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

NOTICE OF PROPOSED RULEMAKING

Adopted: March 20, 2012 **Released: March 20, 2012**

Comment Date: [60 days after date of publication in the Federal Register]
Reply Comment Date: [90 days after date of publication in the Federal Register]

By the Commission:

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I. INTRODUCTION

1. We issue this Notice of Proposed Rulemaking ("*NPRM*") to seek comment on (i) whether to retain, sunset, or relax one of the several protections afforded to multichannel video programming distributors ("MVPDs") by the program access rules – the prohibition on exclusive contracts involving

satellite-delivered, cable-affiliated programming; and (ii) potential revisions to our program access rules to better address alleged violations, including potentially discriminatory volume discounts and uniform price increases. This *NPRM* promotes the goals of Executive Order 13579 and the Commission's plan adopted thereto, whereby the Commission analyzes rules that may be outmoded, ineffective, insufficient, or excessively burdensome and determines whether any such regulations should be modified, streamlined, expanded, or repealed.[1]

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").[2] The exclusive contract prohibition applies to all satellite-delivered, cable-affiliated programming and presumes that an exclusive contract will cause competitive harm in every case, regardless of the type of programming at issue.[3] The exclusive contract prohibition applies only to programming which is delivered via satellite; it does not apply to programming which is delivered via terrestrial facilities.[4] 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.[5] Thus, while an exclusive contract involving satellite-delivered, cable-affiliated programming is generally prohibited, an exclusive contract involving terrestrially delivered, cable-affiliated programming is permitted unless the Commission finds in response to a complaint that it violates Section 628(b) of the Act.[6]

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[1] *See* Executive Order No. 13579, § 2, 76 FR 41587 (July 11, 2011); *Preliminary Plan for Retrospective Analysis of Existing Rules*, 2011 WL 5387696 (Nov. 7, 2011).

[2] *See* 47 U.S.C. § 548(c)(2)(D). An exclusive contract for satellite cable programming or satellite broadcast programming between a cable operator and a cable-affiliated programming vendor that provides satellite-delivered programming would violate Section 628(c)(2)(D) even if the cable operator that is a party to the contract is not affiliated with the cable-affiliated programming vendor that is a party to the contract. *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, 17840-41, ¶¶ 70-72 (2007) ("*2007 Extension Order*"), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010) ("*Cablevision I*"); *see also Cable Horizontal and Vertical Ownership Limits*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2195-96, ¶ 145 (2008).

[3] *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*").

[4] 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 *NPRM*, we refer to "satellite cable programming" and "satellite broadcast programming" collectively as "satellite-delivered programming."

[5] *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*").

[6] 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….)

3. 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."[7] In June 2002, the Commission found that the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity and retained the exclusive contract prohibition for five years, until October 5, 2007.[8] The Commission provided that, during the year before the expiration of the five-year extension, it would conduct a second review to determine whether the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity in the distribution of video programming.[9] After conducting such a review, the Commission in September 2007 concluded that the exclusive contract prohibition was still necessary, and it retained the prohibition for five more years, until October 5, 2012.[10] The Commission again provided that, during the year before the expiration of the five-year extension, it would conduct a third review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[11]

4. Accordingly, in this *NPRM*, we initiate the third review of the necessity of the exclusive contract prohibition. Below, we present certain data on the current state of competition in the video distribution market and the video programming market, and we invite commenters to submit more recent data or empirical analyses. We seek comment on whether current conditions in the video marketplace support retaining, sunsetting, or relaxing the exclusive contract prohibition. To the extent that the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment on whether we can preserve and protect competition in the video distribution market by either:

- Sunsetting the exclusive contract prohibition in its entirety and instead relying solely on 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; (ii) the prohibition on discrimination in Section 628(c)(2)(B) of the Act; and (iii) the prohibition on undue or improper influence in Section 628(c)(2)(A) of the Act; 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; (ii) retaining the

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subscribers or consumers, as required by Section 628(b). *See id*. at 780-82, ¶¶ 50-51; *see also Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011) (concluding that withholding the MSG HD and MSG+ HD Regional Sports Networks 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), *affirmed*, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); *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), *affirmed*, *AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.).

[7] 47 U.S.C. § 548(c)(5).

[8] *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, 17 FCC Rcd 12124 (2002) ("*2002 Extension Order*").

[9] *See id.* at 12161, ¶ 80.

[10] *See generally 2007 Extension Order*. We discuss in further detail below the decision of the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") in *Cablevision I* affirming the *2007 Extension Order*. *See infra* ¶¶ 15-16.

[11] *See 2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

prohibition only for satellite-delivered, cable-affiliated Regional Sports Networks ("RSNs") and any other satellite-delivered, cable-affiliated programming that the record here establishes as being important for competition and non-replicable and having no good substitutes; and/or (iii) other ways commenters propose.

We seek comment also on (i) how to implement a sunset (complete or partial) to minimize any potential disruption to consumers; (ii) the First Amendment implications of the alternatives discussed herein; (iii) the costs and benefits of the alternatives discussed herein; and (iv) the impact of a sunset on existing merger conditions.

5. In addition, we seek comment below on potential improvements to the program access rules to better address potential violations. With the exception of certain procedural revisions and the previous extensions of the exclusive contract prohibition, the program access rules have remained largely unchanged in the almost two decades since the Commission originally adopted them in 1993.[12] We seek comment on, among other things, whether our rules adequately address potentially discriminatory volume discounts and uniform price increases and, if not, how these rules should be revised to address these concerns.

II. BACKGROUND

A. Program Access Protections

6. Congress adopted the program access provisions as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[13] Congress was concerned that, in order to compete effectively, new market entrants would need access to satellite-delivered, cable-affiliated programming.[14] At that time, Congress found that increased horizontal concentration of cable operators and extensive vertical integration[15] created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors.[16] As a result of this imbalance of power, Congress determined that the development of competition among MVPDs was limited and consumer choice was restricted.[17] Congress concluded that cable-affiliated programmers had the incentive and ability to favor their affiliated cable operators over other, unaffiliated, MVPDs with the effect that competition and diversity in the distribution of video programming would not be preserved and protected.[18]

7. The program access provisions afford several protections to MVPDs in their efforts to compete in the video distribution market. Sections 628(b), 628(c)(1), and 628(d) of the Act grant the Commission broad authority to prohibit "unfair acts" of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors 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."[19] In addition to this broad grant of authority, Congress in Section 628(c)(2) of the Act

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[12] *See generally 1993 Program Access Order*.

[13] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[14] *See* S. Rep. No. 102-92 at 28 (1992).

[15] Vertical integration means the combined ownership of cable systems and suppliers of cable programming.

[16] *See* 1992 Cable Act § 2(a)(2).

[17] *See id*.

[18] *See 1993 Program Access Order*, 8 FCC Rcd at 3366, ¶ 21.

[19] 47 U.S.C. § 548(b) ("[I]t 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 (continued….)

required the Commission to adopt specific regulations to specify particular conduct that is prohibited by Section 628(b), *i.e.*, certain unfair acts involving satellite-delivered, cable-affiliated programming.[20] In contrast to Section 628(b), the unfair acts listed in Section 628(c)(2) pertaining to satellite-delivered programming are presumed to harm competition in every case, and MVPDs alleging such unfair acts are not required to demonstrate harm.[21] First, Section 628(c)(2)(A) requires the Commission to prohibit efforts by cable operators to unduly influence the decision of cable-affiliated programming vendors that provide satellite-delivered programming to sell their programming to competitors ("undue influence").[22] Second, Section 628(c)(2)(B) requires the Commission to prohibit discrimination among MVPDs by cable-affiliated programming vendors that provide satellite-delivered programming in the prices, terms, and conditions for sale of programming ("discrimination").[23] Third, Sections 628(c)(2)(C)-(D) require the Commission to prohibit exclusive contracts between cable operators and cable-affiliated programming vendors that provide satellite-delivered programming, subject to certain exceptions.[24] In this proceeding, our focus is on the protection provided under Section 628(c)(2)(D), although we discuss the other statutory protections to the extent they bear on our consideration of whether to allow the exclusive contract provision to sunset.

B. Enactment of the Exclusive Contract Prohibition with a Sunset Provision

8. In the 1992 Cable Act, Congress drew a distinction between exclusive contracts for satellite-delivered, cable-affiliated programming in areas not served by a cable operator as of October 5, 1992 ("unserved areas") and areas served by a cable operator as of that date ("served areas"). In unserved areas, Congress adopted a *per se* prohibition on exclusive contracts between cable operators and satellite-

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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."); 47 U.S.C. § 548(c)(1); 47 U.S.C. § 548(d); *see also* 47 C.F.R. § 76.1001. Throughout this *NPRM*, we use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices." 47 U.S.C. § 548(b); *see* 47 C.F.R. § 76.1001.

[20] *See* 47 U.S.C. § 548(c)(2). As discussed above, Section 628(c)(2) pertains only to "satellite cable programming" and "satellite broadcast programming"; it does not apply to terrestrially delivered programming. *See supra* ¶ 2.

[21] *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 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.").

[22] *See* 47 U.S.C. § 548(c)(2)(A) (requiring the Commission to "establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor"); *see also* 47 C.F.R. § 76.1002(a).

[23] *See* 47 U.S.C. § 548(c)(2)(B) (requiring the Commission to "prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from" engaging in certain practices described in Section 628(c)(2)(B)(i)-(iv)); *see also* 47 C.F.R. § 76.1002(b).

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

delivered, cable-affiliated programmers.[25] In served areas, however, the prohibition on exclusive contracts is not absolute; rather, an exclusive contract is permissible if the Commission determines that it "is in the public interest."[26] Congress thus recognized that, in served areas, 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.[27] 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.[28]

9. In addition to this prior approval process, Congress also recognized that exclusivity can be a legitimate business practice where there is sufficient competition.[29] Accordingly, in Section 628(c)(5), Congress provided that the exclusive contract prohibition in served areas:

> shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[30]

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[25] 47 U.S.C. § 548(c)(2)(C) (prohibiting "practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent 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 the date of enactment of this section"). The Commission has implemented this provision through Section 76.1002(c)(1) of the rules. *See* 47 C.F.R. § 76.1002(c)(1).

[26] 47 U.S.C. § 548(c)(2)(D) (prohibiting "with respect to distribution to persons in areas served by a cable operator, . . . exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and 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, unless the Commission determines (in accordance with [Section 628(c)(4)]) that such contract is in the public interest"). The Commission has implemented this provision through Section 76.1002(c)(2) of the rules. *See* 47 C.F.R. § 76.1002(c)(2).

[27] In determining whether an 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); *see also* 47 C.F.R. § 76.1002(c)(4).

[28] *See* 47 C.F.R. § 76.1002(c)(5). Ten Petitions for Exclusivity have been filed since enactment of the 1992 Cable Act. Of these petitions, two were granted, three were denied, and five were dismissed at the request of the parties. *See New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231 (1994) (granting exclusivity petition); *Time Warner Cable*, Memorandum Opinion and Order, 9 FCC Rcd 3221 (1994) (denying exclusivity petition for Courtroom Television ("Court TV")); *Outdoor Life Network and Speedvision Network*, Memorandum Opinion and Order, 13 FCC Rcd 12226 (CSB 1998) (denying exclusivity petition for the Outdoor Life Network ("OLN") and Speedvision Network ("Speedvision")); *Cablevision Industries Corp. and Sci-Fi Channel*, Memorandum Opinion and Order, 10 FCC Rcd 9786 (CSB 1995) (denying exclusivity petition for the Sci-Fi Channel); *NewsChannel,* Memorandum Opinion and Order, 10 FCC Rcd 691 (CSB 1994) (granting exclusivity petition).

[29] *See* S. Rep. No. 102-92 at 28.

[30] 47 U.S.C. § 548(c)(5).

The 1992 Cable Act was enacted on October 5, 1992. Accordingly, the "sunset provision" of Section 628(c)(5) would have triggered the expiration of the exclusive contract prohibition on October 5, 2002, absent a Commission finding that the prohibition remained necessary to preserve and protect competition and diversity in the distribution of video programming.

C. 2002 Extension of the Exclusive Contract Prohibition

10. In October 2001, approximately a year before the initial expiration of the exclusive contract prohibition, the Commission sought comment on whether the exclusive contract prohibition remained necessary to preserve and protect competition and diversity in the distribution of video programming.[31] Ultimately, the Commission concluded that the prohibition remained "necessary."[32] The Commission explained that, based on marketplace conditions at the time, cable-affiliated programmers retained the incentive and ability to withhold programming from unaffiliated MVPDs with the effect that competition and diversity in the distribution of video programming would be impaired without the prohibition.[33] The Commission found as follows:

> The competitive landscape of the market for the distribution of multichannel video programming has changed for the better since 1992. The number of MVPDs that compete with cable and the number of subscribers served by those MVPDs have increased significantly. We find, however, that the concern on which Congress based the program access provisions – that in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected – persists in the current marketplace.[34]

11. Accordingly, the Commission extended the exclusive contract prohibition for five years (*i.e.*, through October 5, 2007).[35] The Commission provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity in distribution of video programming.[36]

D. 2007 Extension of the Exclusive Contract Prohibition and D.C. Circuit Decision

12. In February 2007, the Commission again sought comment on whether the prohibition remained necessary to preserve and protect competition and diversity in the distribution of video

[31] *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*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074 (2001).

[32] *See 2002 Extension Order*, 17 FCC Rcd at 12153-54, ¶ 65 ("Given these findings, we conclude that, were the prohibition on exclusive contracts permitted to sunset in the current market conditions, competition and diversity in the distribution of video programming would not be preserved and protected.") (footnote omitted).

[33] *See id.* at 12125, ¶ 3.

[34] *Id.* at 12153, ¶ 65.

[35] *See id.* at 12124, ¶ 1.

[36] *See id.* at 12161, ¶ 80.

programming.[37] For a second time, the Commission concluded that the prohibition remained "necessary."[38]

13. The Commission conducted its analysis of the exclusive contract prohibition in five parts.[39] First, in considering the applicable standard of review, the Commission determined that it may use its predictive judgment, economic theory, and specific factual evidence in determining whether, "in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected."[40] If such an inquiry is answered in the affirmative, then the Commission concluded that it must extend the exclusive contract prohibition.[41] Second, the Commission examined the changes that had occurred in the video programming and distribution markets since 2002, and it found that, while there had been some procompetitive trends, the concerns on which Congress based the program access provisions persisted in the marketplace.[42] Third, the Commission examined the incentive and ability of cable-affiliated programmers to favor their affiliated cable operators over competitive MVPDs with the effect that competition and diversity in the distribution of video programming would not be preserved and protected.[43] The Commission determined that this incentive and ability existed with the effect that the exclusive contract prohibition remained necessary to preserve and protect competition and diversity in the distribution of video programming.[44] The Commission recognized, however, "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."[45] Fourth, the Commission considered commenters' arguments that the exclusive contract prohibition is both overinclusive and underinclusive with respect to the types of programming and MVPDs it covers, and the Commission declined either to narrow or broaden the prohibition.[46] Fifth, the Commission considered the appropriate length of time for an extension of the exclusive contract prohibition, and it again concluded that the prohibition should be extended for five years.[47]

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[37] *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*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252 (2007).

[38] *See 2007 Extension Order*, 22 FCC Rcd at 17792-93, ¶1 and 17800, ¶ 12.

[39] *See id.* at 17800, ¶ 12.

[40] *Id.* at 17801, ¶¶ 13-14 (footnote omitted).

[41] *See id.* at 17801, ¶ 13.

[42] *See id.* at 17802, ¶ 16.

[43] For purposes of this *NPRM*, the term "competitive MVPD" refers to MVPDs that compete with incumbent cable operators in the video distribution market, such as DBS operators and wireline video providers.

[44] *See id.* at 17810, ¶ 29.

[45] *Id.*; *see id*. at 17832-33, ¶ 60 ("If competition in the MVPD market continues to develop and cable market share continues to decline, however, the incentive of vertically integrated programmers to engage in withholding will presumably diminish to the extent that we may be able to relax the exclusive contract prohibition.").

[46] *See id.* at 17839, ¶¶ 67. Some cable multiple system operators ("MSOs") had argued that the exclusive contract prohibition is overinclusive in that it includes new and unpopular networks that are not essential to an MVPD's ability to compete, and it also applies to all cable operators and benefits all competitive MVPDs, regardless of their size or the extent of competition in a given market. *See id.* at 17839-41, ¶¶ 68, 70, 73. Some cable MSOs and competitive MVPDs had argued that the prohibition is underinclusive because it does not apply to certain unaffiliated programming that is necessary for MVPDs to compete. *See id.* at 17843-44, ¶¶ 75, 78.

[47] *See id.* at 17845, ¶ 79.

14. Accordingly, the Commission extended the exclusive contract prohibition for five years (*i.e.*, until October 5, 2012).[48] As in 2002, the Commission provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition (*i.e.*, between October 2011 and October 2012), it would conduct a third review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[49]

15. Cablevision Systems Corporation ("Cablevision") and Comcast Corporation ("Comcast") (Cablevision and Comcast, collectively, the "Petitioners") filed petitions for review of the *2007 Extension Order* with the D.C. Circuit.[50] The D.C. Circuit addressed Petitioners' objections to three conclusions that the Commission reached in the *2007 Extension Order*. First, Petitioners objected to the Commission's interpretation of the term "necessary" as used in the sunset provision as requiring the exclusive contract prohibition to continue "'if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.'"[51] The D.C. Circuit found that the term "necessary" is "not language of plain meaning" and that the Commission's interpretation was "well within the Commission's discretion" under *Chevron*.[52] Second, Petitioners contended that "the Commission did not rely on substantial evidence when it concluded that vertically integrated cable companies would enter into competition-harming exclusive contracts if the exclusivity prohibition were allowed to lapse."[53] The D.C. Circuit disagreed, finding that the Commission relied on substantial evidence and stating that "conclusions based on [the Commission's] predictive judgment and technical analysis are just the type of conclusions that warrant deference from this Court."[54] While there had been substantial changes in the MVPD market since 1992, the court described the transformation as a "mixed picture" and deferred to the Commission's analysis, which concluded that vertically integrated cable companies retained a substantial ability and incentive to withhold "must have" programming.[55] Finally, Petitioners objected to the Commission's failure to narrow the exclusive contract prohibition to apply only to certain types of cable companies or certain types of programming.[56] The D.C. Circuit found that the Commission's decision to refrain from narrowing the exclusive contract prohibition was not arbitrary and capricious, but rather was a reasonable decision "to adhere to Congress's statutory design."[57]

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[48] *See id.* at 17792, ¶ 1 and 17846, ¶ 81.

[49] *See id.*

[50] *See Cablevision I*, 597 F.3d at 1307. Citing *Time Warner*, the D.C. Circuit determined that a First Amendment challenge to the exclusive contract prohibition would be reviewed under the intermediate scrutiny standard because the prohibition is content-neutral on its face. *See id.* at 1311; *see also Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (considering a facial challenge to the constitutionality of the exclusive contract prohibition, but leaving open the possibility of a future as-applied challenge). Because Petitioners failed to present an as-applied First Amendment challenge, however, the D.C. Circuit found "it unnecessary to evaluate the [*2007 Extension Order*] under the intermediate scrutiny standard." *See Cablevision I*, 597 F.3d at 1311-12. In his dissenting opinion, Judge Kavanaugh expressed his view that Petitioners had presented an as-applied First Amendment challenge and that the exclusive contract prohibition violates the First Amendment and the 1992 Cable Act, as construed to conform to the First Amendment. *See id*. at 1315-29 (Kavanaugh, J., dissenting).

[51] *Cablevision I*, 597 F.3d at 1313 (quoting *2007 Extension Order*, 22 FCC Rcd at 17800-01, ¶ 13).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See id.* at 1313-14.

[56] *See id.* at 1314.

[57] *Id.* at 1315.

16. While the D.C. Circuit affirmed the *2007 Extension Order*, it also provided some comment on the Commission's subsequent review of the exclusive contract prohibition. Specifically, the D.C. Circuit stated as follows:

> We anticipate that cable's dominance in the MVPD market 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. Petitioners are correct in pointing out that the MVPD market has changed drastically since 1992. We expect that if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the [exclusive contract] prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming.[58]

E. TWC/Time Warner and Comcast/NBCU Transactions

17. Since the *2007 Extension Order*, two transactions have had a particular impact on the video distribution market and the video programming market: (i) the separation of Time Warner Cable Inc. ("TWC"; a cable operator) from Time Warner Inc. ("Time Warner"; an owner of satellite-delivered, national programming networks);[59] and (ii) the joint venture between Comcast (a vertically integrated cable operator) and NBC Universal, Inc. ("NBCU"; an owner of broadcast stations and satellite-delivered, national programming networks).[60]

18. In the *Time Warner Order*, the Media, Wireline Competition, Wireless Telecommunications, and International Bureaus (the "Bureaus") granted the applications for the assignment and transfer of control of certain Commission licenses and authorizations from Time Warner to TWC.[61] Before the transaction, Time Warner controlled TWC, but after their separation, Time Warner no longer has an ownership interest in TWC or its subsidiary licensees.[62] As a result of the transaction, Time Warner's programming networks are no longer affiliated with TWC, thus reducing the number of satellite-delivered, national programming networks that are cable-affiliated. The Bureaus found that the transaction would benefit the public interest by lessening the extent to which TWC is vertically integrated and by eliminating Time Warner's vertical integration.[63] In declining to adopt a condition applying the program access rules to Time Warner post-transaction, the Commission explained that the underlying premise of the program access rules would no longer apply because Time Warner and TWC would no longer have the incentive and ability to discriminate in favor of each other.[64] If an MVPD believed that

[58] *Id.* at 1314.

[59] *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/Transferree*, Memorandum Opinion and Order, 24 FCC Rcd 879 (MB, WCB, WTB, IB, 2009) ("*Time Warner Order*").

[60] *See 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*").

[61] *See Time Warner Order*, 24 FCC Rcd at 879, ¶ 1.

[62] *See id.* at 880, ¶ 1.

[63] *See id.* at 890, ¶ 20.

[64] *See id.* at 890, ¶ 21.

