying groups by including "buying groups" within the definition of "multichannel video programming distributor" set forth in Section 76.1000(e) of the Commission's rules.[14]

6. Section 76.1000(c) of the Commission's rules sets forth the requirements that an entity must satisfy in order to be considered a "buying group" for purposes of the definition of "multichannel video programming distributor" in Section 76.1000(e) — that is, to avail itself of the non-discrimination protections afforded to MVPDs under the program access rules.[15] One of these requirements pertains to the liability of the buying group or its members to the programmer for payments.[16] The Commission has established three alternatives ways for the buying group to satisfy this requirement. First, the entity seeking to qualify as a "buying group" may agree "to be financially liable for any fees due pursuant to a . . . programming contract which it signs as a contracting party as a representative of its members" (the "full liability" option).[17] Second, the members of the buying group, as contracting parties, may agree to joint and several liability (the "joint and several liability" option).[18] Third, the entity seeking to qualify as a "buying group" may maintain liquid cash or credit reserves equal to the cost of one month of programming fees for all buying group members and each member of the buying group must remain liable for its pro rata share (the "cash reserve" option).[19]

7. ACA asserts that none of these alternative liability options reflect current industry practice. First, with respect to the "full liability" option, ACA asserts that buying groups, such as the

[12] *See* ACA Comments at 12-13, Rogerson Report at 9; ACA August 2, 2012 Ex Parte Letter, Attachment at 4.

[13] *See* 47 U.S.C. § 548(c)(2)(B) (prohibiting discrimination by a vertically integrated satellite cable programming vendor "among or between cable systems, cable operators, or other multichannel video programming distributors, *or their agents or buying groups* . . . .") (emphasis added).

[14] *See* 47 C.F.R. § 76.1000(e) (defining "multichannel video programming distributor" as "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities."); *1993 Program Access Order*, 8 FCC Rcd at 3362 n.3 (including buying groups under the definition of "multichannel video programming distributor" for purposes of the program access rules).

[15] *See* 47 C.F.R. § 76.1000(c)(1).

[16] In addition to satisfying this requirement, the entity seeking to qualify as a "buying group" must also agree (i) to uniform billing and standardized contract provisions for individual members; and (ii) either collectively or individually, on reasonable technical quality standards for individual members of the group. *See* 47 C.F.R. § 76.1000(c)(2), (3).

[17] 47 C.F.R. § 76.1000(c)(1); *see also 1993 Program Access Order*, 8 FCC Rcd at 3412, ¶ 115.

[18] *See* 47 C.F.R. § 76.1000(c)(1); *see also 1993 Program Access Order*, 8 FCC Rcd at 3412, ¶ 115.

[19] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, 15859, ¶ 78 (1998) ("*1998 Program Access Order*").

National Cable Television Cooperative ("NCTC"),[20] never assume full liability for the contractual commitment that each member company makes when it opts into a master agreement.[21] Rather, NCTC's obligation is limited to forwarding any payments that are received from members to the programmer and notifying the programmer of any default by one of its members.[22] Second, with respect to the "joint and several liability" option, ACA notes that NCTC found this option impracticable because it would interfere with some members' loan covenants as to debt and result in fewer MVPDs being able to participate in NCTC master agreements.[23] Third, with respect to the "cash reserve" option, ACA states that NCTC's standard practice in its early years was to require its members to deposit 30 days of payments into an escrow account when they opted into a master agreement, but programmers and NCTC eventually decided this protection was unnecessary.[24]

8. According to ACA, programmers have widely accepted NCTC's current business model, including the reduced level of liability that NCTC assumes under a master agreement.[25] Because the existing definition of "buying group" does not conform to these widely accepted practices, ACA asserts that NCTC is effectively barred from bringing a program access complaint concerning a master agreement on behalf of its member companies.[26] ACA accordingly recommends that the Commission modernize the definition of "buying group" in Section 76.1000(c)(1) by adding, as an alternative to the existing liability options, a requirement that the entity seeking to qualify as a "buying group" assumes liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.[27]

9. In the *FNPRM*, we tentatively conclude that we should revise Section 76.1000(c)(1) to require, as an alternative to the current liability options, that the buying group agree to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer. In light of the significance of buying groups in the marketplace today and Congress's recognition of the importance of buying groups for small MVPDs, we further propose to revise the definition of "buying group" to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership.