Time Warner or TWC violated the program access rules while they were vertically integrated, however, the Commission stated that the program access complaint process would provide an avenue for relief.[65]

19. In contrast, another recent transaction has led to an increased number of satellite-delivered, national programming networks that are cable-affiliated. In the *Comcast/NBCU Order*, the Commission 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.[66] The transaction created a joint venture ("Comcast-NBCU") combining NBCU's broadcast, cable programming, online content, movie studio, and other businesses with some of Comcast's cable programming and online content businesses.[67] Before the transaction, both Comcast and NBCU either wholly or partly owned a number of satellite-delivered, national programming networks.[68] As a result of the transaction, programming networks that were previously affiliated with NBCU became affiliated with the joint venture, thus increasing the number of satellite-delivered, national programming networks that are cable-affiliated.

20. In evaluating post-transaction MVPD access to Comcast-NBCU programming, the Commission concluded that the transaction "creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the [joint venture] would come to control or raise programming costs to its video distribution rivals."[69] The Commission found the joint venture would "have the power to implement an exclusionary strategy," and that "successful exclusion . . . of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power."[70] Additionally, the Commission concluded that an "anticompetitive exclusionary program access strategy would often be profitable for Comcast."[71] Accordingly, the Commission imposed conditions designed to ameliorate the potential harms, including a baseball-style arbitration condition that allows an aggrieved MVPD to submit a dispute with Comcast-NBCU over the terms and conditions of carriage of programming to commercial arbitration.[72]

III. DISCUSSION

A. Exclusive Contract Prohibition

21. We seek comment on whether to retain, sunset, or relax the exclusive contract prohibition. Our discussion of this issue below proceeds in ten main parts. First, we present relevant data for assessing whether to retain, sunset, or relax the exclusive contract prohibition, and we invite commenters to submit more recent data or empirical analyses. Second, we ask commenters to assess whether these data, as updated and supplemented by commenters, support either retaining, sunsetting, or

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[65] *See id.* at 891, ¶ 21. The Commission also explained that program access conditions previously imposed through the *Adelphia Order* would continue to apply to TWC. *See id.* at 893, ¶ 26; *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 (2006) ("*Adelphia Order*").

[66] *Comcast/NBCU Order*, 26 FCC Rcd at 4239-40, ¶ 1.

[67] *See id.* at 4240, ¶ 1.

[68] *See id.* at 4243-44, ¶¶ 10, 14.

[69] *Id.* at 4250, ¶ 29.

[70] *Id.* at 4255, ¶¶ 38-39.

[71] *Id.* at 4257, ¶ 44.

[72] *See id.* at 4259, ¶¶ 49-50.

relaxing the exclusive contract prohibition. Third, we seek comment on how each of these three options (*i.e.*, retaining, sunsetting, or relaxing the exclusive contract prohibition) will impact the creation of new national, regional, and local programming. Fourth, to the extent that the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment on whether we can nonetheless preserve and protect competition in the video distribution market by either (i) sunsetting the prohibition in its entirety and relying solely on existing protections provided by the program access rules that will not sunset; or (ii) relaxing the exclusive contract prohibition, such as through removal of the prohibition on a market-by-market basis based on the extent of competition in the market or by retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming. Fifth, we seek input on how a sunset (complete or partial) of the exclusive contract prohibition will impact consumers, and how to implement a sunset to minimize any potential disruption to consumers. Sixth, we ask commenters to assess whether and how each of the three options comports with the First Amendment. Seventh, we ask commenters to consider the costs and benefits associated with each of the three options. Eighth, to the extent the exclusive contract prohibition sunsets (wholly or partially), we propose to eliminate existing restrictions on exclusive subdistribution agreements between cable operators and satellite-delivered, cable-affiliated programmers. Ninth, we propose that any amendments we adopt herein to our rules pertaining to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas will apply equally to existing rules pertaining to exclusive contracts involving common carriers and Open Video Systems ("OVS") in served areas. Finally, we seek comment on how conditions adopted in previous merger orders may be impacted if the exclusive contract prohibition were to sunset (wholly or partially).

1. Relevant Data in Considering a Sunset of the Exclusive Contract Prohibition

22. In evaluating whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming,"[73] the Commission has previously examined data on the status of competition in the video programming market and the video distribution market. Specifically, in the *2007 Extension Order*, the Commission examined "the changes that [had] occurred in the programming and distribution markets since 2002 when the Commission last reviewed whether the exclusive contract prohibition continued to be necessary to preserve and protect competition."[74] The Commission examined data relating to (i) the number of MVPD subscribers nationwide and in regional markets attributable to each category of MVPD, including cable operators, as well as the extent of regional clustering by cable operators;[75] (ii) the number of satellite-delivered, national programming networks and the percentage of such networks that are cable-affiliated; and (iii) the number of regional programming networks and the percentage of such networks that are cable-affiliated.[76] We believe it is appropriate to consider similar data in determining whether the exclusive contract prohibition remains necessary today. We also seek comment on whether our assessment of the exclusivity prohibition should consider data concerning other types of "satellite cable programming."[77]

23. In an effort to aid such an evaluation, we have prepared the tables attached at Appendices A through C, which contain data from previously released Commission documents as well as other sources. The first column of data, entitled "1st Annual Report," focuses on data from the *1st Annual*

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[73] 47 U.S.C. § 548(c)(5).

[74] *2007 Extension* Order, 22 FCC Rcd at 17802, ¶ 16.

[75] "Clustering" refers to "an increase over time in the number of cable subscribers and homes passed by a single MSO in particular markets (accomplished via internal growth as well as by acquisitions)." *Id*. at 17831, ¶ 56.

[76] *See id.* at 17802-10, ¶¶ 17-28.

[77] *See infra* ¶ 30.

Report on video competition.[78] The second column of data, entitled "2002 Extension," focuses on data from the *2002 Extension Order*.[79] The third column of data, entitled "2007 Extension," focuses on data from the *2007 Extension Order*.[80] The fourth and final column of data, entitled "Most Recent," focuses on the most recent data available. We believe that considering data from these four time periods will enable us to view the evolution of the video distribution and video programming markets over time. We invite commenters to submit more recent data in each of the categories identified, as well as data regarding the extent of regional clustering of cable operators,[81] and any additional data the Commission should consider in its review.

a. Nationwide and Regional MVPD Subscribership

24. In past reviews of the exclusive contract prohibition, the Commission has assessed the percentage of MVPD subscribers nationwide that are attributable to each category of MVPD, including cable operators.[82] The data in Appendix A indicate that the percentage of MVPD subscribers nationwide attributable to cable operators has declined over time, with the current percentage at approximately 58.5 percent, a decrease of 8.5 percentage points since the *2007 Extension Order*. On a regional basis, the market share held by cable operators in Designated Market Areas ("DMAs") varies considerably, from a high in the 80 percent range to a low in the 20 percent range.[83]

25. We seek comment on the extent to which we should consider online distributors of video programming in our analysis. The Commission recently stated that online distributors of video programming "offer a tangible opportunity to bring customers substantial benefits" and that they "can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices."[84] While the Commission concluded that consumers today do not perceive online distributors as a substitute for traditional MVPD service, it stated that online distributors are a "potential competitive threat" and that they "must have a similar array of programming" if they are to "fully compete against a traditional MVPD."[85] In addition, in connection with the Commission's forthcoming *14th Annual Report*

[78] *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 (1994) ("*1st Annual Report*") (containing data as of 1994).

[79] *2002 Extension Order*, 17 FCC Rcd 12124 (citing data from the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244 (2002) (containing data as of June 2001) ("*8th Annual Report*")).

[80] *See 2007 Extension Order*, 22 FCC Rcd 17791 (citing data from the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006) (containing data as of June 2005) ("*12th Annual Report*")).

[81] *See infra* ¶¶ 41-42.

[82] *See, e.g., 2007 Extension Order*, 22 FCC Rcd at 17806-07, ¶¶ 23-24.

[83] *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[84] *Comcast/NBCU Order*, 26 FCC Rcd at 4268-69, ¶ 78.

[85] *Id*. at 4269, ¶ 79 and 4272-73, ¶ 86; *see also id.* at 4256, ¶ 41 ("We do not determine at this time whether online video competes with MVPD services. . . . [W]e conclude that regardless of whether online video is a complement or substitute to MVPD service today, it is potentially a substitute product. When identifying market participants, therefore, we will include online video distributors as potential competitors into MVPD services markets."); *id.* at 4266, ¶ 70 ("Without access to online content on competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers."); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17975-76, ¶ 129 (2010) ("online transmission of programming by DBS operators or stand-alone online video programming aggregators [] may function as competitive alternatives to traditional MVPDs").

on video competition, the Commission sought comment on the emergence of online video distributors.[86] In light of possible cord-cutting and cord-shaving trends, we ask commenters to provide information regarding the effect that online distributors have had, or may have, on nationwide and regional MVPD subscription rates. Our task under Section 628(c)(5) is to determine whether the exclusive contract prohibition is necessary to preserve and protect "competition," not competitors.[87] Thus, to the extent that we conclude that competition in the video distribution market and the video programming market is currently sufficient to warrant sunsetting or relaxing the exclusive contract prohibition, how, if at all, should the emergence of a new category of potential competitor that could benefit from the exclusive contract prohibition impact our analysis?

b. Satellite-Delivered, Cable-Affiliated, National Programming Networks

26. In past reviews of the exclusive contract prohibition, the Commission has assessed the percentage of satellite-delivered, national programming networks that are cable-affiliated and the number of cable-affiliated networks that are among the Top 20 satellite-delivered, national programming networks as ranked by either subscribership or prime time ratings.[88] The data in Appendix B indicate 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. We note that the calculation of the percentage of satellite-delivered, national programming networks that are cable-affiliated is based on our estimate of a total of 800 satellite-delivered, national programming networks available to MVPDs today.[89] We seek comment on the reasonableness of this estimate and how, if at all, it should be revised. We also note that these data include satellite-delivered, national programming networks affiliated with Comcast, many of which (*i.e.*, the "Comcast-controlled networks") are subject to program access conditions adopted in the

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[86] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, 26 FCC Rcd 14091, 14112-13, ¶¶ 52-55 (2011) ("*Further Notice for the 14th Report*").

[87] *See Cablevision I*, 597 F.3d at 1313; *2007 Extension Order*, 22 FCC Rcd at 17833-34, ¶ 61 ("In considering whether to allow the exclusive contract prohibition to sunset, our primary focus is on the impact that sunset would have on competition and diversity in the distribution of video programming generally, not on individual competitors and not on programming diversity. Thus, the more salient point for our analysis is not whether individual competitors will remain in the market if the exclusive contract prohibition were to sunset, but how competition in the video distribution market will be impacted if the exclusive contract prohibition were to sunset.").

[88] *See, e.g., 2007 Extension Order*, 22 FCC Rcd at 17802-03, ¶ 18.

[89] In the *2007 Extension Order*, the Commission found that 22 percent of satellite-delivered, national programming networks were affiliated with cable operators. *See id*. This percentage was based on a total of 531 satellite-delivered, national programming networks, as stated in the *12th Annual Report*. *See 12th Annual Report*, 21 FCC Rcd at 2509-10, ¶ 21 and 2575, ¶ 157 (containing data as of June 2005). For purposes of the analysis in this *NPRM*, we increase this figure to 800 based on two factors. First, since 2005, we estimate that approximately 150 high-definition versions of networks previously provided only in standard definition have been launched. *See* SNL Kagan, *High-Definition Cable Networks Getting More Carriage*, Feb. 17, 2009; NCTA, Cable Networks, available at http://www.ncta.com/Organizations.aspx? type=orgtyp2&contentId=2907. Second, we estimate a net addition of approximately 100 networks, reflecting the increase over time in the number of national programming networks. *See 2007 Extension Order*, 22 FCC Rcd at 17836-37, ¶ 64 (noting the increase in national programming networks over time); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 550, ¶ 20 (2009) ("*13th Annual Report*") (noting an increase of 34 programming networks between June 2005 and June 2006); *id*. at 731-36, Table C-4 (listing planned networks); SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 27 (listing cable networks launched after 2005).

Comcast/NBCU Order and will continue to be subject to these conditions for six more years (until January 2018, assuming they are not modified earlier in response to a petition[90]) even if the exclusive contract prohibition were to sunset.[91] If the Comcast-controlled networks are excluded, the data in Appendix B indicate 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 11 percent; (ii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has remained at six; 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 fallen from seven to five. We seek comment on whether and how to account for different versions of the same network in our analysis. For example, to the extent a particular network is available in standard definition ("SD"), high definition ("HD"), 3D, and video-on-demand ("VOD"), should this be counted as four different networks for purposes of our analysis?[92] If so, and if both cable-affiliated and unaffiliated networks are treated similarly, how will this impact the percentage of networks that are cable-affiliated?

[90] *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).

[91] *See Comcast/NBCU Order*, 26 FCC Rcd at 4358, Appendix A, Condition II. The program access conditions reflected in Condition II apply to "C-NBCU Programmers," which are defined as "Comcast, C-NBCU, their Affiliates and any entity for which Comcast or C-NBCU manages or controls the licensing of Video Programming and/or any local broadcast television station on whose behalf Comcast or NBCU negotiates retransmission consent." *Id*. at 4356, Appendix A, Definitions. An "Affiliate" of any person means "any person directly or indirectly controlling, controlled by, or under common control with, such person at the time at which the determination of affiliation is being made." *Id*. at 4355, Appendix A, Definitions. The issue of whether a particular cable network qualifies as a "C-NBCU Programmer" subject to these conditions is a fact-specific determination. For purposes of the estimates in this *NPRM*, and with the exception of the iN DEMAND networks discussed below, 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 B, Table 2 and Appendix C, Table 2. We refer to these networks as "Comcast-controlled networks." 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 *NPRM* are not "C-NBCU Programmers" 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. *See id*. Although Comcast has stated that it has a 53.7 percent interest in iN DEMAND, it has also stated that it "cannot control decisionmaking at iN DEMAND." *See* Application of General Electric and Comcast, MB Docket No. 10-56 (Jan. 28, 2010), at 20 (stating that Comcast has a 53.7 percent interest in iN DEMAND) ("*GE/Comcast/NBCU Application*"); Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, FCC, MB Docket No. 10-56 (Oct. 22, 2010), at 2 n.5. Accordingly, for purposes of the estimates in this *NPRM*, 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*. Nothing in this *NPRM* 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."

[92] *See infra* Appendices B and C (treating the HD version of a network separately from the SD version); *2010 Program Access Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55 (concluding that HD programming is growing in significance to consumers and that consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content; thus, the Commission will analyze the HD version of a network separately from the SD version with similar content for purposes of determining whether an "unfair act" has the purpose or effect set forth in Section 628(b)).

c. Satellite-Delivered, Cable-Affiliated, Regional Programming Networks

27. In addition to national programming networks, the Commission in past reviews of the exclusive contract prohibition has assessed the extent to which regional programming networks are cable-affiliated.[93] As an initial matter, we note that some regional networks may be terrestrially delivered and therefore not subject to the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming.[94] The data in Appendix C pertaining to regional networks do not distinguish between terrestrially delivered and satellite-delivered networks. We ask commenters to provide data regarding which cable-affiliated, regional programming networks, including RSNs, are satellite-delivered and which are terrestrially delivered.

28. For purposes of our analysis, we distinguish between RSNs and other regional networks. The Commission has previously held that RSNs have no good substitutes,[95] are important for competition,[96] and are non-replicable.[97] As set forth in Appendix C, recent data indicate that the number of RSNs that are cable-affiliated has increased from 18 to 31 (not including HD versions)[98] since the *2007 Extension Order*, and the percentage of all RSNs that are cable-affiliated has increased from 46 percent to approximately 52.3 percent. Are there networks that satisfy the Commission's definition of an RSN that are not included in the list of RSNs in Appendix C, such as certain local and regional networks that show NCAA Division I college football and basketball games?[99] Should we include these and other similar networks, including unaffiliated networks, in our list of RSNs in Appendix C? In addition, are there networks included in the list of RSNs in Appendix C that do not satisfy the Commission's definition of an RSN? For example, do networks such as the Big Ten Network, PAC-12 Network, and The Mtn. –

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[93] *See, e.g., 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22.

[94] *See supra* ¶ 2 (explaining that an exclusive contract involving terrestrially delivered, cable-affiliated programming is permitted unless the Commission finds in response to a complaint that it violates Section 628(b) of the Act).

[95] The Commission has stated that RSNs "purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game." *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 535, ¶ 133 (2004) ("*News/Hughes Order*").

[96] *See 2010 Program Access Order*, 25 FCC Rcd at 750, ¶ 8 and 782-83, ¶ 52. The Media Bureau recently issued a Report on the RSN marketplace and noted that several commenters asserted that ensuring access to RSNs remains a critical component of fostering a competitive MVPD marketplace. *See The Regional Sports Marketplace*, Report, DA 12-18 (MB Jan. 6, 2012), at ¶ 8 ("*Media Bureau RSN Report*").

[97] *See 2010 Program Access Order*, 25 FCC Rcd at 750, ¶ 8 and 782-83, ¶ 52.

[98] In the *2007 Extension Order*, the Commission noted 18 cable-affiliated RSNs, based on data in the *12th Annual Report*. *See 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22 (citing *12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183). The *12th Annual Report* did not consider the HD versions of RSNs separately from the SD versions. *See 12th Annual Report*, 21 FCC Rcd at 2644-49, Table C-3. As indicated in Appendix C, we estimate 57 cable-affiliated RSNs when the SD and HD versions are considered separately. *See infra*, Appendix C.

[99] The Commission has defined an RSN in the same way the Commission has defined that term in previous merger proceedings for purposes of adopting program access conditions: "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 subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." *2010 Program Access Order*, 25 FCC Rcd at 783-84, ¶ 53.

Mountain West Sports Network, which show NCAA Division I college football and basketball games of a particular college conference but not necessarily those of a particular team, satisfy the Commission's definition of an RSN? As required by this definition, do these and similar networks (i) distribute programming in "a limited geographic region"[100] and (ii) carry the minimum amount of covered programming for an individual sports team.[101]

29. We note that the figures in Appendix C include RSNs that are affiliated with Comcast, many of which are subject to program access conditions adopted in the *Comcast/NBCU Order* and which will continue to be subject to these conditions for six more years (until January 2018, assuming they are not modified earlier in response to a petition[102]) even if the exclusive contract prohibition were to sunset.[103] If the Comcast-controlled RSNs are excluded, the data in Appendix C indicate that the number of RSNs that are cable-affiliated has increased from 18 to 22 (not including HD versions)[104] since the *2007 Extension Order*, and the percentage of RSNs that are cable-affiliated has decreased slightly from 46 percent to approximately 44.1 percent. With respect to non-RSN regional programming, we ask commenters to provide recent data on the number of these networks and the percentage of them that are cable-affiliated.[105]

d. Other Types of Cable-Affiliated "Satellite Cable Programming"

30. While the Commission in past reviews of the exclusive contract prohibition has considered linear and VOD programming networks, we also seek comment on whether there are other types of "satellite cable programming" or "satellite broadcast programming" that we should consider in assessing the exclusive contract prohibition.[106] The Act defines "satellite cable programming" as (i) "video programming" (ii) which is "transmitted via satellite" and (iii) which is "primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."[107] The Act defines "video

[100] *See Adelphia Order*, 21 FCC Rcd at 8275, ¶ 158 n.529 (stating that the definition of RSN does not include "networks [that] are distributed nationally, as opposed to within a limited geographic region"); *Comcast Corporation Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, File No. CSR-7108, Order, 22 FCC Rcd 17938, 17941-42, ¶ 10 (2007) (holding that a network that offers "its sports programming to a limited number of DMAs, on a limited regional basis" satisfies "the regional prong of the definition of RSN").

[101] *See supra* n.99 (providing Commission's definition of RSN).

[102] *See supra* n.90.

[103] *See supra* n.91.

[104] *See supra* n.98.

[105] In the *2007 Extension Order*, the Commission found that there were 96 regional programming networks, of which 44 (46 percent) were cable-affiliated. *See 2007 Extension Order*, 22 FCC Rcd at 17804, ¶ 21 (citing *12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166). We note that Comcast and TWC currently own a number of regional networks. *See GE/Comcast/NBCU Application* at 20 ("Comcast also has interests in a variety of regional and local programming networks, including the following (with the percentage interest shown in parentheses): The Comcast Network (100 percent), New England Cable News (100 percent), Comcast Entertainment Television (100 percent), Comcast Hometown Television (100 percent), C2 (100 percent), CN100 (100 percent), Comcast Television Network (100 percent), Pittsburgh Cable News (30 percent), and certain local origination channels."); Application of Time Warner Cable Inc. and Insight Communications Company, Inc., WC Docket No. 11-148 (Sept. 6, 2011), at 3-4 and Exhibit F (listing regional programming services affiliated with TWC) ("*TWC/Insight Application*").

[106] *See* 47 U.S.C. § 548(c)(2)(D).

[107] 47 U.S.C. § 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. § 605); 47 U.S.C. § 605(d)(1) (defining "satellite cable programming" as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable (continued….)

programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[108] Are cable operators affiliated with forms of "video programming" that meet the other two requirements of the definition of "satellite cable programming," but that are not necessarily considered programming "networks"? For example, to the extent that cable operators own or are affiliated with film libraries and other content, to what extent does this content qualify as "satellite cable programming"? If so, how should this factor into our consideration of the exclusive contract prohibition?

2. Assessing Whether the Data Support Retaining, Sunsetting, or Relaxing the Exclusive Contract Prohibition

31. We seek comment on whether the data set forth herein, as updated and supplemented by commenters, support retaining, sunsetting, or relaxing the exclusive contract prohibition. In addition to the specific questions stated herein, we seek comment on any new trends in the industry or any other issues that are relevant to our determination of whether the status of the MVPD marketplace today supports the sunset of the exclusive contract prohibition. We specifically seek comment on the effect of the development of online video on the marketplace. We also request information on the impact of the Comcast/NBCU and TWC/Time Warner transactions on the MVPD marketplace.[109] To what extent, if any, should these transactions inform our analysis of whether to retain, sunset, or relax the exclusive contract prohibition? What other recent developments in the MVPD market since our 2007 review should we consider in deciding whether to retain, sunset, or relax the exclusive contract prohibition?

32. In analyzing whether the exclusive contract prohibition remains necessary, the Commission has stated that it will "assess whether, in the absence of the exclusive contract prohibition, vertically integrated programmers would have the ability and incentive to favor their affiliated cable operators over nonaffiliated competitive MVPDs and, if so, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming."[110] Accordingly, in light of the data noted above and as updated and supplemented by commenters, we seek comment on whether cable-affiliated programmers would have the ability and incentive to favor their affiliated cable operators absent the exclusive contract prohibition in today's marketplace with the effect that competition and diversity in the distribution of video programming would not be preserved and protected. How has the exclusive contract prohibition impacted the general state of competition among MVPDs in the video distribution market? How would a sunset or relaxation of the exclusive contract prohibition affect consumers and competition in the video distribution market, and how would a sunset or relaxation affect the potential entry of new competitors in the market? Is there any basis for treating satellite-delivered, cable-affiliated programming and terrestrially delivered, cable-affiliated programming differently with respect to the exclusive contract prohibition?[111] Are there differences between satellite-delivered programming and terrestrially delivered programming that would result in cable operators

(Continued from previous page)
subscribers"); 47 C.F.R. § 76.1000(h). The exclusive contract prohibition also applies to cable-affiliated "satellite broadcast programming." *See* 47 U.S.C. § 548(i)(3) (defining "satellite broadcast programming" as "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster"); 47 C.F.R. § 76.1000(f).

[108] 47 U.S.C. § 522(20).

[109] *See supra* Section II.E.

[110] *2007 Extension Order*, 22 FCC Rcd at 17810, ¶ 29 (citing *2002 Extension Order*, 17 FCC Rcd at 12130-31, ¶ 16).

[111] *See supra* ¶ 2 (explaining that the Commission currently considers allegedly "unfair acts" involving terrestrially delivered, cable-affiliated programming on a case-by-case basis pursuant to Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules).

having a greater ability and incentive to favor affiliates providing satellite-delivered programming that warrants extension of the exclusive contract prohibition? To the extent the data support retaining the exclusive contract prohibition as it exists today, we seek comment on the appropriate length of an extension. Should the sunset date be five years from the current sunset date (*i.e.*, until October 5, 2017), consistent with the two prior five-year extensions?[112]

a. Ability

33. In assessing whether cable-affiliated programmers have the "ability" to favor their affiliated cable operators with the effect that competition and diversity in the distribution of video programming would not be preserved and protected, the Commission has explained that it considers whether satellite-delivered, cable-affiliated programming remains programming that is necessary for competition and for which there are no good substitutes.[113] In the *2007 Extension Order*, the Commission found that there were no good substitutes for certain satellite-delivered, cable-affiliated programming, and that such programming remained necessary for viable competition in the video distribution market.[114] 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."[115] 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."[116] Moreover, the Commission 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).'"[117]

34. We seek comment on whether competitive MVPDs' access to satellite-delivered, cable-affiliated programming remains necessary today to preserve and protect competition in the video distribution marketplace. Is there any basis to depart from the Commission's conclusion in the *2007 Extension Order* that satellite-delivered, cable-affiliated programming remains necessary for viable competition in the video distribution market? We seek comment on whether and how the continued decline in the number and percentage of national programming networks that are cable-affiliated should impact our analysis, if at all.[118] Despite a similar decline between the *2002 Extension Order* and the *2007 Extension Order*, the Commission in the *2007 Extension Order* nonetheless found that "cable-affiliated programming continues to represent some of the most popular and significant programming available today" and that "vertically integrated programming, if denied to cable's competitors, would adversely affect competition in the video distribution market."[119] Is this also true today, considering that the data in

[112] *See 2002 Extension Order*, 17 FCC Rcd at 12160-61, ¶¶ 79-80; *2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

[113] *See 2007 Extension Order*, 22 FCC Rcd at 17811, ¶ 30 (citing *2002 Extension Order*, 17 FCC Rcd at 12135, ¶ 24).

[114] *See id.* at 17810, ¶ 29.

[115] *Id.*

[116] *Id*. at 17814-15, ¶ 37.

[117] *Id*. at 17816, ¶ 38 (quoting *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33).

[118] *See infra*, Appendix B, Table 1.

[119] *2007 Extension Order*, 22 FCC Rcd at 17816, ¶ 38 (quoting *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33).

Appendices B and C indicate 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; (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; and (iv) the number of cable-affiliated RSNs has increased from 18 to 31 (not including HD versions)?[120]

35. To what extent should we consider Comcast-controlled networks in our review of the exclusive contract prohibition? Because these networks will continue to be subject to program access conditions adopted in the *Comcast/NBCU Order* for six more years (until January 2018, assuming they are not modified earlier in response to a petition[121]) even if the exclusive contract prohibition were to sunset, is there any basis to consider them in assessing whether to retain, sunset, or relax the exclusive contract prohibition? With the Comcast-controlled networks excluded, the data in Appendices B and C indicate that, since the *2007 Extension Order*, (i) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has remained at six; (ii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by average prime time ratings has fallen from seven to five; and (iii) the number of cable-affiliated RSNs has increased from 18 to 21 (not including HD versions).[122] With the Comcast-controlled networks excluded from the analysis, is it still accurate to characterize cable-affiliated programming as "some of the most popular and significant programming available today," the absence of which from an MVPD's offering would "adversely affect competition in the video distribution market."[123] Rather than focusing on the number and percentage of networks that are cable-affiliated, is it more critical to assess the extent to which cable-affiliated programming remains popular and without substitutes? We note that, in the *Comcast-NBCU Order*, the Commission found that the "the loss of Comcast-NBCU programming . . . would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers" and that "[t]his is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes from other sources."[124] Is there any basis to reach a different conclusion with respect to satellite-delivered programming affiliated with other cable operators?

36. We ask commenters contending that access to certain satellite-delivered, cable-affiliated programming remains necessary to preserve and protect competition in the video distribution market to present reliable, empirical data supporting their positions, rather than merely labeling such programming as "must have." While the Commission has recognized that some satellite-delivered, cable-affiliated programming has substitutes and that exclusive contracts involving such programming are unlikely to impact competition,[125] are there certain categories of programming, such as RSNs, that we can presume have no close substitutes and that are necessary for competition?[126] Does the wide variation in the

[120] *See infra*, Appendix B, Table 1 and Appendix C, Table 1.

[121] *See supra* n.90.

[122] *See infra*, Appendix B, Table 1 and Appendix C, Table 1.

[123] *2007 Extension Order*, 22 FCC Rcd at 17816, ¶ 38 (quoting *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33).

[124] *Comcast/NBCU Order*, 26 FCC Rcd at 4254, ¶ 36.

[125] *See 2007 Extension Order*, 22 FCC Rcd at 17816, ¶ 38; *see also Adelphia Order*, 21 FCC Rcd at 8279, ¶ 169 (concluding that the record did not indicate that an MVPD's lack of access to terrestrially delivered non-sports regional programming would harm competition or consumers).

[126] *See infra* ¶¶ 72-80 (seeking comment on whether to retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming).

importance and substitutability of satellite-delivered, cable-affiliated programming call for a case-by-case or categorical assessment of programming, rather than a broad rule that applies to all programming equally?

37. We also seek comment on whether a sunset of the exclusive contract prohibition would result in increased vertical integration in the video marketplace. If cable operators are permitted to enter into exclusive contracts with satellite-delivered, cable-affiliated programmers, will this result in the acquisition of existing programming networks by cable operators, thereby increasing vertical integration? How can we accurately predict any such expected increase as we assess whether to retain, sunset, or relax the exclusive contract prohibition? Are cable operators more likely to acquire established networks that provide popular and non-substitutable programming, rather than creating new networks or investing in fledgling networks? Are there certain categories of programming networks that are more likely to be acquired or launched by cable operators? For example, we note that TWC recently announced that it will launch two RSNs in 2012 featuring the games of the Los Angeles Lakers, including the first Spanish-language RSN.[127] Are cable operators expected to make further investments in RSNs in the future, especially if the exclusive contract prohibition were to sunset?

b. Incentive

38. In evaluating whether vertically integrated programmers retain the incentive to favor their affiliated cable operators over competitive MVPDs, the Commission analyzes "whether there continues to be an economic rationale for vertically integrated programmers to engage in exclusive agreements with cable operators that will cause [] anticompetitive harms."[128] The Commission has explained that, if a vertically integrated cable operator withholds programming from competitors, 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.[129] The Commission explained that, particularly "where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy."[130] Moreover, in the *2007 Extension Order*, the Commission provided an empirical analysis demonstrating that the profitability of withholding increases as the number of television households passed by a vertically integrated cable operator increases in a given market area, such as through clustering.[131]

39. The Commission concluded in the *2007 Extension Order* that market developments since 2002 did not yet support the lifting of the exclusive contract prohibition, but "there nevertheless may come a point when these developments will be sufficient to allow the prohibition to sunset."[132] Similarly, in upholding the *2007 Extension Order*, the D.C. Circuit stated its expectation that, if the market continued evolving rapidly, the Commission could soon allow the exclusive contract prohibition to sunset, which Congress intended to occur at some point.[133] We seek comment on whether now, almost

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[127] *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.

[128] *2007 Extension Order*, 22 FCC Rcd at 17820, ¶ 43 (citing *2002 Extension Order*, 17 FCC Rcd at 12139-40, ¶ 35).

[129] *See Adelphia Order,* 21 FCC Rcd at 8256, ¶ 117*; see also 2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53; *2002 Extension Order*, 17 FCC Rcd at 12140, ¶ 36.

[130] *2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53.

[131] *See id*. at 17831-32, ¶¶ 56-59 and 17883-91, Appendix C.

[132] *Id.* at 17810, ¶ 29.

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

five years since the most recent extension of the exclusive contract prohibition, we have reached such a point.

40. As set forth in Appendix A, the percentage of MVPD subscribers nationwide attributable to cable operators has fallen since 2007, from an estimated 67 percent to approximately 58.5 percent today.[134] Is there a certain market share threshold that, if reached, will render it unlikely for satellite-delivered, cable-affiliated programmers to withhold national networks from competitive MVPDs? We ask commenters to provide empirical analyses to support their positions. Has the decline in cable market share benefited consumers, such as through lower prices, or in some other way?[135] If not, does that suggest that the level of competition in the video distribution market has not reached a point where the exclusive contract prohibition should sunset, or is the price of cable offerings determined by other factors?

41. We also seek comment on how the current state of cable system clusters and cable market share in regional markets should affect our decision on whether to retain, sunset, or relax the exclusive contract prohibition. On 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.[136] 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*.[137] In other DMAs, such as Dallas, Denver, and Phoenix, data indicate that the share of MVPD subscribers attributable to cable operators is below 50 percent.[138] How should this variation in regional market shares impact our analysis? Does this wide variation in cable market share on a regional and local basis call for a more granular assessment of the continued need for an exclusive contract prohibition in individual markets, rather than a broad rule that applies to all markets equally?[139]

42. The Commission stated in the *2002 Extension Order* that "clustering, accompanied by an increase in vertically integrated regional programming networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."[140] We seek comment on whether this conclusion remains valid today. In the *2007 Extension Order*, the Commission found that the cable industry had continued to form regional clusters since the *2002 Extension Order*.[141] We note that a decrease in the amount of regional clustering could decrease the market share of individual cable operators within the footprints of regional programming, which would create fewer opportunities to implement exclusive arrangements.

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[134] *See infra*, Appendix A.

[135] *See 2010 Program Access Order*, 25 FCC Rcd at 762-63, ¶ 26 n.91 (noting that, although competitors have entered the video distribution market, there is evidence that cable prices have risen in excess of inflation) (citing *2007 Extension Order,* 22 FCC Rcd at 17826-27, ¶ 50).

[136] *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[137] *See 2007 Extension Order,* 22 FCC Rcd at 17827-29, ¶ 53; ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[138] *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[139] *See infra* ¶¶ 69-71 (seeking comment on relaxing the exclusive contract prohibition by 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).

[140] *2002 Extension Order*, 17 FCC Rcd at 12145, ¶ 47.

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

Has the amount of regional clustering increased or decreased since the *2007 Extension Order*?[142] We seek comment on whether events since the *2007 Extension Order* mitigate or exacerbate the impact of clustering. In the *2007 Extension Order*, the Commission provided an empirical analysis demonstrating that the profitability of withholding increases as the number of television households passed by a vertically integrated cable operator increases in a given market area, such as through clustering.[143] The analysis examined two vertically integrated cable operators on a DMA-by-DMA basis.[144] Taking account of various factors, including the characteristics of the affiliated RSN and the profitability figures of the vertically integrated cable operator examined, the analysis identified multiple DMAs in which withholding would be profitable.[145] In those DMAs, the homes passed by the vertically integrated cable operator as a percentage of television households ranged from 60-80 percent.[146] We seek comment on this analysis and whether, based on current data, it continues to support retaining an exclusive contract prohibition, particularly in those markets where a vertically integrated cable operator passes a significant number of television households. We also note that the Commission in the *2007 Extension Order* performed an analysis that concluded that withholding of some nationally distributed programming networks could be profitable if as little as 1.9 percent of non-cable subscribers were to switch to cable as a result of the withholding.[147] We seek comment on this analysis and whether, based on current data, it continues to support retaining an exclusive contract prohibition for national programming networks.

43. Has the current state of horizontal consolidation in the cable industry increased or decreased incentives for anticompetitive foreclosure of access to vertically integrated programming? We note that the data in Appendix A indicate that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs has decreased from between 54 and 56.75 percent as stated in the *2007 Extension Order*[148] to approximately 42.8 percent today. What impact, if any, does this have on our review of the exclusive contract prohibition?

3. Impact on the Video Programming Market

44. We seek comment on how retaining, sunsetting, or relaxing the exclusive contract prohibition would impact the creation of new national, regional, and local programming and which of these options is most likely to increase programming diversity. What effect has the exclusive contract prohibition had on the incentives of incumbent cable operators to develop and produce video programming? Are incumbent cable operators less willing to invest in programming because they cannot enter into exclusive contracts and therefore must share their programming investment with their competitors?[149] In the *2007 Extension Order*, the Commission concluded that the extension of the

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[142] *See id.*

[143] *See id*. at 17831, ¶ 56 ("[T]he larger the share of television households in the market that is served by the [vertically integrated satellite cable programmer's ("VISCP")] cable affiliate (*i.e.*, the larger the ratio of homes passed by the VISCP's cable affiliate to total television households), the larger is the total number of switching subscribers that switch to the VISCP's cable affiliate (as opposed to switching to another cable operator), and the greater is the potential compensating gain to the VISCP and its cable affiliate."); *see also id*. at 17831-32, ¶¶ 57-59 and 17883-91, Appendix C.

[144] *See id*. at 17832, ¶¶ 56-59 and 17883-90, ¶¶ 1-20, Appendix C.

[145] *See id*. at 17832, ¶ 59 and 17890, ¶¶ 18-20, Appendix C.

[146] *See id*. at 17832, ¶ 59.

[147] *See id.* at 17827-29, ¶ 53 and 17890-91, ¶ 21, Appendix C.

[148] *See id.* at 17829, ¶ 54.

[149] *See 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").

exclusive contract prohibition would not create a disincentive for the creation of new programming.[150] In support of this finding, the Commission noted that, despite the exclusive contract prohibition, the number of programming networks, including cable-affiliated networks, had increased since 1994.[151] Is there any basis to conclude that the number of video programming networks, including cable-affiliated networks, would be even greater today if the exclusive contract prohibition had sunset earlier? Since the 2007 extension of the exclusive contract prohibition, has there been an increase or decrease in the development, promotion, and launch of new video programming services by incumbent cable operators? Would a sunset of the exclusive contract prohibition entice incumbent cable operators to invest in and launch new programming networks to compete with established networks, leading to greater diversity in the video programming market, or are incumbent cable operators more likely to acquire these established networks?

45. What effect has the exclusive contract prohibition had on the incentives of competitive MVPDs and non-MVPD-affiliated programmers to develop and produce video programming? In the *2007 Extension Order*, the Commission noted evidence that some competitive MVPDs had begun to invest in their own video programming, despite their ability to access satellite-delivered, cable-affiliated programming as a result of the exclusive contract prohibition.[152] To what extent have competitive MVPDs invested in their own video programming? In the *2007 Extension Order*, the Commission "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."[153] Have competitive MVPDs made further investments in their own programming since that time? If the exclusive contract prohibition were to sunset (wholly or partially), would competitive MVPDs be likely to increase their investment in video programming in order to ensure that they have a robust offering of programming to counteract any exclusive deals that incumbent cable operators might enter into with their affiliated programmers? We note that certain competitive MVPDs are currently subject to the exclusive contract prohibition, such as those that are cable operators or common carriers that provide video programming directly to subscribers.[154] Has the exclusive contract prohibition caused these competitive MVPDs to be less willing to invest in programming because they must share their programming investment with their competitors? Would a sunset of the exclusive contract prohibition entice these competitive MVPDs to invest in and launch new programming networks? Do competitive MVPDs have the resources to invest in creating their own video programming? If not, to the extent that certain satellite-delivered, cable-affiliated programming is withheld from competitive MVPDs, is it likely that non-MVPD-affiliated programming vendors will fill the void by creating competing programming to license to competitive MVPDs, thereby leading to even greater diversity in the video programming market? Are there certain categories of programming that cannot be replicated by either competitive MVPDs or non-MVPD-affiliated programming vendors? In the *2010 Program Access Order*, the Commission stated:

> If 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. Conversely, when

[150] *See 2007 Extension Order*, 22 FCC Rcd at 17836-37, ¶ 64.

[151] *See id.* ("[T]he number of vertically integrated satellite-delivered national programming networks has more than doubled since 1994 when the rule implementing the exclusive contract prohibition took effect and has continued to increase since 2002 when the Commission last examined the exclusive contract prohibition. Moreover, the number of national programming networks has increased by almost 400 percent since 1994 and by 80 percent since 2002.") (citations omitted).

[152] *See id.*

[153] *Id.* at 17810, ¶ 29.

[154] *See* 47 U.S.C. § 548(j).

> programming is non-replicable and valuable to consumers, such as regional sports programming, no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace.[155]

While the Commission found that RSNs are non-replicable,[156] it concluded that local news and local community or educational programming is "readily replicable programming."[157] We seek comment on how the distinction between replicable and non-replicable content should impact our review of the exclusive contract prohibition.

4. Alternatives to Retaining the Exclusive Contract Prohibition as it Exists Today

46. As discussed in further detail below, to the extent the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment on whether we can nonetheless preserve and protect competition in the video distribution market either by (i) sunsetting the prohibition in its entirety and relying solely on existing protections provided by the program access rules that will not sunset; or (ii) relaxing the exclusive contract prohibition, such as through removal of the prohibition on a market-by-market basis based on the extent of competition in the market or by retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming.

a. Sunsetting the Exclusive Contract Prohibition in its Entirety and Relying Solely on Existing Protections

47. As discussed above, the exclusive contract prohibition is just one of several protections that the program access rules afford to competitive MVPDs in their efforts to compete in the video distribution market.[158] Even if the exclusive contract prohibition were to sunset (wholly or partially[159]), these other existing protections will remain in effect. We seek comment on whether these existing protections are sufficient to preserve and protect competition in the video distribution market if the exclusive contract prohibition were to sunset and whether any additional safeguards should be adopted.

(i) Section 628(b) Complaints

48. The Act and the Commission's existing rules allow for the filing of complaints alleging a violation of Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules.[160] These provisions require a complainant to establish three elements in order to demonstrate a violation: (i) the defendant is one of the three entities covered by these provisions (*i.e.*, a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor); (ii) the defendant has engaged in an "unfair act"; and (iii) the "purpose or effect" of the unfair act is to "significantly hinder or prevent" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[161] Even if the exclusive

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[155] *2010 Program Access Order*, 25 FCC Rcd at 750-51, ¶ 9.

[156] *See id*. at 750, ¶ 8 and 782-83, ¶ 52.

[157] *Id*. at 750, ¶ 8 and 781-82, ¶ 51 n.200.

[158] *See supra* ¶ 7.

[159] *See infra* ¶¶ 69-71 (seeking comment on relaxing the exclusive contract prohibition by 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).

[160] *See* 47 U.S.C. §§ 548(b), (d); 47 C.F.R. §§ 76.1001(a), 76.1003(a), (c)(7).

[161] *See* 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a).

contract prohibition were to sunset (wholly or partially), an MVPD would still 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 these provisions.[162] We note that the Commission currently considers allegedly "unfair acts" involving terrestrially delivered, cable-affiliated programming on a case-by-case basis pursuant to Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules.[163] Applying these provisions, the Commission recently found that the withholding of terrestrially delivered, cable-affiliated RSNs from certain MVPDs in the New York, Buffalo, and Hartford/New Haven DMAs violated these provisions.[164] We seek comment regarding whether there are any justifications for applying different rules and procedures to satellite-delivered, cable-affiliated programming than those that apply to terrestrially delivered, cable-affiliated programming.[165]

49. The Commission previously concluded that Section 628(b) was not an adequate substitute for the prohibition on exclusive contracts under Section 628(c)(2)(D).[166] Among other things, the Commission noted that Section 628(b) "carries with it an added burden" to demonstrate that the "purpose or effect" of the "unfair act" is to "significantly hinder or prevent" an MVPD from providing programming.[167] We seek comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming to reliance instead on a case-by-case process, including Section 628(b) complaints. To what extent would a case-by-case process be more costly for competitive MVPDs than the current prohibition on exclusive contracts? What would be the benefits of eliminating the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming? Would these benefits outweigh the costs of a case-by-case process?

(a) Case-by-Case Complaint Process

50. We note that a case-by-case complaint process alleging a violation of Section 628(b) would differ from the current prohibition on exclusive contracts in Section 628(c)(2)(D) in several important respects. First, under the current exclusive contract prohibition, all exclusive contracts between a cable operator and a satellite-delivered, cable-affiliated programmer pertaining to satellite-delivered, cable-affiliated programming are considered categorically "unfair." If the exclusive contract prohibition were to sunset (wholly or partially), however, exclusive contracts would no longer always be presumed "unfair." Rather, a complainant would have the burden to establish that the exclusive contract at issue is "unfair" based on the facts and circumstances presented.[168] Second, under the current exclusive contract prohibition, all exclusive contracts between a cable operator and a satellite-delivered, cable-affiliated programmer pertaining to satellite-delivered, cable-affiliated programming are presumed to harm

[162] *See 2010 Program Access Order*, 25 FCC Rcd at 788, ¶ 61 (explaining that Section 628(b) does not contain a sunset provision).