10. In addition, we seek comment on ACA's proposal that we establish a "safe harbor" subscriber level for buying group members to participate in a master agreement negotiated with a cable-affiliated programmer. Under ACA's proposed approach, a buying group member MVPD with no more

[20] NCTC is a buying group with approximately 910 member companies representing approximately 25 million MVPD subscribers. NCTC's members vary widely in size, from a few dozen subscribers to several million subscribers. More than half of NCTC's 910 members have fewer than 1,000 subscribers, while a little over 100 of its members have more than 10,000 subscribers. In addition to negotiating the rates, terms, and conditions of master agreements with programmers, NCTC acts as an interface for all billing and collection activities between its member companies and the programmer. *See* ACA Comments at 17, Appendix B, Declaration of Frank Hughes, Senior Vice President of Member Services for NCTC ("NCTC Declaration"), at 2.

[21] *See* ACA Comments at 18, 23, Rogerson Report at 11, NCTC Declaration at 3; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 7.

[22] *See* ACA Comments at 18, 23, Rogerson Report at 11.

[23] *See* ACA Comments, NCTC Declaration at 3.

[24] *See* ACA Comments, Rogerson Report at n.15.

[25] *See* ACA Comments at 18, NCTC Declaration at 3.

[26] *See* ACA Comments at 23.

[27] *See id.* at 24; ACA August 2, 2012 *Ex Parte* Letter, Attachment at 8.

than three million subscribers would be presumptively entitled to participate in master agreements between the programmer and the buying group.[28] A buying group member MVPD which has more than the safe harbor number of subscribers would also be entitled to participate if it demonstrates that it incurs some specified minimum share of its total expenditures on programming through the buying group. Further, when an expiring master agreement is up for renewal, buying group members participating in the expiring agreement would have the right to participate in the renewed agreement. As a consequence of this safe harbor, it would be a violation of the Section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that regularly participates in a master agreement.

11. Finally, we seek comment on ACA's proposals that we revise the rules to clarify that: (i) the standard to be applied in determining whether buying groups are being discriminated against is the same as that applied to an individual MVPD providing the same number of subscribers to the programmer; (ii) a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the master agreement; and (iii) the standard of comparability for a buying group is an MVPD providing the same number of customers for purposes of evaluating all terms and conditions of the agreement, not just the price.

B. Legal Basis

12. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 548.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

13. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted herein.[29] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[30] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[31] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[32] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

14. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and

[28] *See* ACA August 31, 2012 *Ex Parte* Letter, Attachment at 4.

[29] 5 U.S.C. § 603(b)(3).

[30] 5 U.S.C. § 601(6).

[31] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[32] 15 U.S.C. § 632.

infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[33] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[34] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[35] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[36]

15. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[37] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[38]

16. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[39] Industry data indicate that all but ten cable operators nationwide are small under this size standard.[40] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[41] Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an

[33] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[34] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[35] *See id.*

[36] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[37] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[38] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[39] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[40] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[41] 47 C.F.R. § 76.901(c).

additional 258 systems have 10,000-19,999 subscribers.[42] Thus, under this standard, most cable systems are small.

17. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[43] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[44] Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.[45] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[46] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

18. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[47] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[48] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[49] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network).[50] Each currently offers subscription services. DIRECTV[51] and DISH

[42] *See* TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

[43] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[44] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[45] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[46] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[47] *See* 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 14, above.

[48] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[49] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[50] S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Annual Report, FCC 12-81, ¶ 31 (2012) ("*14th Annual Report*").

[51] As of December 2010, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 19% of MVPD subscribers nationwide. *See id.* at Table 5; *see also supra* App. E at n. 9.

Network[52] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

19. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[53] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[54] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[55]

20. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[56] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[57] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[58]

21. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the

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[52] As of December 2010, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 14% of MVPD subscribers nationwide. *See 14th Annual Report* at Table 5; *see also supra* App. E at n. 9.

[53] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[54] *See id*.

[55] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[56] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[57] *See id*.

[58] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

Instructional Television Fixed Service (ITFS)).[59] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[60] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[61] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[62] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[63] Auction 86 concluded in 2009 with the sale of 61 licenses.[64] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

22. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[65] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and

[59] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

[60] 47 C.F.R. § 21.961(b)(1).