[163] *See supra* ¶ 2.

[164] *See id*. at ¶ 2 n.5.

[165] *See also supra* ¶ 32.

[166] *See 2002 Extension Order,* 17 FCC Rcd at 12153-54, ¶ 65 n.206 ("We do not believe other provisions in the statute – namely, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) – are adequate substitutes for the particularized protection afforded under Section 628(c)(2)(D)."); *2007 Extension Order*, 22 FCC Rcd at 17796-97, ¶ 6 and 17834-35, ¶ 62 n.320.

[167] *2002 Extension Order,* 17 FCC Rcd at 12153-54, ¶ 65 n.206.

[168] *See, e.g.*, *Verizon Tel. Cos. et al.*, 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*, 26 FCC Rcd at 15868, ¶ 32, *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.).

competition, and competitive MVPDs alleging a prohibited exclusive contract are not required to demonstrate harm.[169] In alleging that an exclusive contract violates Section 628(b), however, a complainant would have the burden of proving that the exclusive contract has the "purpose or effect" of "significantly hindering or preventing" the MVPD from providing satellite cable programming or satellite broadcast programming.[170] Third, the current exclusive contract prohibition forbids all exclusive contracts between a cable operator and a satellite-delivered, cable-affiliated programmer pertaining to satellite-delivered, cable-affiliated programming, unless a cable operator or programmer can satisfy its burden of demonstrating that an exclusive contract 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.[171] If the exclusive contract prohibition were to sunset (wholly or partially), however, the situation would be reversed. That is, such exclusive contracts would be permitted, unless an MVPD could carry its burden of demonstrating that the exclusive contract violates Section 628(b) (or, potentially, Section 628(c)(2)(B)[172]). We seek comment on the above interpretations of Section 628(b) as it pertains to exclusive contracts involving satellite-delivered, cable-affiliated programming, particularly the practical implications for competitive MVPDs, cable operators, and satellite-delivered, cable-affiliated programmers.

(b) Extending Rules and Policies Adopted for Section 628(b) Complaints Involving Terrestrially Delivered, Cable-Affiliated Programming to Section 628(b) Complaints Challenging Exclusive Contracts Involving Satellite-Delivered, Cable-Affiliated Programming

51. 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).[173] In doing so, the Commission adopted rules and policies that would appear to be equally appropriate for complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b). Accordingly, if the exclusive contract prohibition were to sunset (wholly or partially), we propose to apply these same rules and policies to such complaints.

52. First, the Commission declined to adopt specific evidentiary requirements with respect to proof that the defendant's alleged activities violated Section 628(b).[174] Among other things, the Commission explained that 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.[175] In addition, the Commission provided the following illustrative examples of

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[169] *See supra* ¶ 7.

[170] *See* 47 U.S.C. § 548(b).

[171] *See* 47 U.S.C. § 548(c)(2)(D), (c)(4); 47 C.F.R. § 76.1002(c)(4)-(5); *2002 Extension Order*, 17 FCC Rcd at 12153-54, ¶ 65 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).

[172] *See infra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

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

[174] *See id*. at 785-86, ¶ 56.

[175] *See id*.

evidence that litigants might consider providing: (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.[176] The Commission also explained that the discovery process will enable parties to obtain additional evidence.[177] If the exclusive contract prohibition were to sunset (wholly or partially), we propose to apply the same requirements to complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b).

53. Second, the Commission found that one category of programming, RSNs, was shown by both Commission precedent and record evidence to be very likely to be both non-replicable and highly valued by consumers.[178] Rather than requiring litigants and the Commission staff to undertake repetitive examinations of this RSN precedent and the relevant historical evidence, the Commission instead allowed complainants to invoke a rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b).[179] The D.C. Circuit upheld the Commission's decision to establish a rebuttable presumption of "significant hindrance" for "unfair acts" involving terrestrially delivered, cable-affiliated RSNs under both First Amendment and Administrative Procedure Act ("APA") review.[180] Accordingly, to the extent the exclusive contract prohibition were to sunset (wholly or partially) and we do not retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs,[181] should we similarly adopt a rebuttable presumption of "significant hindrance" under Section 628(b) for exclusive contracts involving satellite-delivered, cable-affiliated RSNs? If so, we propose to define the term "RSN" in the same way the Commission defined that term in the *2010 Program Access Order*.[182] Is there any basis to have a rebuttable presumption of "significant hindrance" for terrestrially delivered, cable-affiliated RSNs, but not when these networks are satellite-delivered? Are there any other categories of satellite-delivered, cable-affiliated programming that can be deemed "must have" and for which we should establish a rebuttable presumption of "significant hindrance"? We note that the Commission in the *Comcast-NBCU Order* concluded that "certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming."[183] Are there other types of satellite-delivered, cable-

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[176] *See id*.

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

[178] *See 2010 Program Access Order*, 25 FCC Rcd at 750, ¶ 8 and 782-83, ¶ 52.

[179] *See id*. In establishing the RSN rebuttable presumption, the Commission relied on evidence in the record supporting the conclusion that RSNs typically offer non-replicable content and are considered "must have" programming by MVPDs. *See id*. at 768-69, ¶ 32 and 782-83, ¶ 52 nn.205-206. The Commission also relied on an empirical analysis performed in the *Adelphia Order* assessing the impact of the withholding of terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators. *See id*. at 768-69, ¶ 32 and 782, ¶ 52 n.202 (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; and 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); *2007 Extension Order*, 22 FCC Rcd at 17818-19, ¶ 40 and 17876-82, Appendix B (addressing comments concerning the *Adelphia Order* study)).

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

[181] *See infra* ¶¶ 72-80.

[182] *See supra* n.99.

[183] *Comcast/NBCU Order*, 26 FCC Rcd at 4258, ¶ 46.

affiliated programming besides RSNs that have no good substitutes, are important for competition, and are non-replicable, as the Commission has found with respect to RSNs?[184] To the extent that commenters contend that there are, we ask that they provide reliable, empirical data supporting their positions, rather than merely labeling such programming as "must have." In addition, we request commenters to provide a rational and workable definition of such programming that can be applied objectively.

54. Third, the Commission concluded that HD programming is growing in significance to consumers[185] and that consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content.[186] Accordingly, the Commission determined that it would analyze the HD version of a network separately from the SD version of similar content for purposes of determining whether an "unfair act" has the purpose or effect set forth in Section 628(b).[187] Thus, the fact that a respondent provides the SD version of a network to the complainant will not alone be sufficient to refute the complainant's showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b).[188] Similarly, in cases involving an RSN, withholding the HD feed is rebuttably presumed to cause "significant hindrance" even if an SD version of the network is made available to competitors.[189] The D.C. Circuit upheld the Commission's decision on this issue under both First Amendment and APA review.[190] To the extent the exclusive contract prohibition were to sunset (wholly or partially), we believe the same requirements should apply to complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b). We seek comment on this proposal.[191]

(c) Additional Rules for Complaints Challenging Exclusive Contracts Involving Satellite-Delivered, Cable-Affiliated Programming

55. To the extent the exclusive contract prohibition were to sunset (wholly or partially), we seek comment on ways to reduce burdens on both complainants and defendants in connection with complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b) (or, potentially, Section 628(c)(2)(B)[192]). We acknowledge that a case-by-case complaint process for addressing exclusive contracts involving satellite-delivered, cable-affiliated, national programming networks may impose some burdens for litigants and the Commission, especially in comparison to the current broad, prophylactic prohibition. For example, although several MVPDs could join as complainants, the showing in the complaint and any subsequent ruling on the complaint

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[184] *See supra* ¶ 28.

[185] *See 2010 Program Access Order*, 25 FCC Rcd at 784-85, ¶ 54.

[186] *See id*. at 784-85, ¶¶ 54-55.

[187] *See id*. at 784-85, ¶ 54.

[188] *See id*. at 785, ¶ 55.

[189] *See id*.

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

[191] In addition, as discussed below, a defendant answering a complaint alleging an "unfair act" involving terrestrially delivered, cable-affiliated programming is provided with 45 days – rather than the standard 20 days – to file an answer. *See* 47 C.F.R. § 76.1001(b)(2)(i); *2010 Program Access Order*, 25 FCC Rcd at 779-80, ¶ 49. We propose below that the same 45-day answer period apply to all answers to complaints alleging a violation of Section 628(b). *See infra* ¶ 97.

[192] *See infra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

(either grant or denial) will be limited to the complainants. Other competitive MVPDs that are not parties to the complaint would have to file their own complaint and demonstrate how the exclusive contract at issue is "unfair" and has "significantly hindered" them from providing programming. Given the number of competitive MVPDs nationwide that might seek access to a satellite-delivered, cable-affiliated, national programming network that is subject to an exclusive contract with cable operators, the number of such complaints involving just one national network could be significant.

56. We seek comment on how to reduce these potential burdens for both complainants and defendants. For example, rather than requiring litigants and the Commission staff to undertake repetitive examinations of the same network, we seek comment on whether the Commission could establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a satellite-delivered, cable-affiliated programming network 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 seek comment on whether adoption of such a rebuttable presumption is rational.[193] For example, in the event the Commission finds that an exclusive contract violates Section 628(b) (or Section 628(c)(2)(B)) in response to a complaint brought by a small, fledgling MVPD, is it rational to assume that the Commission is likely to reach the same conclusion when the complaint is brought by a large, established MVPD?

57. We also seek comment on whether there would be any benefit to retaining post-sunset our 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.[194] While a cable operator post-sunset would be permitted generally to enter into an exclusive contract with a satellite-delivered, cable-affiliated programming network without receiving prior Commission approval, we propose that the grant of a Petition for Exclusivity would immunize such an exclusive contract from potential complaints alleging a violation of Section 628(b), as well as Section 628(c)(2)(B).[195] We further propose that, to the extent we were to deny a Petition for Exclusivity post-sunset, the petitioner would not be precluded from entering into or enforcing the exclusive contract subject to the petition. Rather, denial of a Petition for Exclusivity post-sunset would mean that the exclusive contract at issue may not be permissible in all cases if challenged pursuant to Section 628(b) or,

[193] *See Cablevision II*, 649 F.3d at 716 (stating that an agency may adopt an evidentiary presumption provided the presumption is "rational" and that "'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'") (quoting *Nat'l Mining Ass'n v.Dep't of Interior,* 177 F.3d 1, 6 (D.C. Cir. 1999) (internal citation and quotation marks omitted)).

[194] *See* 47 U.S.C. § 548(c)(2)(D), (c)(4); 47 C.F.R. § 76.1002(c)(4)-(5); *see also infra* ¶ 75 (proposing that, to the extent the Commission retains an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs or other satellite-delivered, cable-affiliated "must have" programming, the Commission would retain existing rules and procedures whereby a cable operator or a satellite-delivered, cable-affiliated programmer can seek prior Commission approval to enter into an exclusive contract by demonstrating that the arrangement satisfies the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules).

[195] *See* 47 U.S.C. § 548(c)(2)(B)(iv) (providing 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)]"); *infra* ¶ 61 (explaining that the Commission has interpreted this language to pertain to only those exclusive contracts that have been deemed by the Commission to be in the public interest pursuant to the factors set forth in Section 628(c)(4)).

potentially, Section 628(c)(2)(B).[196] We seek comment on the costs and benefits of retaining this petition process after a sunset, especially whether the burdens for the Commission staff and impacted parties would outweigh any benefits. We also seek comment on any other ways to reduce the potential burdens for both complainants and defendants resulting from a case-by-case complaint process.

(ii) Section 628(c)(2)(B) Discrimination Complaints

58. We believe that discrimination complaints under Section 628(c)(2)(B) also will provide some protection for competitive MVPDs should the exclusive contract prohibition sunset (wholly or partially). Discrimination can take two forms: price discrimination and non-price discrimination.[197] Non-price discrimination includes an unreasonable refusal to license programming to an MVPD.[198] A refusal to license is permissible only if there is a "legitimate business justification" for the conduct.[199] As discussed below, a refusal to license can take two forms. First, a satellite-delivered, cable-affiliated programmer may refuse to license its programming to all MVPDs in a market except for one (such as its affiliated cable operator), thereby providing the affiliated cable operator with exclusive access to the programming. Second, a satellite-delivered, cable-affiliated programmer may selectively refuse to license its programming to certain MVPDs in a market (such as a recent entrant) while licensing the programming to other MVPDs (such as its affiliated cable operator and DBS operators). We seek comment on each of these scenarios below.

(a) Challenging an Exclusive Arrangement as an Unreasonable Refusal to License

59. We seek comment on the interplay between the potential sunset of the exclusive contact prohibition in Section 628(c)(2)(D) and the continued prohibition on unreasonable refusals to license pursuant to Section 628(c)(2)(B). As an initial matter, we note that Section 628(c)(2)(D) prohibits "exclusive contracts . . . between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest."[200] This language presumes that an agreement will exist between the cable operator and the satellite-delivered, cable-affiliated programmer that would provide the cable operator with exclusivity.[201] In the event that a satellite-delivered, cable-affiliated programmer

[196] *See infra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[197] *See 1993 Program Access Order*, 8 FCC Rcd at 3364, ¶ 14.

[198] *See id*. at 3364, ¶ 14 and 3412-13, ¶ 116.

[199] *See 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).

[200] 47 U.S.C. § 548(c)(2)(D).

[201] In Section 628(c)(2)(C), which pertains to exclusivity in areas unserved by cable operators, Congress used broader language than in Section 628(c)(2)(D) to define the prohibited exclusive arrangements. *Compare* 47 U.S.C. § 548(c)(2)(C) (prohibiting in unserved areas "practices, understandings, arrangements, and activities, including exclusive contracts . . . between a cable operator" and specified programmers) *with* 47 U.S.C. § 548(c)(2)(D) (prohibiting in served areas "exclusive contracts . . . between a cable operator" and specified programmers). The Commission's rules, however, define the prohibition on exclusive contracts in served areas as prohibiting a cable (continued….)

unilaterally refuses to license its programming to all MVPDs in a market except for one cable operator and without any exclusive contract with the cable operator, we believe an MVPD can challenge this conduct as an unreasonable refusal to license in violation of Section 628(c)(2)(B). While a cable operator would be permitted generally to enter into an exclusive contract with the satellite-delivered, cable-affiliated programmer in the event of a sunset, the scenario presented here does not involve an exclusive contract; rather, it involves unilateral action by the satellite-delivered, cable-affiliated programmer. We seek comment on this interpretation. In defending against a complaint, the satellite-delivered, cable-affiliated programmer would be required to provide a "legitimate business justification" for its conduct.[202]

60. In the event that a satellite-delivered, cable-affiliated programmer and a cable operator enter into an exclusive contract post-sunset (complete or partial), we seek comment on whether an MVPD can challenge this exclusive contract as an unreasonable refusal to license in violation of Section 628(c)(2)(B).[203] We believe that there are legitimate arguments for and against this interpretation. We seek comment on which of the interpretations set forth below is more reasonable and consistent with the goals of Section 628.

61. In favor of interpreting Section 628(c)(2)(B) to allow a challenge post-sunset to an exclusive contract as an unreasonable refusal to license, we note that 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)]."[204] The Commission has previously interpreted this language to pertain to only those exclusive contracts that have been deemed by the Commission to be in the public interest pursuant to the factors set forth in Section 628(c)(4).[205] This provision is silent regarding exclusive contracts that are generally permissible after a sunset pursuant to Section 628(c)(5).[206] Does the omission of post-sunset exclusive contracts from both Section 628(c)(2)(D) and Section 628(c)(2)(B)(iv) mean that Congress intended that such contracts might still be challenged as impermissibly discriminatory in violation of Section 628(c)(2)(B)?[207] In addition, we note that the exclusive contract prohibition in Section 628(c)(2)(D) applies to exclusive contracts between a satellite-delivered, cable-affiliated programmer and a cable operator; it does not apply to exclusive contracts between a satellite-delivered, cable-affiliated programmer and a DBS operator.[208]

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operator from "enter[ing] into any exclusive contracts, or *engag[ing] in any practice, activity or arrangement tantamount to an exclusive contract* . . . with" specified programmers. 47 C.F.R. § 76.1002(c)(2) (emphasis added).

[202] *See supra* n.199.

[203] To the extent that we determine that an MVPD can challenge an exclusive contract as an unreasonable refusal to license in violation of Section 628(c)(2)(B) post-sunset, we seek comment above on ways to reduce the potential burdens for both complainants and defendants resulting from a case-by-case complaint process. *See supra* ¶¶ 56-57.

[204] 47 U.S.C. § 548(c)(2)(B)(iv).

[205] *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*").

[206] *See* 47 U.S.C. § 548(c)(5).

[207] *See United States of America v. Davis*, 978 F.2d 415, 418 (8th Cir. 1992) (the maxim of statutory construction *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another) dictates that an expressly stated exception impliedly excludes all other exceptions).

[208] *See* 47 U.S.C. § 548(c)(2)(D); *1996 OVS Order*, 11 FCC Rcd at 18320-21, ¶ 187 ("[I]n order for an exclusive contract to be prohibited under Sections 628(c)(2)(C) and 628(c)(2)(D) of the Communications Act and Section 76.1002(c) of the Commission's rules, the exclusive agreement must involve a cable operator (or, following the (continued….)

Both before and after a sunset, however, the decision of a satellite-delivered, cable-affiliated programmer to license its programming to a DBS operator but not to other MVPDs might be challenged as an unreasonable refusal to license pursuant to Section 628(c)(2)(B).[209] If, post-sunset, an MVPD cannot challenge an exclusive arrangement between a satellite-delivered, cable-affiliated programmer and a cable operator as an unreasonable refusal to license in violation of Section 628(c)(2)(B), would this produce an anomalous result? Specifically, in challenging an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator, an MVPD would have to rely on Section 628(b), which places the burden on the MVPD to demonstrate that the defendant has engaged in an "unfair act" that has the "purpose or effect" of "significantly hindering or preventing" the MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[210] By contrast, in challenging an exclusive contract between a satellite-delivered, cable-affiliated programmer and a DBS operator, an MVPD could rely on Section 628(c)(2)(B), which presumes harm in every case[211] and places the burden on the satellite-delivered, cable-affiliated programmer to provide a "legitimate business justification" for its conduct.[212] Is there any basis for placing a greater burden on an MVPD in challenging an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator than between a satellite-delivered, cable-affiliated programmer and a DBS operator?

62. On the other hand, we note that there are legitimate arguments against interpreting Section 628(c)(2)(B) to allow an MVPD to challenge an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator post-sunset as an unreasonable refusal to license. Currently, with the exclusive contract prohibition in effect, an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator is prohibited, unless the programmer or cable operator can demonstrate that the exclusive contract serves the public interest based on the factors set forth in Section 628(c)(4).[213] If, post-sunset, an MVPD can challenge an exclusive contract between a satellite-delivered, cable-affiliated programmer and a cable operator as an unreasonable refusal to license in violation of Section 628(c)(2)(B), the satellite-delivered, cable-affiliated programmer would be required to demonstrate a "legitimate business reason" for its conduct.[214] Is it reasonable to interpret

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1996 Act, a common carrier or its affiliate that provides video programming directly to subscribers, or an open video system operator)."); *see also id*. at 18318-20, ¶¶ 183-84; *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 3105, 3127-28, ¶ 42 (1994) ("*1994 DBS Order*").

[209] *See* 47 U.S.C. § 548(c)(2)(B) (prohibiting discrimination by a satellite-delivered, cable-affiliated programmer in the prices, terms, and conditions of sale or delivery of programming "among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups"); *1993 Program Access Order*, 8 FCC Rcd at 3412, ¶ 116 ("one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor"); *1996 OVS Order*, 11 FCC Rcd at 18319-20, ¶ 185 ("[W]e also do not intend to foreclose challenges to exclusive contracts between vertically integrated satellite programmers and MVPDs, including unaffiliated MVPDs, on open video systems under Section 628(c)(2)(B), which prohibits, with limited exceptions, discrimination among competing MVPDs by a vertically integrated satellite programmer. In particular, as we found in the [*1993 Program Access Order*], Section 628(c)(2)(B) covers non-price discrimination such as an unreasonable refusal to deal, including one which might result from an exclusive contract.") (citations and footnotes omitted) and 18325, ¶ 197.

[210] *See* 47 U.S.C. § 548(b); *see also supra* ¶ 48.

[211] *See supra* n.21.

[212] *See supra* n.199.

[213] *See* 47 U.S.C. §§ 548(c)(2)(D), 548(c)(4).

[214] *See supra* n.199.

Section 628 to provide that, post-sunset, the public interest factors in Section 628(c)(4) would be replaced with a showing of a "legitimate business reason" in response to a complaint alleging a violation of Section 628(c)(2)(B)? We note that two of the public interest factors in Section 628(c)(4) focus on competition in the video distribution market, allowing a proponent of exclusivity to demonstrate how the exclusive contract will not adversely impact competition.[215] In a complaint alleging discrimination under Section 628(c)(2)(B), however, the alleged discriminatory act is presumed to harm competition in every case.[216] Is it reasonable to interpret Section 628 to provide that, pre-sunset, a satellite-delivered, cable-affiliated programmer or a cable operator could make a showing that an exclusive contract would not adversely impact competition pursuant to the public interest factors in Section 628(c)(4), but, post-sunset, exclusivity is presumed to harm competition in every case when challenged pursuant to Section 628(c)(2)(B)?

63. In addition to the foregoing, we seek comment on whether the legislative history of the 1992 Cable Act supports either of the above interpretations. The Senate Report accompanying the 1992 Cable Act states that the "bill does not equate exclusivity with an unreasonable refusal to deal."[217] This statement might be read to imply that Congress considered exclusive contracts and unreasonable refusals to deal to be mutually exclusive, with the effect that once a satellite-delivered, cable-affiliated programmer enters into an exclusive contract with a cable operator post-sunset, the contract cannot be challenged as an unreasonable refusal to license pursuant to Section 628(c)(2)(B). Another part of the Senate Report, however, states that "the dominance in the market of the distributor obtaining exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal."[218] This statement might be read to imply that Congress did not consider exclusive contracts and unreasonable refusals to license to be mutually exclusive, with the effect that an exclusive contract could be challenged as an unreasonable refusal to license pursuant to Section 628(c)(2)(B).

(b) Selective Refusals to License Programming

64. Notwithstanding the question raised in the previous section of whether an MVPD can challenge post-sunset an exclusive arrangement between a satellite-delivered, cable-affiliated programmer and a cable operator as an unreasonable refusal to license in violation of Section 628(c)(2)(B), our rules and precedent establish that the discrimination provision in Section 628(c)(2)(B) would prevent a satellite-delivered, cable-affiliated programmer from licensing its content to MVPD A (such as a DBS operator) in a given market area, but to selectively refuse to license the content to MVPD B (such as a telco video provider) in the same area, absent a legitimate business reason.[219] When a satellite-delivered,

[215] *See* 47 U.S.C. § 548(c)(4)(A) (requiring the Commission to consider the effect of the exclusive contract on "the development of competition in local and national [MVPD] markets"); 47 U.S.C. § 548(c)(4)(B) (requiring the Commission to consider the effect of the exclusive contract on "competition from [MVPD] technologies other than cable"); *see also New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231, 3235, ¶¶ 30-31 (1994) (finding that New England Cable News ("NECN") channel's exclusive contract with cable operators would not have an effect on competition in local or national video distribution markets that could not be offset by public interest benefits of the exclusive contract); *NewsChannel*, Memorandum Opinion and Order, 10 FCC Rcd 691, 694, ¶ 21 (CSB 1994) (finding that NewsChannel's exclusive contract with cable operators would not have an effect on competition in the video distribution market).

[216] *See supra* n.21.

[217] S. Rep. No. 102-92 (1991), at 26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161.

[218] *Id*.

[219] 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 (continued….)

cable-affiliated programmer discriminates among MVPDs in this manner, it faces the prospect of a complaint alleging non-price discrimination in violation of Section 628(c)(2)(B).[220] As noted above, complaints alleging a violation of Section 628(c)(2)(B) do not require a showing of harm to the complainant.[221]

65. We seek comment on whether the right of an MVPD to challenge a selective refusal to license as a form of prohibited non-price discrimination under Section 628(c)(2)(B) will help to preserve and protect competition in the video distribution market if the exclusive contract prohibition were to sunset (wholly or partially). As reflected in Appendix A, the two DBS operators together have approximately 34 percent of MVPD subscribers nationwide today. Because a national programming network that refuses to license its content to these MVPDs will forgo significant licensing fees and advertising revenues, is it reasonable to assume that most satellite-delivered, cable-affiliated, national programming networks will license their content to DBS operators? If they do, we interpret Section 628(c)(2)(B) as permitting other competitive MVPDs, such as a telco video provider, to bring non-price discrimination complaints should these programmers refuse to deal with them. How does this analysis change with respect to local and regional markets, where cable operators may have an overwhelming share of the market or a vertically integrated cable operator may pass a large percentage of television households?[222]

66. The Commission previously concluded that the discrimination provision in Section 628(c)(2)(B) is not an adequate substitute for the prohibition on exclusive contracts under Section 628(c)(2)(D).[223] Among other things, the Commission noted that a non-price discrimination complaint requires an MVPD to demonstrate that the conduct was "unreasonable," which the Commission noted may be difficult to establish.[224] We seek comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming to reliance instead on a case-by-case process, including non-price discrimination complaints.[225]

(iii) Section 628(c)(2)(A) Undue Influence Complaints

67. We seek comment on the extent to which undue influence complaints under Section 628(c)(2)(A) may also provide some protection for competitive MVPDs should the exclusive contract prohibition sunset (wholly or partially).[226] Section 628(c)(2)(A) precludes a cable operator that has an

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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.

[220] *See supra* ¶ 58.

[221] *See supra* n.21.

[222] *See supra* ¶¶ 41-42; *2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53 ("where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy"); *id*. at 17832, ¶ 58 ("Substantial increases in clustering, *i.e.*, the number of DMAs in which homes passed by a single cable operator is a large share of total television households, would mean that withholding is likely more profitable than it was before.").

[223] *See 2002 Extension Order,* 17 FCC Rcd at 12153-54, ¶ 65 n.206 ("We do not believe other provisions in the statute – namely, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) – are adequate substitutes for the particularized protection afforded under Section 628(c)(2)(D)."); *2007 Extension Order*, 22 FCC Rcd at 17796-97, ¶ 6 and 17834-35, ¶ 62 n.320.

[224] *See 2002 Extension Order,* 17 FCC Rcd at 12153-54, ¶ 65 n.206.

[225] *See supra* ¶ 49.

[226] *See* 47 U.S.C. § 548(c)(2)(A).

attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from "unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated [MVPD]."[227] 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."[228] The Commission 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."[229] To what extent, if any, will the prohibition on undue influence provide some protection for competitive MVPDs should the exclusive contract prohibition sunset? If the exclusive contract prohibition were to sunset, then a cable operator would be permitted generally to enter into an exclusive contract with a satellite-delivered, cable-affiliated programming network, although the contract may be deemed to violate Section 628(b) (or, potentially, Section 628(c)(2)(B)[230]) after the conclusion of a complaint proceeding. In the event the exclusive contract prohibition sunsets, if a cable operator "unduly influences" a satellite-delivered, cable-affiliated programmer to enter into an exclusive contract, would that conduct violate Section 628(c)(2)(A) even though the underlying contract would be permissible (absent a finding of a violation of Section 628(b) (or, potentially, Section 628(c)(2)(B)[231]))? Stated differently, in the event of a sunset, can a cable operator "unduly influence" a satellite-delivered, cable-affiliated programmer to enter into an exclusive contract only if the underlying contract violates Section 628(b) (or, potentially, Section 628(c)(2)(B)[232])?

b. Relaxing the Exclusive Contract Prohibition

68. Rather than sunsetting the exclusive contract prohibition in its entirety and relying solely on existing protections provided by the program access rules that will not sunset, we seek comment on whether we should instead relax, rather than sunset, the exclusivity prohibition in the ways discussed below, or in some other way. We ask parties to comment on whether retaining the exclusivity ban in certain circumstances would be more effective in preserving and protecting competition in the video distribution market than permitting the exclusive contract prohibition to sunset entirely. In addition to the proposals below, we invite comment on other ways to relax the exclusive contract prohibition.

(i) Sunsetting the Exclusive Contract Prohibition on a Market-by-Market Basis

69. We seek comment on whether to establish 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.[233] In

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[227] *Id*.

[228] *1993 Program Access Order*, 8 FCC Rcd at 3424, ¶ 145.

[229] *Id*.

[230] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[231] *See id*.

[232] *See id*.

[233] We note that the Commission sought comment on a similar proposal in the *2007 Program Access NPRM*. *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, 17859, ¶ 114 (2007) (seeking comment on whether the Commission can establish a procedure that would shorten the term of the exclusive contract prohibition (continued….)

the *2002 Extension Order*, the Commission explained that "clustering, accompanied by an increase in vertically integrated regional programming networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."[234] Moreover, as noted above, 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.[235] As the Commission has explained previously, particularly "where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy."[236] Moreover, in the *2007 Extension Order*, the Commission provided an empirical analysis demonstrating that the profitability of withholding increases as the number of television households passed by a vertically integrated cable operator increases in a given market area, such as through clustering.[237] Accordingly, a cable-affiliated programmer will have an increased incentive to enter into exclusive contracts with cable operators in those areas where the market share of competitive MVPDs is comparatively low or where its affiliated cable operator passes a large percentage of television households or where both circumstances are present.[238] If there was not a blanket prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming, would incumbent cable operators and cable-affiliated programmers enter into exclusive contracts in these markets? If so, does the wide variation in cable market share and television households passed by a vertically integrated cable operator on a regional and local basis call for a more granular assessment of the continued need for an exclusive contract prohibition in individual markets, rather than a broad rule that applies to all markets equally? Would such a market-by-market assessment necessarily be based on a Commission finding that satellite-delivered, cable-affiliated programming remains necessary for competition in the video distribution market?[239] That is, absent such a finding, would a market-by-market assessment approach mean that the exclusive contract prohibition would sunset only in areas where satellite-delivered, cable-affiliated programmers lack an incentive to enter into exclusive contracts, regardless of the importance of the programming at issue for competition? Is there any basis for interpreting the sunset provision in Section 628(c)(5) in this manner, which might permit exclusive contracts only when there is little possibility such contracts will exist?

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if, after two years (*i.e.*, October 5, 2009), a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA) ("*2007 Program Access NPRM*"). We hereby incorporate by reference the comments filed in response to this proposal.

[234] *2002 Extension Order*, 17 FCC Rcd at 12145, ¶ 47.

[235] *See supra* ¶ 41.

[236] *2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53.

[237] *See id*. at 17831-32, ¶¶ 56-59 and 17883-91, Appendix C.

[238] *See 2002 Extension Order*, 17 FCC Rcd at 12140, ¶ 38 ("The number of subscribers that a vertically integrated cable programmer serves is of particular importance in calculating the benefits of withholding programming from rival MVPDs. The larger the number of subscribers controlled by the vertically integrated cable programmer the larger the benefits of withholding that accrue to that programmer. Other things being equal, then, as the number of subscribers rises, so does the likelihood that withholding would be profitable."); *2007 Extension Order*, 22 FCC Rcd at 17832, ¶ 58 ("Substantial increases in clustering, *i.e.*, the number of DMAs in which homes passed by a single cable operator is a large share of total television households, would mean that withholding is likely more profitable than it was before.").

[239] *See supra* ¶¶ 33-37 (discussing the "ability" of cable-affiliated programmers to favor their affiliated cable operators, such that competition and diversity in the distribution of video programming would not be preserved and protected, and whether satellite-delivered, cable-affiliated programming remains programming that is necessary for competition).

70. To the extent we establish a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can petition to remove the exclusive contract prohibition on a market-by-market basis, we seek comment on the details of this process. First, in assessing whether to sunset the exclusive contract prohibition in an individual market, we propose to apply the same test set forth in Section 628(c)(5) – *i.e.*, whether the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[240] Who should bear the burdens of production and persuasion in demonstrating that the exclusive contract prohibition either does or does not meet this test in an individual market? While a petitioner (in this case, the cable operator or satellite-delivered, cable-affiliated programmer) might normally bear these burdens, Congress established that the exclusive contract prohibition would sunset unless it continues to be necessary pursuant to this test. The Commission has explained that Section 628(c)(5) thus "creates a presumption that the rule will sunset" unless it continues to be necessary.[241] Does this call for a regime where, in response to a petition seeking to remove the prohibition in an individual market, the burden of production shifts to competitive MVPDs and other interested parties to put forth evidence demonstrating that the prohibition continues to be necessary? To provide guidance to impacted parties, should we establish a specific benchmark which, if met, would establish a rebuttable presumption that the market is not sufficiently competitive to allow the exclusive contract prohibition to sunset? For example, should the market be rebuttably presumed to not be sufficiently competitive to allow the exclusive contract prohibition to sunset if the market share held by competitive MVPDs is below a certain threshold or television households passed by a vertically integrated cable operator is above a certain threshold?[242] We ask commenters to provide support for any proposed threshold. Should we instead apply the test set forth in Section 628(c)(5) on an entirely case-by-case basis, considering all of the facts and circumstances presented, without establishing a specific benchmark? Second, how should we define the "market" for purposes of these petitions? Should we establish a specific market size for purpose of the petitions (such as DMA, county, or franchise area) or should we allow petitioners to seek a sunset of the exclusive contract prohibition for any size market they choose? Third, we seek comment on procedural deadlines. Given the likely fact-intensive nature of these petitions, we propose to establish a pleading cycle that is identical to the one established for complaints involving terrestrially delivered, cable-affiliated programming.[243] Specifically, we propose to establish a 45-day opposition period and a 15-day reply period. Fourth, to the extent that the exclusive contract prohibition has not been removed in an individual market, we propose to retain our existing rules and procedures whereby a cable operator or a satellite-delivered, cable-affiliated programmer can seek prior Commission approval to enter into an exclusive contract by demonstrating that the arrangement satisfies the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules. Fifth, we seek comment on whether to adopt a sunset date for the exclusive contract prohibition, thereby eliminating the need for further market-based petitions, subject to a review by the Commission in the year

[240] 47 U.S.C. § 548(c)(5).

[241] *2002 Extension Order*, 17 FCC Rcd at 12130-31, ¶ 16.

[242] *See infra*, Appendix A (noting recent data indicating that competitive MVPDs have a nationwide market share of 44.1 percent). While the Commission has deemed certain markets as subject to "effective competition" pursuant to Section 623 of the Act, it has also explained that this test serves a limited and defined purpose and, if met, "do[es] not demonstrate that . . . this level of competition deprives cable operators of the incentive to withhold or to take other anticompetitive actions with their affiliated programming." *2010 Program Access Order*, 25 FCC Rcd at 763, ¶ 27 n.97.

[243] *See 2010 Program Access Order*, 25 FCC Rcd at 779-80, ¶ 49 (providing the defendant with 45 days to file an answer to a complaint alleging an "unfair act" involving terrestrially delivered, cable-affiliated programming to ensure that the defendant has adequate time to develop a response); *see also* 47 C.F.R. §§ 76.1001(b)(2)(i), 76.1003(f).

prior to the sunset date. Should the sunset date be five years from the current sunset date (*i.e.*, until October 5, 2017), consistent with the two prior five-year extensions?[244]

71. We also seek comment on the practical effect of sunsetting the exclusive contract prohibition on a market-by-market basis. For example, to the extent that certain competitive MVPDs, such as DBS providers, market their service on a nationwide basis, how will the sunset of the exclusive contract prohibition in individuals markets impact their marketing efforts? For example, if a certain satellite-delivered, cable-affiliated programming network is available to DBS customers in some markets, but not in others due to exclusive contracts with cable operators, how burdensome will it be for DBS providers to inform subscribers and potential customers of the limited availability of this programming and to implement the selective availability of the programming? In addition to this potential concern, we seek comment on the other costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming throughout the nation to reliance instead on a market-by-market assessment.[245]

(ii) Retaining an Exclusive Contract Prohibition for Satellite-Delivered, Cable-Affiliated RSNs and Other Satellite-Delivered, Cable-Affiliated "Must Have" Programming

72. We seek comment on whether we should retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming. The Commission has previously explained that RSNs have no good substitutes, are important for competition, and are non-replicable.[246] Moreover, in his dissenting opinion to the D.C. Circuit decision affirming the *2007 Extension Order*, Judge Kavanaugh articulated the following explanation for why a ban on exclusive contracts for RSNs may be appropriate:

> I would leave open the possibility that the Government might still impose a prospective ban on some exclusive agreements between video programming distributors and affiliated *regional* video programming networks, particularly regional sports networks. That is because the upstream market in which video programming distributors contract with *regional* networks is less competitive than the national market . . . . [M]arket share and other relevant factors in certain areas may dictate tolerance of a narrow exclusivity ban. Situations where a highly desirable "must have" regional sports network is controlled by one video programming distributor might justify a targeted restraint on such regional exclusivity arrangements. I need not definitively address such a possibility in this case.[247]

73. We note, however, that the Commission in the *2010 Program Access Order* declined to adopt a flat ban on exclusive contracts involving terrestrially delivered, cable-affiliated RSNs pursuant to Section 628(b) of the Act.[248] Noting empirical evidence that withholding of an RSN in one case did not have an impact on competition,[249] the Commission declined to adopt a general conclusion regarding

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[244] *See 2002 Extension Order*, 17 FCC Rcd at 12160-61, ¶¶ 79-80; *2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

[245] *See supra* ¶ 49.

[246] *See supra* ¶ 28.

[247] *Cablevision I*, 597 F.3d at 1324 n.3 (Kavanaugh, J., dissenting).

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

[249] *See id*. at 770-71, ¶ 35 and 782-83, ¶ 52 (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, and noting that the RSN showed the games of the Charlotte Bobcats, a relatively
(continued….)

RSNs, adopting instead a case-by-case approach, albeit with a rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b).[250] The Commission explained that "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."[251]

74. Are there 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? We note that, in adopting a case-by-case approach for terrestrially delivered, cable-affiliated RSNs, the Commission was applying and interpreting Section 628(b) of the Act, which prohibits "unfair acts" that have the "purpose or effect" to "significantly hinder or prevent" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[252] In considering a sunset of the exclusive contract prohibition, however, we are applying and interpreting Section 628(c)(5) of the Act, which requires the Commission to determine whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[253] Unlike Section 628(b), the language in Section 628(c)(5) does not require the Commission to assess whether particular exclusive contracts are "unfair" or whether they have the "purpose or effect" to "significantly hinder or prevent" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. We note that two vertically integrated cable operators, Comcast and Cablevision, previously stated before the D.C. Circuit that a partial sunset of the exclusive contract prohibition is a legally permissible approach, explaining that "Section 628(c)(5) grants the FCC additional sunsetting authority, and nothing in the statute suggests that the FCC must do so on an all-or-nothing basis."[254] Does this difference in statutory language provide a basis for treating satellite-delivered, cable-affiliated RSNs differently from terrestrially delivered, cable-affiliated RSNs? In addition, are there policy reasons why the Commission may want to retain the exclusivity ban as it applies to satellite-delivered, cable-affiliated RSNs? If so, we propose to define the term "RSN" in the same way the Commission defined that term in the *2010 Program Access Order*.[255]

75. To the extent we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs, we propose to retain our existing rules and procedures whereby a cable operator or a satellite-delivered, cable-affiliated programmer can file a Petition for Exclusivity seeking prior Commission approval to enter into an exclusive contract by demonstrating that the arrangement satisfies the factors set forth in Section 628(c)(4) of the Act and Section 76.1002(c)(4) of the Commission's rules.[256] We seek comment on whether this process is sufficient for addressing those instances where an exclusive contract pertaining to a satellite-delivered, cable-affiliated RSN might serve the public interest.

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new team that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs)).

[250] *See id*.

[251] *Id*. at 770-71, ¶ 35; *see id*. (concluding that "significant hindrance" under Section 628(b) will not result in every case of RSN withholding).

[252] 47 U.S.C. § 548(b).

[253] 47 U.S.C. § 548(c)(5).

[254] Brief of Cablevision Systems Corporation and Comcast Corporation, Nos. 07-1425, 07-1487 (Oct. 8, 2008), at 64.

[255] *See supra* n.99.

[256] *See supra* ¶ 8.

We note that, if we were to retain an exclusive contract prohibition for only satellite-delivered, cable-affiliated RSNs, our rules would apply burdens to different parties depending on whether or not the programming subject to an exclusive contract is an RSN: (i) in the case of satellite-delivered, cable-affiliated RSNs, exclusive contracts with cable operators would be generally prohibited, unless a cable operator or RSN can satisfy its burden of demonstrating that an exclusive contract 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; and (ii) in the case of all other satellite-delivered, cable-affiliated programming, exclusive contracts with cable operators would be generally permitted, unless an MVPD can satisfy its burden of demonstrating that the exclusive contract violates Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules (or, potentially, Section 628(c)(2)(B) of the Act and Section 76.1002(b) of the Commission's rules[257]). Given the Commission precedent and relevant historical evidence pertaining to the importance of RSNs for competition, as well as their non-substitutability and non-replicability, we believe there is a sufficient basis for drawing this distinction between RSN and non-RSN programming.[258] We seek comment on this view.

76. Are there any other categories of satellite-delivered, cable-affiliated programming besides RSNs that can be deemed "must have" and for which we should retain the exclusivity prohibition? We note that the Commission in the *Comcast-NBCU Order* concluded that "certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming."[259] Are there other types of satellite-delivered, cable-affiliated programming besides RSNs that have no good substitutes, are important for competition, and are non-replicable, as the Commission has found with respect to RSNs?[260] To the extent that commenters contend that there are, we ask that they provide reliable, empirical data supporting their positions, rather than merely labeling such programming as "must have." In addition, we request commenters to provide a rational and workable definition of such programming that can be applied objectively. We note that in the *2007 Extension Order* the Commission declined to differentiate between categories of programming for purposes of the exclusive contract prohibition for a number of legal and policy reasons.[261] We seek comment on whether any of the concerns the Commission expressed in the *2007 Extension Order* should prevent us from retaining an exclusive contract prohibition for satellite-

[257] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[258] *See supra* ¶¶ 28, 53; *see also Cablevision II*, 649 F.3d 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.").

[259] *Comcast/NBCU Order*, 26 FCC Rcd at 4258, ¶ 46.

[260] *See supra* ¶ 28.

[261] These reasons were as follows: (i) Congress did not distinguish between different types of satellite-delivered, cable-affiliated programming in adopting the exclusive contract prohibition in Section 628(c)(2)(D) (*see 2007 Extension Order*, 22 FCC Rcd at 17839-40, ¶ 69; *see also 2002 Extension Order,* 17 FCC Rcd at 12156, ¶ 69); (ii) requests to relieve satellite-delivered, cable-affiliated programming networks from the exclusive contract prohibition can be addressed through individual exclusivity petitions satisfying the factors set forth in Section 628(c)(4) (*see 2007 Extension Order*, 22 FCC Rcd at 17839-40, ¶ 69); (iii) no commenter provided a rational and workable definition of "must have" programming that would allow the Commission to apply the exclusive contract prohibition to only this type of programming (*see id.*); (iv) the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition (*see id.*; *see also 2002 Extension Order,* 17 FCC Rcd at 12156, ¶ 69); and (v) distinguishing between different types of satellite-delivered, cable-affiliated programming might raise First Amendment concerns (*see 2007 Extension Order*, 22 FCC Rcd at 17839-40, ¶ 69; *see also 2002 Extension Order,* 17 FCC Rcd at 12156, ¶ 69).

delivered, cable-affiliated RSNs, or potentially other satellite-delivered, cable-affiliated "must have" programming, given the state of the market today.

77. With respect to First Amendment concerns, we note that the Commission in the *2010 Program Access Order* applied a rebuttable presumption of significant hindrance to one category of programming – terrestrially delivered, cable-affiliated RSNs.[262] The D.C. Circuit rejected claims that this was a content-based restriction on speech subject to strict scrutiny, explaining that:

> [T]here is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas. 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. Thus content-neutral, the presumptions are subject only to intermediate scrutiny.[263]

In applying intermediate scrutiny, the D.C. Circuit ruled 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."[264] Based on the D.C. Circuit's decision, we do not believe that retaining an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming would run afoul of the First Amendment. We seek comment on this view.