[61] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[62] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[63] *Id.* at 8296.

[64] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[65] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[66] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[67] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[68]

23. *Fixed Microwave Services.* Microwave services include common carrier,[69] private-operational fixed,[70] and broadcast auxiliary radio services.[71] They also include the Local Multipoint Distribution Service (LMDS),[72] the Digital Electronic Message Service (DEMS),[73] and the 24 GHz Service,[74] where licensees can choose between common carrier and non-common carrier status.[75] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[76] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[77] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[78] Of those 1,383,

[66] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[67] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[68] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[69] *See* 47 C.F.R. Part 101, Subparts C and I.

[70] *See* 47 C.F.R. Part 101, Subparts C and H.

[71] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[72] *See* 47 C.F.R. Part 101, Subpart L.

[73] *See* 47 C.F.R. Part 101, Subpart G.

[74] *See id.*

[75] *See* 47 C.F.R. §§ 101.533, 101.1017.

[76] 13 C.F.R. § 121.201, 2007 NAICS code 517210.

[77] *See id*. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[78] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009); http://www.census.gov/econ/industry/ec07/a517210.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

1,368 had fewer than 1000 employees, and 15 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

24. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[79] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[80] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[81] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[82] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[83] In addition, we note that the Commission has certified approximately 42 OVS operators, with some now providing service.[84] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[85] Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. The Commission does not have financial or employment information regarding the other entities authorized to provide OVS, some of which may not yet be operational. Thus, up to 41 of the OVS operators may qualify as small entities.

25. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[86] The SBA has developed a small business size standard for this category,

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[79] 47 U.S.C. § 571(a)(3)-(4). *See Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("*13th Annual Report*").

[80] *See* 47 U.S.C. § 573.

[81] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[82] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[83] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[84] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[85] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[86] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

which is: all such firms having $15 million dollars or less in annual revenues.[87] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year.[88] Of that number, 325 operated with annual revenues of $9,999,999 dollars or less.[89] Seventy-one (71) operated with annual revenues of between $10 million and $100 million or more.[90] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

26. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[91] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[92] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

27. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[93] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[94] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[95] Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[96]

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[87] 13 C.F.R. § 121.201, 2007 NAICS code 515210.

[88] *See* http://www.census.gov/econ/industry/ec07/a515210.htm (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

[89] *Id*.

[90] *Id*.

[91] 15 U.S.C. § 632.

[92] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[93] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[94] *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) ("*Trends in Telephone Service*").

[95] *See id*.

[96] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

28. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[97] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[98] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

29. *Motion Picture and Video Production*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."[99] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[100] To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.[101] Of these, 8995 had annual receipts of $24,999,999 or less, and 100 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[102] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

30. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[103] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[104] To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission

[97] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[98] *See* http://www.census.gov/econ/industry/ec07/a517110.htm (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

[99] U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[100] 13 C.F.R. § 121.201, 2007 NAICS code 512110.

[101] *See* http://www.census.gov/econ/industry/ec07/a51211.htm (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

[102] *Id.*

[103] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[104] 13 C.F.R. § 121.201, 2007 NAICS code 512120.

relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.[105] Of these, 434 had annual receipts of $24,999,999 or less, and 16 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[106] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

31. Certain proposed rule changes discussed in the *FNPRM* would affect reporting, recordkeeping, or other compliance requirements. The *FNPRM* seeks comment on whether to establish (i) a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an "unfair act" under Section 628(b); (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint; (iii) rebuttable presumptions with respect to the "unfair act" element and/or the "significant hindrance" element of a Section 628(b) claim challenging an exclusive contract involving a cable-affiliated "national sports network" (regardless of whether it is terrestrially delivered or satellite-delivered); and (iv) a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates Section 628(b) (or, potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network violates Section 628(b) (or Section 628(c)(2)(B)). The *FNPRM* tentatively concludes that the Commission should revise definition of "buying group" to require, as an alternative to the current liability options, that the buying group agree to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer. The *FNPRM* also proposes to revise the definition of "buying group" to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership. In addition, the *FNPRM* seeks comment on whether the Commission should establish a "safe harbor" subscriber level for buying group members to participate in master agreements with cable-affiliated programmers. As a consequence of this safe harbor, it would be a violation of the Section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that regularly participates in a master agreement. Finally, the *FNPRM* seeks comment on whether the Commission should revise the rules to clarify that: (i) the standard to be applied in determining whether buying groups are being discriminated against is the same as that applied to an individual MVPD providing the same number of subscribers to the programmer; (ii) a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the master agreement; and (iii) the standard of comparability for a buying group is an MVPD providing the same number of customers for purposes of evaluating all terms and conditions of the agreement, not just the price.