78. To the extent we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, we propose to apply the prohibition independently to the SD and HD versions of the same network. As discussed above, the Commission has concluded that HD programming is growing in significance to consumers[265] and that consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content.[266] Accordingly, the Commission has determined that it will analyze the HD version of a network separately from the SD version with similar content for purposes of determining whether an "unfair act" has the purpose or effect set forth in Section 628(b).[267] Because this same finding would appear to apply to an exclusive contract prohibition, we propose that, if a satellite-delivered, cable-affiliated programmer makes the SD version of an RSN or other "must have" programming available to MVPDs, this would not exempt the satellite-delivered, HD version of the RSN or other "must have" programming from the exclusive contract prohibition. We seek comment on this view.

79. To the extent we retain an exclusive contract prohibition pursuant to Section 628(c)(5) only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, should we adopt a date when this prohibition will sunset, subject to a review by the

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[262] *See supra* ¶ 53.

[263] *Cablevision II*, 649 F.3d at 717-18 (citations omitted).

[264] *Id*.

[265] *See 2010 Program Access Order*, 25 FCC Rcd at 784-85, ¶ 54.

[266] *See id*. at 784-85, ¶¶ 54-55.

[267] *See id*. at 784-85, ¶ 54.

Commission in the year prior to the sunset date? Should the sunset date be five years from the current sunset date (*i.e.*, until October 5, 2017), consistent with the two prior five-year extensions?[268]

80. Should we combine the two approaches to partial sunsetting of the exclusive contract prohibition, by adopting a market-by-market approach[269] and also retaining the prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming? If so, how should the two approaches interrelate? If the exclusive contract prohibition sunsets in a specific market, should this sunset also apply to satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming? Or, given the critical nature of RSNs and other "must have" programming for competition, should the exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming continue to apply even if the exclusive contract prohibition sunsets for other satellite-delivered, cable-affiliated programming in the market? Should the Commission instead assess whether the exclusive contract prohibition should continue to apply to satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming on a market-by-market basis, considering all of the facts and circumstances presented in the petition?

5. Implementation of a Sunset in a Manner that Minimizes Any Potential Disruption for Consumers

81. Whether we retain, sunset, or relax the exclusive contract prohibition, our goal is protect consumers and minimize any potential disruption. As an initial matter, as noted above,[270] many Comcast-affiliated networks are subject to program access conditions adopted in the *Comcast/NBCU Order* and will continue to be subject to these conditions for six more years (until January 2018, assuming they are not modified earlier in response to a petition[271]). These networks will not be impacted by a sunset (complete or partial). With respect to other satellite-delivered, cable-affiliated networks, we seek comment below on how sunsetting the exclusive contract prohibition (wholly or partially) will impact consumers, and whether a phased implementation of a sunset is necessary to minimize any potential disruption to consumers. As discussed above, to the extent the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment above on sunsetting or relaxing the prohibition. To the extent the prohibition sunsets (wholly or partially), we envision that there are at least two possible scenarios with respect to existing affiliation agreements. We seek comment on which scenario is more likely and if there are any other likely scenarios. First, if the exclusive contract prohibition were to sunset, an existing affiliation agreement between a cable-affiliated programmer and an MVPD pertaining to a satellite-delivered, cable-affiliated programming network might allow the programmer to terminate or modify the existing agreement immediately on the effective date of the sunset and to instead enter into an exclusive contract with a cable operator. Second, even if the exclusive contract prohibition were to sunset, an existing affiliation agreement might require the satellite-delivered, cable-affiliated programmer to continue to provide the programming to the MVPD for the duration of the term of the affiliation agreement despite the sunset. We seek comment on these alternative scenarios below.

a. Termination or Modification of Affiliation Agreements on the Effective Date of the Sunset

82. To the extent that existing affiliation agreements permit satellite-delivered, cable-affiliated programmers to terminate or modify the agreements immediately on the effective date of the

[268] *See 2002 Extension Order*, 17 FCC Rcd at 12160-61, ¶¶ 79-80; *2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

[269] *See supra* ¶¶ 69-71.

[270] *See supra* ¶ 26.

[271] *See supra* n.90.

sunset and to instead enter into an exclusive contract with a cable operator, is there any basis to expect that many satellite-delivered, cable-affiliated programmers would terminate or modify existing agreements simultaneously and thereby cause significant disruption to consumers by depriving them of programming they have come to expect? Are our existing rules sufficient to prevent any customer disruption? For example, to the extent that a cable-affiliated programmer terminates or modifies an existing affiliation agreement with an MVPD pertaining to a satellite-delivered, cable-affiliated programming network and instead enters into an exclusive arrangement with a cable operator, the MVPD could file a complaint alleging a violation of Section 628(b) of the Act[272] (and, potentially, Section 628(c)(2)(B) of the Act[273]). While our program access rules contain specific procedures for the filing of a petition for a standstill along with a program access complaint when seeking to renew an existing affiliation agreement,[274] should our standstill procedures also apply when an MVPD files a program access complaint based on a satellite-delivered, cable-affiliated programmer's mid-term termination or modification of an affiliation agreement resulting from the sunset? If the standstill petition is granted, the price, terms, and other conditions of the existing affiliation agreement will remain in place pending resolution of the program access complaint, thereby reducing consumer disruption.

83. Rather than relying on the complaint and standstill process, should we instead abrogate provisions of affiliation agreements that would allow satellite-delivered, cable-affiliated programmers to terminate or modify their existing agreements with MVPDs immediately on the effective date of the sunset? We seek comment regarding the benefits and burdens of abrogating contractual provisions that otherwise would permit a programmer to terminate or modify its existing agreement with an unaffiliated MVPD immediately upon sunset of the exclusive contract prohibition.[275] We seek comment regarding how the abrogation of such contractual provisions would be congruous with a possible finding to sunset the exclusive contract prohibition. In *NCTA v. FCC*, the D.C. Circuit upheld the Commission's abrogation of existing contracts in the program access context.[276] Alternatively, to minimize any potential disruption to consumers, should we adopt a phased implementation of the sunset? For example, should we provide that, for a period of three years from the sunset date, a cable-affiliated programmer cannot enter into an exclusive contract with a cable operator for a satellite-delivered, cable-affiliated programming network that is an RSN (assuming the prohibition is not retained for RSNs) or is ranked within the Top 20 cable networks as measured by either prime time ratings, average all-day ratings, or total number of subscribers? Should we adopt a similar restriction, for a period of two years from the sunset date, for a satellite-delivered, cable-affiliated programming network that is ranked within the Top 21-50 cable networks? We seek comment on these proposals and any other appropriate ways to minimize any disruption to consumers resulting from the sunset in the event that existing affiliation agreements permit satellite-delivered, cable-affiliated programmers to terminate or modify them on the effective date of the sunset.

b. Continued Enforcement of Existing Affiliation Agreements Despite the Sunset

84. To the extent that existing affiliation agreements require cable-affiliated programmers to continue to provide satellite-delivered, cable-affiliated programming networks to MVPDs for the duration

[272] *See supra* ¶¶ 48-57.

[273] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[274] *See* 47 C.F.R. § 76.1003(l).

[275] *See Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670-71 (D.C. Cir. 2009).

[276] *See id*.

of the term of the existing agreement despite the sunset of the exclusive contract prohibition, we seek comment on the interplay between the sunset and the discrimination provision of the program access rules. For example, assume that a cable-affiliated programmer has existing affiliation agreements for a satellite-delivered, cable-affiliated programming network with three MVPDs (including one cable operator) subject to the following termination dates: December 31, 2012 (cable operator); December 31, 2013 (MVPD A); December 31, 2014 (MVPD B). If the satellite-delivered, cable-affiliated programmer enters into an exclusive contract with the cable operator after its current agreement expires on December 31, 2012, would the satellite-delivered, cable-affiliated programmer be required to make the programming available to all MVPDs until after the expiration of the latest-expiring affiliation agreement with an MVPD other than the cable operator that is a party to the exclusive contract? We seek comment on whether it would be impermissibly discriminatory in violation of Section 628(c)(2)(B) if the satellite-delivered, cable-affiliated programmer were to refuse to license the network to MVPD A after December 31, 2013, while continuing to provide the programming to MVPD B until its agreement expires on December 31, 2014, based on the future enforcement of an exclusive contract with the cable operator as of January 1, 2015, after the expiration of the agreement with MVPD B.[277] While the satellite-delivered, cable-affiliated programmer's discriminatory treatment of MVPD A relative to MVPD B and the cable operator during the period of December 31, 2013 to December 31, 2014 might be justified based on a legitimate business reason, is the future enforcement of an exclusive contract a legitimate business reason for such discriminatory conduct? If not, then the satellite-delivered, cable-affiliated programmer would not be permitted to have the exclusivity period with the cable operator begin, or to refuse to license the programming to other MVPDs, until all affiliation agreements with other MVPDs expire. Thus, in this scenario, absent a legitimate business reason, the satellite-delivered, cable-affiliated programmer would be required to enter into an affiliation agreement with MVPD A that terminates no earlier than December 31, 2014 (*i.e.*, the expiration of the latest-expiring affiliation agreement with an MVPD other than the cable operator that is a party to the exclusive contract). We seek comment on this view.

85. To the extent that affiliation agreements require cable-affiliated programmers to continue to provide satellite-delivered, cable-affiliated programming networks to MVPDs for the duration of the term of the existing agreement despite the sunset, does the anti-discrimination provision of Section 628(c)(2)(B) as described here prevent the enforcement of any exclusive contract until the expiration of the latest-expiring affiliation agreement with an MVPD other than the cable operator that is a party to the exclusive contract? Will this limit the immediate impact of the sunset (complete or partial) and help to minimize any potential disruption to consumers? What impact, if any, does Section 628(c)(2)(B)(iv) have on this discussion?[278] Even if this section could be read to immunize post-sunset exclusive contracts from being challenged as impermissibly discriminatory in violation of Section 628(c)(2)(B), would this provision allow a satellite-delivered, cable-affiliated programmer to selectively refuse to license programming to certain MVPDs based on future enforcement of an exclusive contract, as described here?[279]

[277] To be sure, regardless of whether the market includes MVPD B, MVPD A might also challenge the exclusive contract pursuant to Section 628(b) (*see supra* ¶¶ 48-57) or, potentially, Section 628(c)(2)(B) as an unreasonable refusal to license (*see supra* ¶¶ 59-63).

[278] *See supra* ¶ 61; 47 U.S.C. § 548(c)(2)(B)(iv) (providing that the anti-discrimination provision of Section 628(c)(2)(B) of the Act does not prohibit a satellite-delivered, cable-affiliated programmer from "entering into an exclusive contract that is permitted under [Section 628(c)(2)(D)]").

[279] *See supra* ¶ 84.

6. First Amendment

86. We ask commenters to consider carefully how the First Amendment impacts our review of the exclusive contract prohibition, including the proposals to relax the prohibition.[280] As the D.C. Circuit explained in rejecting a facial challenge to the constitutionality of the program access provisions, these provisions will survive intermediate scrutiny if they "further[] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[281] Given the current state of competition in the video programming market and the video distribution market, does the First Amendment require the exclusive contract prohibition as it exists today to sunset or to be relaxed? Is a prohibition on all exclusive contracts in all markets between cable operators and cable-affiliated programmers pertaining to satellite-delivered, cable-affiliated programming "no greater than is essential" to the furtherance of the substantial government interest in promoting competition in the MVPD market? Would retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, and/or allowing the prohibition to sunset on a market-by-market basis, be a sufficiently tailored approach?

87. We note that, in rejecting a facial First Amendment challenge to the *2010 Program Access Order* in which the Commission adopted a case-by-case approach for considering unfair acts involving terrestrially delivered, cable-affiliated programming, the D.C. Circuit 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."[282] Moreover, the D.C. Circuit stated that the Commission, in adopting this case-by-case approach, "has no obligation to establish that vertically integrated cable companies retain a stranglehold on competition nationally or that all withholding of terrestrially delivered programming negatively affects competition."[283] Is a case-by-case approach pursuant to Section 628(b) (and, potentially, Section 628(c)(2)(B)[284]) or a narrowed application of the exclusive contract prohibition as discussed above, rather than the current broad, prophylactic prohibition, preferable under the First Amendment given the competitive environment today? We also seek comment on the First Amendment implications of a phased implementation of a sunset as discussed above to minimize any potential disruption to consumers.[285]

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[280] *See supra* Section III.A.4.b.

[281] *Time Warner*, 93 F.3d at 978 (quoting *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 662 (1994) (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968))).

[282] *Cablevision II*, 649 F.3d at 711-12 (quoting 47 U.S.C. § 548(b)).

[283] *Id.* at 12.

[284] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[285] *See supra* ¶¶ 82-83.

7. Costs and Benefits

88. In addition to the specific questions noted above,[286] we ask commenters to consider generally the costs and benefits associated with either retaining, sunsetting, or relaxing the exclusive contract prohibition as described herein. We believe that retaining the exclusive contract prohibition in its entirety as it exists today will result in certain costs, such as unnecessarily restricting procompetitive arrangements that in certain instances may foster competition in the video distribution market and promote competition and diversity in the video programming market.[287] While a case-by-case approach, either pursuant to a Section 628(b) complaint (and, potentially, a Section 628(c)(2)(B) complaint[288]) or a market-based petition, will better enable the Commission to consider the unique facts and circumstances presented in each case, this approach will also result in certain costs by requiring the affected parties and the Commission to expend resources litigating and resolving the complaints and petitions.[289] Retaining an exclusive contract prohibition for programming that is demonstrated to be important for competition, non-replicable, and without good substitutes (*i.e.*, satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming),[290] may help to reduce these costs by eliminating the need to file complaints with respect to this class of programming. To the extent possible, we encourage commenters to quantify the costs and benefits of the different approaches to the exclusive contract prohibition as described herein. Which of the approaches would be most beneficial to the public? When would the public realize these benefits? Which of these approaches would be least burdensome?

8. Subdistribution Agreements

89. We seek comment on the impact of a sunset (complete or partial) of the exclusive contract prohibition on the Commission's rules pertaining to exclusive subdistribution agreements.[291] 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 satellite broadcast programming

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[286] *See supra* ¶ 49 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts as it exists today to reliance instead on a case-by-case process, including Section 628(b) complaints); ¶ 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); ¶ 66 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts as it exists today to reliance instead on a case-by-case process, including non-price discrimination complaints); ¶ 71 (seeking comment on the costs and benefits of moving from a broad, prophylactic prohibition on exclusive contracts throughout the nation as it exists today to reliance instead on a market-by-market assessment).

[287] *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 encouraging innovation and investment in programming and allowing for 'product differentiation' among distributors."); *see supra* ¶¶ 44-45 (discussing the impact of the exclusive contract prohibition in the video programming market).

[288] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[289] *See supra* ¶ 55 (acknowledging that a case-by-case complaint process for addressing exclusive contracts involving satellite-delivered, cable-affiliated, national programming networks may be burdensome for litigants and the Commission, especially in comparison to the current broad, prophylactic prohibition).

[290] *See supra* ¶¶ 72-80 (seeking comment on whether to retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming).

[291] *See* 47 C.F.R. § 76.1002(c)(3); *see also 1993 Program Access Order*, 8 FCC Rcd at 3387-88, ¶¶ 68-70; *1994 Program Access Order*, 10 FCC Rcd at 1941-44, ¶¶ 89-92.

vendor to distribute the vendor's programming to competing multichannel video programming distributors."[292] Based on the exclusive contract prohibition, the Commission in the *1993 Program Access Order* adopted certain restrictions on exclusive subdistribution agreements 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."[293] Specifically, a cable operator engaged in subdistribution (i) may not require a competing MVPD to purchase additional or unrelated programming as a condition of such subdistribution;[294] (ii) may not require a competing MVPD to provide access to private property in exchange for access to programming; [295] (iii) may not charge a competing MVPD more for programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge;[296] and (iv) must 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, the competing MVPD must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.[297] We propose to eliminate these restrictions to the extent the exclusive contract prohibition sunsets and seek comment on this proposal.[298]

9. Common Carriers and Open Video Systems

90. The Commission's rules contain provisions pertaining to exclusive contracts involving common carriers and OVS in served areas that mirror the rules applicable to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas.[299] With respect to common carriers, these rules pertain to exclusive contracts between a satellite-delivered, common-carrier-affiliated programmer and a common carrier or its affiliate that provides video programming by any means directly to subscribers.[300] With respect to OVS, these rules pertain to exclusive contracts (i) between a satellite-delivered, OVS-affiliated programmer and an OVS or its affiliate that provides video programming on its OVS;[301] and (ii) between a satellite-delivered, cable-affiliated programmer and an OVS video programming provider in which a cable operator has an attributable interest.[302] We propose

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[292] 47 C.F.R. § 76.1000(k).

[293] *1993 Program Access Order*, 8 FCC Rcd at 3387-88, ¶ 68; *see 1994 Program Access Order*, 10 FCC Rcd at 1943-44, ¶ 92 (explaining that the Commission's concerns were limited to exclusive, rather than nonexclusive, subdistribution agreements).

[294] *See* 47 C.F.R. § 76.1002(c)(3)(ii)(A).

[295] *See* 47 C.F.R. § 76.1002(c)(3)(ii)(B).

[296] *See id*.

[297] *See id*.

[298] We note that 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. Compare 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). We intend to conform this rule as amended in this proceeding to the amendments previously adopted in the *1994 Program Access Order*.

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

[300] *See* 47 C.F.R. § 76.1004; *see also* 47 U.S.C. § 548(j).

[301] *See* 47 C.F.R. § 76.1507(a)(2), (a)(3)(ii); *1996 OVS Order*, 11 FCC Rcd at 18315-18, ¶¶ 175-180.

[302] *See* 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).

that any amendments we adopt herein to our rules pertaining to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas will apply equally to these rules pertaining to common carriers and OVS. We also propose to conform the rules pertaining to exclusive subdistribution agreements involving OVS to the rules applicable to cable operators and seek comment on this proposal.[303]

10. Impact of a Sunset on Existing Merger Conditions

91. We believe that conditions adopted in two previous merger orders may be impacted if the exclusive contract prohibition were to sunset (wholly or partially). We seek comment on this impact below.

a. *Adelphia Order* Merger Conditions

92. Pursuant to merger conditions adopted in the *Adelphia Order*, certain terrestrially delivered RSNs ("Covered RSNs") affiliated with TWC are currently required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming, including the exclusive contract prohibition.[304] Among other things, the conditions state as follows with respect to exclusivity (the "exclusivity conditions"):

> (i) "Time Warner [Cable], and [its] existing or future Covered RSNs, regardless of the means of delivery, shall not offer any such RSN on an exclusive basis to any MVPD, and . . . Time Warner [Cable], and [its] Covered RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis . . .";[305]
>
> (ii) "Time Warner [Cable] will not enter into an exclusive distribution arrangement with any such Covered RSN, regardless of the means of delivery";[306] and
>
> (iii) "Th[is] exclusive contracts and practices . . . requirement of the program access rules will apply to Time Warner [Cable] and [its] Covered RSNs for six

[303] The Commission's rules pertaining to exclusive subdistribution agreements involving OVS were adopted in 1996. *See 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)).

[304] *See Adelphia Order,* 21 FCC Rcd at 8274, ¶¶ 156-157 (requiring terrestrially delivered RSNs in which Time Warner has or acquires an attributable interest to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming, citing 47 C.F.R. § 76.1002), 8276, ¶ 162, and 8336, Appendix B, § B.1 (citing 47 C.F.R. § 76.1002); *see also Time Warner Order*, 24 FCC Rcd at 893, ¶ 26 (approving transaction separating Time Warner from TWC and explaining that the *Adelphia Order* program access conditions will continue to apply to TWC post-restructuring but will no longer apply to Time Warner). An RSN as defined in the *Adelphia Order* is "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 and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." *Adelphia Order*, 21 FCC Rcd at 8336, Appendix B, § A. While these conditions originally applied to Comcast as well, they were superseded by the *Comcast/NBCU Order*. *See Comcast/NBCU Order*, 26 FCC Rcd at 4364, Appendix A, Condition VI.

[305] *See Adelphia Order*, 21 FCC Rcd at 8336, Appendix B, § B.1.a.

[306] *See id*. at 8336, Appendix B, § B.1.b.

years, *provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission*."[307]

93. These conditions are scheduled to expire in July 2012.[308] Depending on whether and how we revise the exclusive contract prohibition, and if we do so before these conditions expire, we may need to modify these exclusivity conditions to conform to our revised rules. We envision four alternative scenarios. First, to the extent that we retain the exclusive contract prohibition in its entirety as it exists today, including for RSNs, there will be no need to modify the exclusivity conditions because the program access rules will remain the same. Second, to the extent that we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming only,[309] there will be no need to modify the exclusivity conditions because the exclusive contract prohibition will remain the same with respect to RSNs. Third, to the extent we establish a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the exclusive contract prohibition on a market-by-market basis,[310] and grant of such a petition includes RSNs,[311] then we would expect to modify the exclusivity conditions to provide that Covered RSNs in markets covered by such a petition (if granted) will no longer be subject to these exclusivity conditions. If the grant of such a petition does not include RSNs, however, there will be no need to modify the exclusivity conditions because the exclusive contract prohibition will remain the same with respect to RSNs.[312] Fourth, to the extent we sunset the exclusive contract prohibition in its entirety, including for RSNs, then we would expect to modify the exclusivity conditions to provide that Covered RSNs will no longer be subject to these exclusivity conditions; rather, exclusive contracts for Covered RSNs may be assessed on a case-by-case basis in response to a program access complaint alleging a violation of Section 628(b)[313] (and, potentially, Section 628(c)(2)(B)[314]). We seek comment on this interpretation.

b. *Liberty Media Order* Merger Conditions

94. Pursuant to merger conditions adopted in the *Liberty Media Order*, certain programmers affiliated with Liberty Media and DIRECTV are subject to the following conditions (the "exclusivity conditions"), among others:

> (i) "Liberty Media shall not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD. Liberty Media shall continue to make such services available to all MVPDs on a non-exclusive basis . . .";[315]

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[307] *See id.* at 8336, Appendix B, § B.1.d (emphasis added); *see also id.* at 8274, ¶ 157.

[308] *See id.* at 8336, Appendix B, § B.1.d.

[309] *See supra* ¶¶ 72-80.

[310] *See supra* ¶¶ 69-71.

[311] *See supra* ¶ 80.

[312] *See id.*

[313] *See 2010 Program Access Order*, 25 FCC Rcd at 792-93, ¶ 69 n.252.

[314] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[315] *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.1 (2008) ("*Liberty Media Order*"). The conditions state that the term "Liberty Media" includes "any entity or program rights holder in which Liberty Media or John Malone holds an (continued….)

(ii) "DIRECTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.";[316]

(iii) "As long as Liberty Media holds an attributable interest in DIRECTV, DIRECTV will deal with any Affiliated Program Rights Holder with respect to programming services the Affiliated Program Rights Holder controls as a vertically integrated programmer subject to the program access rules.";[317]

(iv) "These conditions will apply to Liberty Media, DIRECTV, and any Affiliated Program Rights Holder until the later of a determination by the Commission that Liberty Media no longer holds an attributable interest in DIRECTV or the Commission's program access rules no longer remain in effect (provided 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*)."[318]

95. These particular *Liberty Media Order* conditions differ from similar conditions in the *Adelphia Order* in that (i) they apply not only to RSNs, but to both national and regional programming services;[319] and (ii) they do not expire after the passage of a certain period of time.[320] Depending on whether and how we revise the exclusive contract prohibition of the program access rules, we may need to modify these exclusivity conditions to conform to our revised rules. First, to the extent that we retain the exclusive contract prohibition in its entirety as it exists today, there will be no need to modify the exclusivity conditions because the program access rules will remain the same. Second, to the extent that we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming only,[321] there will be no need to modify the exclusivity conditions with respect to RSNs and other "must have" programming because the exclusive contract prohibition will remain the same with respect to such programming. With respect to non-RSN programming and other programming that is not deemed "must have," however, we would expect to modify the exclusivity conditions to provide that exclusive contracts involving such programming will no longer be prohibited. To the extent any covered non-RSN/non-"must have" programming is cable-affiliated, however, exclusive contracts may be assessed on a case-by-case basis in response to a program

(Continued from previous page)

attributable interest. Thus, the term 'Liberty Media' includes Discovery Communications." *Id*. at 3340-41 n.3. Moreover, the conditions provide that "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." *Id*.

316 *Liberty Media Order*, 23 FCC Rcd at 3341, Appendix B, § III.2. The conditions state that 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." *Id*. at 3341 n.5.

317 *Id.* at 3341, Appendix B, § III.3.

318 *Id.* at 3341, Appendix B, § III.6 (emphasis added).

319 *Compare Liberty Media Order*, 23 FCC Rcd at 3340-41, Appendix B, § III *with Adelphia Order*, 21 FCC Rcd at 8336-37, Appendix B, § B.1.

320 *Compare Liberty Media Order*, 23 FCC Rcd at 3341, Appendix B, § III.6 *with Adelphia Order*, 21 FCC Rcd at 8336, Appendix B, § B.1.d.

321 *See supra* ¶¶ 72-80.

access complaint alleging a violation of Section 628(b)[322] (and, potentially, Section 628(c)(2)(B)[323]). Third, to the extent we establish a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the exclusive contract prohibition on a market-by-market basis,[324] and grant of such a petition includes satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming,[325] then we would expect to modify the exclusivity conditions to provide that exclusive contracts in markets covered by such a petition (if granted) will not be prohibited under these conditions. If the grant of such a petition does not include satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, however, there will be no need to modify the exclusivity conditions with respect to RSNs and other "must have" programming because the exclusive contract prohibition will remain the same with respect to such programming.[326] Fourth, to the extent we sunset the exclusive contract prohibition in its entirety, including for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming, then we would expect to modify the exclusivity conditions to provide that exclusive contracts will not be prohibited. Again, however, to the extent any of the covered programming is cable-affiliated, exclusive contracts will be assessed on a case-by-case basis in response to a program access complaint alleging a violation of Section 628(b)[327] (and, potentially, Section 628(c)(2)(B)[328]). We seek comment on this interpretation.[329]

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[322] *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). Moreover, 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.").

[323] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[324] *See supra* ¶ 69-71.

[325] *See supra* ¶ 80.

[326] *See id.*

[327] *See supra* n.322.

[328] *See supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

[329] In contrast to the *Adelphia Order* and 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.

B. Potential Revisions to the Program Access Rules to Better Address Alleged Violations

96. The Commission initially adopted its program access rules in 1993.[330] Other than the previous extensions of the exclusive contract prohibition and certain procedural changes, including the adoption of a process for the award of damages, establishing aspirational deadlines for the processing of complaints, and implementing party-to-party discovery, these rules have remained largely unchanged since this time.[331] We seek comment on how our rules can be improved, especially in light of marketplace developments and commenters' experience with these rules over the past two decades.

1. Procedural Rules

97. As an initial matter, while our program access procedural rules provide a defendant with 20 days after service of a complaint to file an answer,[332] the Commission has provided defendants with 45 days from the date of service to file an answer to a Section 628(b) complaint alleging an "unfair act" involving terrestrially delivered, cable-affiliated programming to ensure that the defendant has adequate time to develop a response.[333] The Commission explained that additional time was appropriate because, unlike complaints alleging a violation of the prohibitions 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).[334] To the extent the exclusive contract prohibition were to sunset (wholly or partially), we propose to adopt the same 45-day answer period in complaint proceedings alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b). We seek comment on this proposal. Because all complaints alleging a violation of Section 628(b) will involve the claim that the conduct at issue has the purpose or effect set forth in Section 628(b), we propose to amend our rules to provide for a 45-day answer period for all complaints alleging a violation of Section 628(b). We seek comment on this proposal. Are there any other changes we should make to our program access procedural rules to accommodate the case-by-case consideration of exclusive contracts involving satellite-delivered, cable-affiliated programming under Section 628(b)?

2. Volume Discounts

98. We also seek comment on whether our program access rules adequately address potentially discriminatory volume discounts and, if not, how these rules should be revised to address these concerns. Some MVPDs have expressed concern that cable-affiliated programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs due to volume discounts, which are based on the number of subscribers the MVPD serves.[335] As a result, smaller MVPDs claim that they are

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[330] *See generally 1993 Program Access Order*.

[331] *See generally 1994 Program Access Order*; *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); *2007 Extension Order*, 22 FCC Rcd at 17847-59, ¶¶ 83-113.

[332] *See* 47 C.F.R. § 76.1003(e).

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

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

[335] *See, e.g.*, Comments of the American Cable Association, MB Docket No. 11-128 (Sept. 9, 2011), at 7-10 ("ACA Comments on RSN Report"); Comments of the American Cable Association, MB Docket No. 07-269 (June 8, 2011), at 9-10 ("ACA Comments on Video Competition Report"); Comments of Hiawatha Broadband Corporation, Inc., National Rural Telecommunications Cooperative, Rural Broadband Alliance, Rural Independent Competitive Alliance, MB Docket No. 07-269 (June 8, 2011), at 17 ("Hiawatha et al. Comments"); Reply of the Fair Access to Content and Telecommunications Coalition, the National Telecommunications Cooperative Association, and the (continued….)

placed at a significant cost disadvantage relative to larger MVPDs.[336] Some commenters have claimed that this price differential is not cost-based because program production and acquisition costs are sunk; delivery costs do not vary; and administrative costs are not different.[337] According to some commenters, without a basis in cost, this wholesale practice amounts to price discrimination.[338]

99. The anti-discrimination provision in Section 628(c)(2)(B) of the Act provides 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."[339] The Commission's rules provide that:

> 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.[340]

Thus, the Commission's rules contemplate that an MVPD may file a program access complaint challenging volume-based pricing in certain circumstances. In the *Comcast/NBCU Order*, the Commission declined to adopt a condition that would prohibit Comcast-NBCU from offering volume-based discounts for its video programming, finding such a prohibition to be unnecessary because "the

(Continued from previous page)
Western Telecommunications Alliance, MB Docket No. 10-56 (Aug. 19, 2010), at 8 ("FACT/NTCA/WTA Reply on Comcast/NBCU"); Comments of the American Cable Association, MB Docket No. 10-56 (June 21, 2010), at 38-40 ("ACA Comments on Comcast/NBCU"). We note that some commenters also raised this concern in response to the *2007 Program Access NPRM*. *See* Comments of the American Cable Association, MB Docket No. 07-198 (Jan. 3, 2008), at 17-18 ("ACA Comments on 2007 NPRM"); Reply Comments of the National Telecommunications Cooperative Association, MB Docket No. 07-198 (Feb. 12, 2008), Attachment A at 1-3 ("NTCA Reply Comments on 2007 NPRM").

[336] *See* ACA Comments on Video Competition Report at 9 ("small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs"); *see also* ACA Comments on RSN Report at 8; Hiawatha et al. Comments at 17; FACT/NTCA/WTA Reply on Comcast/NBCU at 8; ACA Comments on Comcast/NBCU at 38-39; ACA Comments on 2007 NPRM at 19; NTCA Reply Comments on 2007 NPRM, Attachment A at 2.

[337] *See* ACA Comments on Video Competition Report at 10; ACA Comments on 2007 NPRM at 17; NTCA Reply Comments on 2007 NPRM, Attachment A at 1-2.

[338] *See* ACA Comments on Video Competition Report at 10; ACA Comments on 2007 NPRM at 17; *see also* ACA Comments on Comcast/NBCU at 39.

[339] 47 U.S.C. § 548(c)(2)(B)(iii); *see* H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 ("*In lieu of permitting volume discounts*, the conference agreement amends the House provision regarding discrimination by satellite cable programming vendors affiliated with cable operators to permit such vendors to establish different prices, terms and conditions which take into account economies of scale, cost savings, or other direct and economic benefits reasonably attributable to the number of subscribers served by the distributor.") (emphasis added).

[340] 47 C.F.R. § 76.1002(b)(3) note; *see 1993 Program Access Order*, 8 FCC Rcd at 3407-08, ¶ 108 ("we will not require the vendor to provide a strict cost justification for the structure of such standard volume factors, but will also recognize non-cost economic benefits related to increased viewership as identified by the vendor").

specific matter of volume-based discounts is adequately addressed by the Commission's program access rules."[341]

100. Despite the concerns expressed by some MVPDs regarding allegedly discriminatory volume discounts and the availability of the existing complaint process, the Commission has not received program access complaints alleging that particular volume discounts violate Section 628(c)(2)(B) of the Act. We seek information about specific instances of perceived volume discount discrimination, along with explanations of why the alleged conduct amounts to a violation of the Commission's rules. We seek comment on the reasons for the lack of program access complaints alleging discriminatory volume discounts, despite the apparent concern among some MVPDs regarding this issue. Do our current program access rules and procedures prevent or discourage the filing of legitimate complaints pertaining to this issue? Is the complaint process too costly and time-consuming with respect to complaints alleging price discrimination? If so, we seek comment on how we might improve our rules and procedures to avoid impeding the filing of legitimate complaints. Are there procedural tools we might use, such as establishing rebuttable presumptions, that will expedite the complaint process while ensuring fairness to all parties? While the Commission has stated that satellite-delivered, cable-affiliated programmers may justify volume discounts based on "non-cost economic benefits" related to increased viewership, it has not defined these benefits in the rules.[342] Should we continue to consider "non-cost economic benefits" on a case-by-case basis due to the various factors, such as advertising and online and VOD offerings, that can be considered in setting prices? Should our rules specifically list those "non-cost economic benefits" related to increased viewership that might justify volume discounts? If so, what non-cost economic benefits should be identified? Should these benefits be limited to increased advertising revenues resulting from increased viewership?[343] Should satellite-delivered, cable-affiliated programmers be required to demonstrate in response to a complaint the increase in advertising revenues resulting from licensing programming to a larger MVPD and how this increase justifies the volume discount provided to the larger MVPD relative to the complainant?

3. Uniform Price Increases

101. We also seek comment on whether and how we should revise our rules to address uniform price increases imposed by satellite-delivered, cable-affiliated programmers. In previous merger decisions, the Commission has discussed the possibility that a vertically integrated cable operator could disadvantage its competitors in the video distribution market by raising the price of a network to all distributors (including itself) to a level greater than that which would be charged by a non-vertically integrated supplier.[344] The Commission explained that a vertically integrated cable operator might employ such a strategy to raise its rivals' costs.[345] Because rival MVPDs would have to pay more for the programming, they would likely respond either by raising their prices to subscribers, not purchasing the programming, or reducing marketing activities.[346] The vertically integrated cable operator could then

[341] *Comcast/NBCU Order*, 26 FCC Rcd at 4261-62, ¶ 56.

[342] *See supra* ¶ 99.

[343] *See 1993 Program Access Order*, 8 FCC Rcd at 3407-08, ¶ 108 ("[O]ther parties have argued that in addition to cost economies, a larger number of subscribers confers direct non-cost 'economic benefits' by delivering more viewers, thus increasing revenue from advertising more than proportionally, and providing a larger base for amortizing the costs of the programming service. We believe that this interpretation most closely follows the language of Section 628 regarding 'direct and legitimate economic benefits.' which distinguishes 'volume differences' from the 'cost differences' considered in the first permissible factor.") (citations omitted).

[344] *See Comcast/NBCU Order*, 26 FCC Rcd at 4259, ¶ 49; *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; *see also News/Hughes Order*, 19 FCC Rcd at 510-11, ¶ 78 and 512-13, ¶¶ 82-83.

[345] *See Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; *see also News/Hughes Order*, 19 FCC Rcd at 510-11, ¶ 78.

[346] *See Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119.

enjoy a competitive advantage, because the higher price for the programming that it would pay would be an internal transfer that it could disregard when it sets its own prices.[347] By forcing its competitors either to pay more for the programming and increase their retail rates, or forgo purchasing the programming, the vertically integrated cable operator could raise its prices to some extent without losing subscribers.[348] The Commission has also stated that this strategy of uniform price increases does not necessarily violate the anti-discrimination provision of the program access rules because the price increases would be applied to all distributors equally and thus does not involve discriminatory conduct.[349] In previous merger orders, the Commission has sought to address this issue by adopting a baseball-style arbitration remedy to maintain the pre-integration balance of bargaining power between vertically integrated programming networks and rival MVPDs.[350]

102. We seek comment on whether and how we should revise our rules to address uniform price increases imposed by satellite-delivered, cable-affiliated programmers.[351] We also seek comment on actual experiences of discriminatory uniform price increases. Is there any basis to interpret the anti-discrimination provision in Section 628(c)(2)(B) as applying to uniform price increases? We note that, in employment law, a practice that appears facially neutral may nonetheless be discriminatory if it has a disparate impact on a certain class.[352] While a uniform price increase appears facially neutral in that it applies to all MVPDs equally, it has a disparate impact on MVPDs that are not affiliated with the cable-affiliated programmer because the price increase is not merely an internal transfer for unaffiliated MVPDs. To the extent that a uniform price increase is not covered by the anti-discrimination provision in Section 628(c)(2)(B), can it be addressed on a case-by-case basis in a Section 628(b) complaint alleging that a uniform price increase is an "unfair act" that has the "purpose or effect" of "significantly hindering or preventing" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers? To the extent that a uniform price increase is actionable under Section 628(c)(2)(B) or Section 628(b), how can we distinguish an anticompetitive uniform price increase intended to raise rivals' costs from a price increase dictated by the market?

[347] *See Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; *see also News/Hughes Order*, 19 FCC Rcd at 512-13, ¶¶ 82-83.

[348] *See Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119. The Commission explained that the profitability of a uniform price increase would depend on the market share of the MVPD within the distribution footprint of the affiliated programming network. *See id.*

[349] *See Comcast/NBCU Order*, 26 FCC Rcd at 4259, ¶ 49; *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; *News/Hughes Order*, 19 FCC Rcd at 513, ¶ 84 and 547-58, ¶ 162.

[350] *See Comcast/NBCU Order*, 26 FCC Rcd at 4259, ¶ 50; *Liberty Media Order*, 23 FCC Rcd at 3306-07, ¶ 90; *Adelphia Order*, 21 FCC Rcd at 8274, ¶ 156; *News/Hughes Order*, 19 FCC Rcd at 552, ¶¶ 173-75. In this baseball-style arbitration, each party submits a "final offer" for carriage of the programming at issue. *See Comcast/NBCU Order*, 26 FCC Rcd at 4364-65, Condition VII.A; *Liberty Media Order*, 23 FCC Rcd at 3346-47, Condition IV.A; *Adelphia Order*, 21 FCC Rcd at 8337, Condition B.2; *News/Hughes Order*, 19 FCC Rcd at 553, ¶ 177. An arbitrator then chooses the final offer that "most closely approximates the fair market value of the programming carriage rights at issue." *Comcast/NBCU Order*, 26 FCC Rcd at 4366, Condition VII.B.4; *Liberty Media Order*, 23 FCC Rcd at 3346-47, Condition IV.B.3; *Adelphia Order*, 21 FCC Rcd at 8338, Condition B.3.c; *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[351] *See* ACA Comments on RSN Report at 10-11 (expressing concern with uniform price increases); ACA Comments on Comcast/NBCU at 42-43 (same).

[352] *See Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-74 (2009); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act Analysis

103. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[353] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") relating to this *NPRM*. The IRFA is attached to this *NPRM* as Appendix E.

B. Paperwork Reduction Act

104. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.[354] In addition, pursuant to the Small Business Paperwork Relief Act of 2002,[355] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."[356]

C. Ex Parte Rules

105. Permit-But-Disclose. The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[357] 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.

D. Filing Requirements

106. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[358] interested parties may file comments and reply comments on or before the dates indicated on the

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[353] *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").

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

[355] Pub. L. No. 107-198.

[356] 44 U.S.C. § 3506(c)(4).

[357] 47 C.F.R. §§ 1.1200 *et seq.*

[358] *See id*. §§ 1.415, 1.419.

first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS").[359]

- 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.

107. 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.

108. 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).

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

V. ORDERING CLAUSES

110. Accordingly, **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, this *Notice of Proposed Rulemaking* **IS ADOPTED**.

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

111. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking*, 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

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]	58.3 million (58.5%)[5]
# (and %) of MVPD subscribers attributable to DBS operators	40,000[6]	16.07 million (18.2%)[7]	29.6 million (>30%)[8]	33.745 million (33.9%)[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, Sept. 30, 2011. The 58.5 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.645 million), then dividing the number of cable subscribers (58.3 million) by the 99.645 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 (99.645 million), then dividing the number of DBS subscribers (33.745 million) by the 99.645 million total. *See* DIRECTV, Inc., SEC Form 10-Q (Nov. 4, 2011) (stating that DIRECTV had 19.8 million subscribers at the end of 3Q2011); DISH DBS Corporation, SEC Form 10-Q (Nov. 9, 2011) (stating that DISH had 13.945 million subscribers at the end of 3Q2011).

	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]	7.6 million Verizon/AT&T subscribers (7.6%)[13]
% of MVPD subscribers receiving their video programming from one of the four largest cable MSOs	47.18%[14]	48%[15]	53-60%[16]	43.8%[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 (Oct. 20, 2011) (stating that AT&T had 3.6 million U-verse video subscribers at the end of 3Q2011); Verizon Communications, Inc., SEC Form 10-Q (Oct. 25, 2011) (stating that Verizon had 4.0 million FiOS TV video subscribers at the end of 3Q2011). The 7.6 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.645 million), then dividing the number of Verizon and AT&T subscribers (7.6 million) by the 99.645 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 43,629,187 subscribers) and dividing by 99.645 million, our estimated number of total MVPD subscribers. *See* SNL Kagan, U. S. Cable Subscriber Highlights, Sept. 30, 2011.

	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 B, Table 2 (Comcast, TWC, Cox, and Cablevision). This figure was calculated by adding the number of subscribers for each of these cable operators (a total of 42,522,287 subscribers) and dividing by 99.645 million, our estimated number of total MVPD subscribers. *See* SNL Kagan, U. S. Cable Subscriber Highlights, Sept. 30, 2011.

APPENDIX B

Satellite-Delivered, Cable-Affiliated, National Programming Networks

Table 1

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
# of satellite-delivered, national programming networks	106[1]	294[2]	531[3]	~800 (SD and HD)[4]
# (and %) of satellite-delivered, national programming networks that are cable-affiliated	56 (53%)[5]	104 (35%)[6]	116 (22%)[7]	115 (SD and HD) (14.4%)[8] Excluding Comcast-controlled networks: 85 out of ~770 (11%)
# of Top 20 satellite-delivered, national programming networks (as ranked by subscribership) that are cable-affiliated	10 of the Top 25[9]	9 of the Top 20[10]	6 of the Top 20[11]	7 of the Top 20[12] Excluding Comcast-controlled networks: 6 of the Top 20

[1] *See 1st Annual Report*, 9 FCC Rcd at 7589-92.

[2] *See 2002 Extension Order*, 17 FCC Rcd at 12131, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309)).

[3] *See 2007 Extension Order*, 22 FCC Rcd at 17802, ¶ 17 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

[4] *See supra* ¶ 26 (estimating a total of 800 satellite-delivered, national programming networks available to MVPDs today and seeking comment on this estimate).

[5] *See 1st Annual Report*, 9 FCC Rcd at 7589-90.

[6] *See 2002 Extension Order*, 17 FCC Rcd at 12131, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309).

[7] *See 2007 Extension Order*, 22 FCC Rcd at 17802, ¶ 18 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

[8] *See infra*, Appendix B, Table 2 (listing satellite-delivered, cable-affiliated, national programming networks).

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

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

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

[12] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 30 (listing the following satellite-delivered, cable-affiliated networks as among the Top 20 in terms of subscribers: Discovery Channel, USA Network, Weather Channel, TLC, A&E, Lifetime, and History).

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
# of Top 20 satellite-delivered, national programming networks (as ranked by average prime time ratings) that are cable-affiliated	12 of the Top 15[13]	7 of the Top 20[14]	7 of the Top 20[15]	7 of the Top 20[16] Excluding Comcast-controlled networks: 5 of the Top 20
# of cable operators that own programming	10, at least[17]	5[18]	5[19]	6[20]

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

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

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

[16] *See* SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 46 (listing the following satellite-delivered, cable-affiliated networks as among the Top 20 in terms of average prime time rating: USA Network, History, A&E, Syfy, Discovery, Lifetime, and Lifetime Movie Network).