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

32. The RFA requires an agency to describe any significant alternatives that it has considered in developing its proposed approach, which may include the following four alternatives (among others):

[105] *See* http://www.census.gov/econ/industry/ec07/a51212.htm (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

[106] *Id.*

"(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[107]

33. The *FNPRM* seeks comment on whether to establish (i) a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an "unfair act" under Section 628(b); (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint; (iii) rebuttable presumptions with respect to the "unfair act" element and/or the "significant hindrance" element of a Section 628(b) claim challenging an exclusive contract involving a cable-affiliated "national sports network" (regardless of whether it is terrestrially delivered or satellite-delivered); and (iv) a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates Section 628(b) (or, potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network violates Section 628(b) (or Section 628(c)(2)(B)). These presumptions may benefit small entities by reducing costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and empirical evidence on RSNs.

34. The *FNPRM* also seeks comment on proposed modifications to the program access rules that are intended to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of the non-discrimination protections of the program access rules. Thus, the proposed modifications would benefit small entities. Specifically, the proposed revision of the definition of "buying group" to include an alternative liability option may benefit small entities by enabling buying groups that do not fall within the scope of the existing definition to file complaints with the Commission alleging violations of the non-discrimination provisions of the program access rules on behalf of their small and medium-sized MVPD members. Additionally, the proposed revision of the "buying group" definition to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership may benefit small entities by making the benefits of buying group membership available to more small entities. Small entities may also benefit from the establishment of a "safe harbor" subscriber level for buying group members to participate in master agreements with cable-affiliated programmers and from clarifications to the rules addressing the standard of comparability for a buying group regarding volume discounts.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

35. None

[107] 5 U.S.C. § 603(c)(1) – (c)(4).

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

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

The FCC is focused on promoting competition and protecting consumers in the evolving video market. Today's unanimous decision enables the FCC to continue preventing anticompetitive video distribution arrangements through a legally sustainable, expeditious, case-by-case review.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, CONCURRING IN PART

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

In this order, we eliminate the rule prohibiting exclusive contracts between cable operators and cable-affiliated programming vendors for satellite-delivered programming. In mandating that the Commission adopt the exclusivity ban as part of the Cable Act of 1992, Congress provided that this prohibition would expire in October 2002, unless the FCC found that it remained necessary to preserve competition and diversity in multichannel video programming distribution.[1] By extending this prohibition twice in 2002 and 2007, the Commission has already retained this rule for a decade longer than Congress required.

In short, the marketplace has evolved substantially since Congress last spoke on this subject a generation ago. The exclusivity ban served its purpose, but now the facts justifying its existence have changed in favor of consumers. Accordingly, this creaky relic must be shown the door.

Although I supported the 2007 extension of the exclusivity ban to further encourage competition in the video distribution market, I recognized, at the time, that "[m]ore competition in a particular market obviates the need for regulation."[2] The United States Court of Appeals for the D.C. Circuit, when reviewing the 2007 extension, came to a similar conclusion, in finding that, if the market continued to evolve, the FCC would be able to conclude that the exclusivity ban is no longer necessary. In fact, the court went so far as to say that "[w]e anticipate that cable's dominance will have diminished still more by the time the Commission next reviews the prohibition, and expect that at that time the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset."[3]

Indeed, since the last review of this rule in 2007, the multichannel video programming distribution market has continued to evolve and become more competitive. Despite this increased competition, I recognize that vertical integration between cable operators and programmers could raise concerns in certain instances, especially for non-replicable programming, such as regional sports networks. To the extent that any such issues arise, the Commission can perform a case-by-case review of exclusive contracts under the remaining program access rules using established complaint processes to ensure that anticompetitive effects do not occur, consumers are not harmed and the marketplace continues to flourish. In today's vibrant marketplace, a prophylactic exclusivity ban is not supportable when we have a more competitive market, as well as a Congressionally-required alternative means to protect competition and diversity in the distribution of video programming.

For these reasons, I support the sunset of the prohibition on exclusive contracts. I anticipate that its elimination will spur the creation of even more new programming and provide American consumers more choices through product differentiation. I do, however, have significant concerns that many of the

[1] 47 U.S.C. § 548(c)(2)(D), (c)(5).

[2] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17934 (2007) (stating that, although the video distribution market had changed significantly, there was increased consolidation in the cable industry and regional clustering of cable systems).

[3] Cablevision Systems Corp. v. FCC, 597 F.3d 1306, 1314 (D.C. Cir. 2010).

positive steps we take today could be undermined by our inquiry into whether the FCC should establish a series of rebuttable presumptions that would apply to certain exclusive contracts challenged under our remaining program access rules.

Despite the Commission's finding that exclusive contracts can be procompetitive and should be reviewed on a case-by-case basis, the FCC seeks comment on whether there should be rebuttable presumptions that certain exclusive contracts should be considered, by their very nature, to be "unfair" regardless of the specific market conditions. The Commission also inquires as to whether there should be a rebuttable presumption for obtaining a standstill arrangement while certain contracts are challenged. Such a presumption does not appear to be consistent with Commission precedent finding that a standstill is an extraordinary remedy that may be awarded only upon a factual showing that the plaintiff is entitled to such relief. If we proceed, these contradictions will undoubtedly result in legal challenges under the Administrative Procedure Act.[4] Also, is this the beginning of a back-handed attempt to resurrect the exclusivity ban for certain exclusive contracts using the remaining program access rules and rebuttable presumptions?

I am also concerned about attempts to extend the rebuttable presumption established for regional sports networks to exclusive contracts for cable-affiliated national sports networks. Such questions could result in content-based regulations – obviously raising First Amendment concerns – with no actual evidence of market failure. In fact, the arguments presented in support of such a presumption are based, in part, on the hypothetical harms that could arise if a high-profile national sports network is acquired by cable operators. Once again, the Commission may be trying to tinker with a market that may function quite well if left alone. In the absence of a *bona fide* market analysis and resulting evidence of market failure, we should avoid *ex ante* regulation and its unpredictable and unintended costs.

For these reasons, I concur to the sections of the further notice seeking comment on these rebuttable presumptions. I look forward to reviewing the comments and appreciate that there are questions contained in the further notice that provide participants the ability to opine on the various legal issues raised by these presumptions. Further, I am hopeful that all stakeholders will continue to engage with the Commission to suggest improvements to our complaint processes if issues arise. We should always strive to do better. I thank the Media Bureau for their hard work on this order and further notice of proposed rulemaking.

[4] *See, e.g.,* Cablevision Systems Corp. v. FCC, 649 F.3d 695, 716 (D.C. Cir. 2011) (stating that "under the APA, agencies may adopt evidentiary presumptions provided that the presumptions (1) shift the burden of production and not the burden of persuasion, … and (2) are rational…. An evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it.").

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

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

Today we vote to sunset the Commission's Program Access Rules enacted by Congress 20 years ago, but not without providing increased protections that will further strengthen our ability to resolve disputes within a set time frame.

There is much debate over the level of competitiveness in the current video market, and I suspect that this will continue. But our job – to ensure that no matter the opinions and actions of industry on either side of a dispute, that consumers are not caught in the middle – to me is quite clear. While the Order released today reaches a conclusion with which I ultimately agree, I felt it necessary to include language that strengthens what already exists on our books.

While the exclusive contract prohibition will indeed sunset, and the opportunity for discriminatory and exclusive dealing will still exist, the language of this rulemaking will seek to end the ability of a defendant in a program access dispute to prolong the FCC's adjudication timeline with time-consuming dilatory maneuvers.

As the language states, we put forth a six-month deadline for the FCC's resolution of program access complaints on a case by case basis. This will help to resolve disputes quickly and efficiently, provide certainty to all parties to the complaint, and fulfill our statutory mandate to provide for expedited review of program access complaints. Both sides of a dispute will be afforded the pleading timeline that is currently in place, but in the interest of fairness, the Media Bureau must render a decision within 2-3 months after the record closes. It is my hope that such a timeline will get rid of the uncertainty, expense, and frustration that comes with prolonged litigation before this agency, and resolution within six months will allow unsuccessful complainants to evaluate their options and proceed accordingly.

Further, the questions we ask regarding a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated regional sports network be entitled to a standstill of an existing programming contract during the pendency of a complaint will give us valuable input into the record on the need, or lack thereof, of such an amendment going forward.

I am also pleased that we are also seeking comment on the possibility of further presumptions, specifically on the unfair act and significant hindrance elements of a challenge to an exclusive arrangement involving a cable-affiliated *national* sports network.

I want to thank the Media Bureau, especially the tireless work of David Konczal, for their diligence on this item and the meaningful additions that were added.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

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

In the Cable Television Consumer Protection and Competition Act of 1992, Congress directed the Commission to adopt rules prohibiting exclusive arrangements by vertically integrated cable companies with respect to satellite delivered programming. This prohibition was slated to expire in 2002 unless the Commission determined that an extension was "necessary to preserve and protect competition and diversity in the distribution of video programming." The Commission previously extended this ban twice, in 2002 and 2007. Today, however, the agency concludes that a further extension is not warranted in light of changes in the video programming market.

Without question, the video marketplace has evolved in the past two decades. But technological change does not preclude the need to be concerned about anticompetitive behavior and the impact of vertical integration on consumers. Exclusive arrangements for "must have" programming can still lead to less competition, denying consumers the benefits of lower prices and higher quality services. This is especially true when such programming is withheld from unaffiliated distributors that are small, rural, or new entrants in the marketplace. Accordingly, Section 628 of the Communications Act provides a number of mechanisms apart from the blanket prohibition to challenge anticompetitive behavior on a case-by-case basis. To this end, the Order provides a shot clock to ensure timely resolution of complaints. It also provides a presumption that an exclusive arrangement with respect to regional sports networks will significantly hinder a complaining distributor from providing satellite cable programming or satellite broadcast programming. Furthermore, the Order seeks comment on whether the Commission should establish a number of additional presumptions, including whether an exclusive contract for a cable-affiliated regional sports network should be presumed to be an "unfair act" under Section 628(b) and whether a complainant should be presumed to be entitled to a standstill for an existing agreement under certain circumstances.

Consequently, I support today's decision. However, the Commission must keep a watchful eye on the evolving marketplace and be ready to take action if the processes we adopt today do not provide consumers with the safeguards they need and deserve.

STATEMENT OF
COMMISSIONER AJIT PAI

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

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

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

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

In reviewing our 2007 decision, a divided panel of the U.S. Court of Appeals for the D.C. Circuit deferred to the Commission's finding that the ban was still necessary.[6] However, the court also indicated that the Commission would have difficulty justifying another renewal if cable's market share continued to

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

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

[3] 47 U.S.C. § 548(c)(5).

[4] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290, Report and Order, 17 FCC Rcd 12124 (2002) (*2002 Sunset Extension Order*).

[5] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007).

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

decline.[7] This is because the Cable Act predicates extension of the ban on a finding that it remains necessary to promote competition.[8]

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

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

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

More significantly, exclusivity can promote competition. It can provide non-cable MVPDs with the incentive to develop content to compete with cable, just as it enhances cable operators' incentive to further develop their programming. Examples involving local news programming demonstrate that exclusive arrangements can yield greater investment in programming and more diverse content. This can allow video distributors to differentiate their products, and thereby compete to deliver better content than

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

[8] *See* 47 U.S.C. § 548(c)(5) ("The prohibition . . . shall cease to be effective 10 years after October 5, 1992, unless the Commission finds . . . that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.").

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

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

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

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

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

their competitors. Eliminating the exclusivity ban thus can help foster a system of broader competition on service and quality, not one limited to a game of price wars.

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

To be clear, removal of the ban does not mean abdication of our responsibility to enforce section 628 of the Communications Act.[14] Even after today's decision, MVPDs may file a complaint at the Commission alleging that a particular exclusive contract is an unfair act that violates section 628(b).[15] I am aware of the costs (both the actual expenses of litigation and costs incurred through delay) that can be imposed upon MVPDs during the pendency of such complaints. For this reason, I believe the Commission must adjudicate these disputes in a timely manner. I am therefore pleased that my colleagues agreed to adopt a six-month deadline for resolving section 628(b) complaints concerning denials of programming.

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

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

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[14] 47 U.S.C. § 548.

[15] 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.").

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

[17] 47 U.S.C. § 548(b).

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