[17] *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*.

[18] *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.*

[19] *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.*

[20] *See infra* Appendix B, Table 2; Appendix C, Table 2.

Table 2 – List of Cable-Affiliated, Satellite-Delivered, National Programming Networks

Cable Operator	**Affiliated, Satellite-Delivered, National Programming Network**
Cablevision (10)[21]	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 (60)[22]	Comcast-controlled networks (30)[23]
	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
	The Style Network
	The Style Network HD

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

[22] *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.

[23] *See supra* n.91 (discussing the distinction between Comcast-controlled networks and Comcast-affiliated networks).

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Comcast (continued)	Comcast-controlled networks (continued)
	Universal HD
	Universal Sports
	Universal Sports HD
	USA Network
	USA Network HD
	NBC Sports Network (formerly Versus)
	NBC Sports Network HD
	Comcast-affiliated networks (30)[24]
	A&E[25]
	A&E HD[25]
	Bio[25]
	Bio HD[25]
	Crime & Investigation[25]
	Crime and Investigation HD[25]
	History[25]
	History HD[25]
	History en Español[25]
	H2 (formerly History International)[25]
	H2 HD[25]
	Lifetime[25]
	Lifetime HD[25]
	Lifetime Real Women[25]
	Lifetime Movie Network[25]
	Lifetime Movie Network HD[25]
	Military History Channel[25]
	Current TV[26]
	FEARnet[27]
	FEARnet HD[27]
	MusicChoice[28]

[24] *See id.*

[25] A&E-owned network, in which NBCU holds a minority interest (16 percent). *See* Comcast Corporation, SEC Form 10-K (Feb. 25, 2011), at 12 ("Comcast 2011 SEC Form 10-K"); *see also Comcast/NBCU Order*, 26 FCC Rcd at 4411, Appendix D; *GE/Comcast/NBCU Application* at 31.

[26] *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.

[27] *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.

[28] *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.

Cable Operator	**Affiliated, Satellite-Delivered, National Programming Network**
Comcast (continued)	Comcast-affiliated networks (continued)
	NHL Network[29]
	NHL Network HD[29]
	Shop NBC[30]
	TV One[31]
	TV One HD[31]
	PBS Kids Sprout[32]
	PBS Kids Sprout HD[32]
	The Weather Channel[33]
	The Weather Channel HD[33]
Discovery[34] (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

[29] *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.

[30] *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.

[31] *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.

[32] *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.

[33] *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.

[34] *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).

Cable Operator	**Affiliated, Satellite-Delivered, National Programming Network**
Discovery (continued)	TLC HD
	OWN: Oprah Winfrey Network
	OWN: Oprah Winfrey Network HD
	The Hub
	The Hub HD
	3net (3D)
Cox (2)[35]	Travel Channel
	Travel Channel HD
Other[36] (23)	MLB Network (affiliated with Comcast, Cox, TWC)[37]
	MLB Network HD (affiliated with Comcast, Cox, TWC)[37]
	iN DEMAND L.L.C. (21)[38]
	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

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

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

[37] *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 *NPRM* 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* n.91; *GE/Comcast/NBCU Application* at 20 (stating that Comcast has a 8.3 percent interest in MLB Network).

[38] *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 *NPRM*, 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* n.91.

APPENDIX C

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]	109 (SD and HD)[4]
# (and %) of cable-affiliated RSNs	N/A[5]	24 (86%)[6]	18 (46%)[7]	57 (SD and HD) (52.3%)[8] Excluding Comcast-controlled networks: 41 out of 93 (44.1%)

[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 supra* 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 C, 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 Cable-Affiliated, Regional Sports Networks[9]

Cable Operator	**Affiliated Regional Sports Networks**[10]
Bright House Networks (2)[11]	Bright House Sports Network
	Bright House Sports Network HD
Cablevision (4)	MSG
	MSG HD
	MSG Plus
	MSG Plus HD
Comcast (20)	Comcast-controlled RSNs (16)[12]
	Comcast SportsNet California
	Comcast SportsNet California HD
	Comcast SportsNet Washington
	Comcast SportsNet Washington HD
	Comcast SportsNet New England
	Comcast SportsNet New England HD
	Comcast SportsNet Northwest
	Comcast SportsNet Northwest HD
	Comcast SportsNet Philadelphia
	Comcast SportsNet Philadelphia HD
	Comcast Sports Southwest
	Comcast Sports Southwest HD
	Comcast SportsNet Bay Area[13]
	Comcast SportsNet Bay Area HD[13]
	The Mtn. – Mountain West Sports Network[14]
	The Mtn. – Mountain West Sports Network HD[14]

[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.

[12] *See supra* n.91 (discussing the distinction between "Comcast-controlled" networks and "Comcast-affiliated" networks).

[13] 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 *NPRM* to be a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See id.*; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 67 percent interest in Comcast SportsNet Bay Area).

[14] Because Comcast has a 50 percent or greater interest in The Mtn. – Mountain West Sports Network, we consider The Mtn. – Mountain West Sports Network for purposes of the estimates in this *NPRM* to be a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra* n.91; *GE/Comcast/NBCU Application* at 21 (stating that Comcast owns a 50 percent interest in The Mtn. – Mountain West Sports Network).

Cable Operator	**Affiliated Regional Sports Networks (continued)**
Comcast (continued)	Comcast-affiliated RSNs (4)[15]
	Comcast SportsNet Chicago[16]
	Comcast SportsNet Chicago HD[16]
	Comcast SportsNet Houston[17]
	Comcast SportsNet Houston HD[17]
Cox (4)	Channel 4 San Diego[18]
	Channel 4 San Diego HD[18]
	Cox Sports Television (New Orleans)
	Cox Sports Television HD (New Orleans)
Time Warner Cable (23)[19]	Lakers RSN[20]
	Lakers RSN HD[20]
	Lakers RSN (Spanish language)[20]
	Lakers RSN HD (Spanish language)[20]
	Metro Sports (Kansas City)
	Metro Sports HD (Kansas City)
	Metro Sports (Nebraska)

[15] *See supra* n.91 (discussing the distinction between "Comcast-controlled" networks and "Comcast-affiliated" networks).

[16] 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 *NPRM* 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* n.91; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 30 percent interest in Comcast SportsNet Chicago).

[17] 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 *NPRM* 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* n.91.

[18] While press reports indicate that Channel 4 San Diego will no longer hold the rights for the Major League Baseball games of the San Diego Padres in 2012, these reports also indicate that Channel 4 San Diego carries NCAA Division I basketball games. *See Cox to Layoff Baseball Programming Employees*, Aug. 30, 2011, available at http://www.10news.com/news/29032885/detail.html; *SDSU Men's Hoops at Arizona to be Simulcast on 4SD*, Nov. 22, 2011, available at http://goaztecs.cstv.com/sports/m-baskbl/spec-rel/112211aab.html.

[19] *See Media Bureau RSN Report* at ¶ 16 n.52; *TWC/Insight Application* at 3-4 and Exhibit F.

[20] TWC recently announced that it will launch two RSNs 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.

Cable Operator	Affiliated Regional Sports Networks (continued)
Time Warner Cable (continued)	OC Sports (Hawaii)
	OC Sports HD (Hawaii)
	TWC Sports (Albany)
	TWC Sports HD (Albany)
	TWC Sports (Central NY)
	TWC Sports HD (Central NY)
	TWC SportsNet (Buffalo)
	TWC SportsNet HD (Buffalo)
	TWC SportsNet (Rochester)
	TWC SportsNet HD (Rochester)
	TWC Connection/Sports (Mid-Ohio)
	TWC Connection/Sports (SW Ohio)
	TWC Sports 32 (Wisconsin)
	TWC Sports 32 HD (Wisconsin)
	Texas Channel (Texas)
	YNN Non-Stop Sports (Texas)
Other[21] (4)	SportsNet NewYork (Comcast, TWC)[22]
	SportsNet NewYork HD (Comcast, TWC)[22]
	Comcast/Charter Sports Southeast (Comcast, Charter)[23]
	Comcast/Charter Sports Southeast HD (Comcast, Charter)[23]

[21] These RSNs are affiliated with more than one cable operator.

[22] 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 *NPRM* 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* n.91; 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.

[23] Because Comcast has a 50 percent or greater interest in Comcast/Charter Sports Southeast, we consider Comcast/Charter Sports Southeast for purposes of the estimates in this *NPRM* to be a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. *See supra* n.91; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 81 percent interest in Comcast/Charter Sports Southeast).

Table 3 – List of Unaffiliated, Regional Sports Networks[1]

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

[1] *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

APPENDIX D

Potential Rule Amendments

In the *NPRM*, the Commission seeks comment on alternative approaches to the exclusive contract prohibition -- retaining, sunsetting, or relaxing (either through market-based petitions or retaining a prohibition for RSNs). This Appendix lists potential rule amendments based on each of these alternatives.

I. Retaining the Exclusive Contract Prohibition

For ease of review, Sections 76.1002 and 76.1003 are restated below showing potential amendments in **<u>bold/underline</u>** (for additions) or ~~strikethrough~~ (for deletions).

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--

* * *

(3) Specific arrangements: Subdistribution agreements--

(i) **<u>Unserved and s</u>**~~S~~erved 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, with respect to areas served **<u>or unserved</u>** by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)**<u>(ii)</u>**~~(iii)~~ of this section.

(ii) Limitations on subdistribution agreements~~ in served 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.

* * *

(6) Sunset provision. The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, ~~2012~~**2017**, 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 paragraph (e) 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.

* * * * *

II. Sunsetting the Exclusive Contract Prohibition

For ease of review, Sections 76.1002, 76.1003, 76.1004, and 76.1507 are restated below showing potential amendments in **<u>bold/underline</u>** (for additions) or ~~strikethrough~~ (for deletions).

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) **<u>[Reserved]</u>** ~~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~~**<u>Unserved</u>** 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 **<u>for distribution to persons in areas not served by a cable operator as of October 5, 1992</u>**~~, with respect to areas served by a cable operator,~~ unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)**<u>(ii)</u>**~~(iii)~~ of this section.

(ii) Limitations on subdistribution agreements in ~~served~~**<u>unserved</u>** 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, or practice, activity or arrangement tantamount to an exclusive contract, with respect to areas served by a cable operator violates section 628(b) of the Communications Act of 1934, as amended, and § 76.1001(a) of this part, or 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 (c)(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 paragraph (e) 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.

* * * * *

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.~~

III. Relaxing the Exclusive Contract Prohibition – Market-Based Petitions

For ease of review, Sections 76.1002, 76.1003, 76.1004, and 76.1507 are restated below showing potential amendments in **bold/underline** (for additions) or ~~strikethrough~~ (for deletions).

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) 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**:**

(i) the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest**; or**

(ii) such contract, practice, activity or arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to paragraph (c)(7) of this section.

(3) Specific arrangements: Subdistribution agreements--

(i) **Unserved and s**~~S~~erved 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, with respect to areas served **or unserved** 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 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.

(iii) Exceptions. Paragraph (c)(3) of this section shall not apply in a geographic area where a petition for sunset has been granted pursuant to paragraph (c)(7) of this section.

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(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. **(i)** 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:**

(A) prior to enforcing or entering into an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, subject to paragraph (c)(2) of this section that pertains to a geographic area for which a petition for sunset has not been granted pursuant to paragraph (c)(7) of this section; and

(B) to preclude the filing of complaints alleging that an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, with respect to areas served by a cable operator violates section 628(b) of the Communications Act of 1934, as amended, and § 76.1001(a) of this part, or section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section.

(i**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**i**) 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.

(i**v**~~ii~~) 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) **[Reserved]**~~Sunset provision. The prohibition of exclusive contracts set forth in paragraph (c)(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.~~

(7) Petition for Sunset. 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 remove the prohibition on exclusive contracts and practices, activities or arrangements tantamount to an exclusive contract set forth in paragraph (c)(2) of this section may submit a "Petition for Sunset" to the Commission.

(i) The petition for sunset shall specify the geographic area for which a sunset of the prohibition set forth in paragraph (c)(2) of this section is sought and shall include a statement setting forth the petitioner's reasons to support a finding that such prohibition is not necessary to preserve and protect competition and diversity in the distribution of video programming in the geographic area specified.

(ii) Any competing multichannel video programming distributor or other interested party affected by the petition for sunset may file an opposition to the petition within forty-five (45) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. Any such formal opposition must be served on the petitioner on the same day on which it is filed with the Commission.

(iii) The petitioner may file a response within fifteen (15) days of receipt of any formal opposition.

(iv) If the Commission finds that the prohibition is not necessary to preserve and protect competition and diversity in the distribution of video programming, then the prohibition set forth in paragraph (c)(2) of this section shall no longer apply in the geographic area specified in the decision of the Commission.

* * * * *

3. Section 76.1003 is amended by revising paragraph (e) 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.

* * * * *

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 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**:**

(1) the Commission determines in accordance with Section § 76.1002(c)(4) that such arrangement is in the public interest; **or**

(2) such arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to § 76.1002(c)(7) of this part.

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) 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**:**

(i) the Commission determines in accordance with § 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest**; or**

(ii) such a contract, practice, activity or arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to § 76.1002(c)(7) of this part.

(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.~~

~~(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 **<u>or unserved</u>** by a cable operator, unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)**<u>(ii)</u>**~~(iii)~~**<u>, except as provided in § 76.1002(c)(3)(iii)</u>**.

(b) No open video system programming provider in which a cable operator has an attributable interest shall:

(1) 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.

(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**<u>:</u>**

<u>(i)</u> the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest**<u>; or</u>**

<u>(ii) such a contract, practice, activity or arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to § 76.1002(c)(7) of this part</u>.

IV. Relaxing the Exclusive Contract Prohibition – Retaining the Prohibition for RSNs Only

For ease of review, Sections 76.1000, 76.1002, 76.1003, 76.1004, and 76.1507 are restated below showing potential amendments in **bold/underline** (for additions) or ~~strikethrough~~ (for deletions).

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 76.1000 is amended by adding new paragraph (n) to read as follows:

§ 76.1000 Definitions.

* * * * *

(n) Regional Sports Network. The term "Regional Sports Network" means video programming 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 paragraph (n)(1) of this section, or 10 percent of the regular season games of at least one sports team that meets the criteria of paragraph (n)(1) of this section.

3. 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) 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 **that meets the definition of a Regional Sports Network as defined in §**

<u>**76.1000(n) of this part**</u> 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) <u>**Un**</u>served 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, ~~with respect to areas served by a cable operator~~ <u>**for distribution to persons in areas not served by a cable operator as of October 5, 1992**</u>, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.

<u>**(ii) Served areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part 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 such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.**</u>

(<u>**i**</u>ii) Limitations on subdistribution agreements~~ in served 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)(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. **(i)** 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:**

(A) prior to enforcing or entering into an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, subject to paragraph (c)(2) of this section; and

(B) to preclude the filing of complaints alleging that an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, with respect to areas served by a cable operator violates section 628(b) of the Communications Act of 1934, as amended, and § 76.1001(a) of this part, or section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section.

(i**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**i**) 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.

(i**v**~~ii~~) 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 (c)(2) of this section shall cease to be effective on October 5, ~~2012~~**2017**, 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.

* * * * *

4. Section 76.1003 is amended by revising paragraph (e) 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.

* * * * *

5. 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 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 **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** 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.

6. 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) 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 **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** 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)(iii) 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 **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** 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) 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.

(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 **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** 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

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 *Notice of Proposed Rulemaking* ("*NPRM*"). 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 *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. We issue the *NPRM* to seek comment on (i) whether to retain, sunset, or relax one of the several protections afforded to multichannel video programming distributors ("MVPDs") by the program access rules – the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming; and (ii) potential revisions to our program access rules to better address alleged violations, including potentially discriminatory volume discounts and uniform price increases.

3. 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").[4] The exclusive contract prohibition applies to all satellite-delivered, cable-affiliated programming and presumes that an exclusive contract will cause competitive harm in every case, regardless of the type of programming at issue.[5] The exclusive contract prohibition applies only to programming which is delivered via satellite; it does not apply to programming which is

[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(c)(2)(D). An exclusive contract for satellite cable programming or satellite broadcast programming between a cable operator and a cable-affiliated programming vendor that provides satellite-delivered programming would violate Section 628(c)(2)(D) even if the cable operator that is a party to the contract is not affiliated with the cable-affiliated programming vendor that is a party to the contract. *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, 17840-41, ¶¶ 70-72 (2007) ("*2007 Extension Order*"), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010) ("*Cablevision I*"); *see also Cable Horizontal and Vertical Ownership Limits*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2195-96, ¶ 145 (2008).

[5] *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*").

delivered via terrestrial facilities.[6] 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.[7] Thus, while an exclusive contract involving satellite-delivered, cable-affiliated programming is generally prohibited, an exclusive contract involving terrestrially delivered, cable-affiliated programming is permitted unless the Commission finds in response to a complaint that it violates Section 628(b) of the Act.[8]

4. 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."[9] In June 2002, the Commission found that the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity and retained the exclusive contract prohibition for five years, until October 5, 2007.[10] The Commission provided that, during the year before the expiration of the five-year extension, it would conduct a second review to determine whether the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity in the distribution of video programming.[11] After conducting such a review, the Commission in September 2007 concluded that the exclusive contract prohibition was still necessary, and it retained the prohibition for five more years, until October 5, 2012.[12] The Commission again provided that, during the year before the expiration of the five-year extension, it would conduct a third review to determine whether the exclusive contract

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[6] 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 the *NPRM*, we refer to "satellite cable programming" and "satellite broadcast programming" collectively as "satellite-delivered programming."

[7] *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*").

[8] 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 subscribers or consumers, as required by Section 628(b). *See id*. at 780-82, ¶¶ 50-51; *see also Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011) (concluding that withholding the MSG HD and MSG+ HD Regional Sports Networks 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), *affirmed*, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); *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), *affirmed*, *AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.).

[9] 47 U.S.C. § 548(c)(5).

[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, 17 FCC Rcd 12124 (2002) ("*2002 Extension Order*").

[11] *See id.* at 12161, ¶ 80.

[12] *See generally 2007 Extension Order*. We discuss in further detail in the *NPRM* the decision of the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") in *Cablevision I* affirming the *2007 Extension Order*. *See NPRM* ¶¶ 15-16.

prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[13]

5. Accordingly, in this *NPRM*, we initiate the third review of the necessity of the exclusive contract prohibition. In the *NPRM*, we present certain data on the current state of competition in the video distribution market and the video programming market, and we invite commenters to submit more recent data or empirical analyses. We seek comment on whether current conditions in the video marketplace support retaining, sunsetting, or relaxing the exclusive contract prohibition. To the extent that the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment on whether we can preserve and protect competition in the video distribution market by either:

- Sunsetting the exclusive contract prohibition in its entirety and instead relying solely on 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; (ii) the prohibition on discrimination in Section 628(c)(2)(B) of the Act; and (iii) the prohibition on undue or improper influence in Section 628(c)(2)(A) of the Act; 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; (ii) retaining the prohibition only for satellite-delivered, cable-affiliated Regional Sports Networks ("RSNs") and any other satellite delivered, cable-affiliated programming that the record here establishes as being important for competition and non-replicable and having no good substitutes; and/or (iii) other ways commenters propose.

We seek comment also on (i) how to implement a sunset (complete or partial) to minimize any potential disruption to consumers; (ii) the First Amendment implications of the alternatives discussed herein; (iii) the costs and benefits of the alternatives discussed herein; and (iv) the impact of a sunset on existing merger conditions.

6. In addition, we seek comment in the *NPRM* on potential improvements to the program access rules to better address potential violations. With the exception of certain procedural revisions and the previous extensions of the exclusive contract prohibition, the program access rules have remained largely unchanged in the almost two decades since the Commission originally adopted them in 1993.[14] We seek comment on, among other things, whether our rules adequately address potentially discriminatory volume discounts and uniform price increases and, if not, how these rules should be revised to address these concerns.

B. Legal Basis

7. 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.

[13] *See 2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

[14] *See generally 1993 Program Access Order*.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

8. 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.[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 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.

9. *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 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]

10. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is

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[15] 5 U.S.C. § 603(b)(3).

[16] 5 U.S.C. § 601(6).

[17] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in 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.

[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).

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]

11. *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.

12. *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 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.

[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).

[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).

13. *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 EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[36] Each currently offers subscription services. DIRECTV[37] and EchoStar[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.

14. *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 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

[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 9, 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*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) ("*13th Annual Report*"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

[37] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3. Currently, DIRECTV serves approximately 19.87% of MVPD subscribers nationwide. *See supra* App. A at n. 9.

[38] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3. Currently, DISH Network serves approximately 13.99% of MVPD subscribers nationwide. *See supra* App. A at n.9.

[39] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[40] *See id*.

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]

15. *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]

16. *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 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

[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.

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.

17. 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]

18. *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

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[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.

[56] *See* 47 C.F.R. Part 101, Subparts C and H.

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.

19. *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 category, which is: all such firms having 1,500 or fewer employees.[68] Census Bureau data for 2007,

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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 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

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.

68 13 C.F.R. § 121.201, 2007 NAICS code 517110.

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 some 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] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

20. *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 million 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.

21. *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."[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

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[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 606-07, ¶ 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.

[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*.

[77] 15 U.S.C. § 632.

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.

22. *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. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[80]

23. *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.[81] 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.[82] 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.

24. *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."[83] 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.[84] 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

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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* 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).

81 13 C.F.R. § 121.201, 2007 NAICS code 517110.

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 U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

84 13 C.F.R. § 121.201, 2007 NAICS code 512110.

the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.[85] 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.[86] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

25. *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."[87] 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.[88] 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.[89] 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.[90] 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

26. Certain proposed rule changes discussed in the *NPRM* would affect reporting, recordkeeping, or other compliance requirements. First, even if the exclusive contract prohibition were to sunset (wholly or partially), the Commission recognizes that other existing protections will remain in effect.[91] Namely, an MVPD would still 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 is an unfair act in violation of Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules.[92] An MVPD may also have the option of filing a discrimination complaint under Section 628(c)(2)(B) of the Act, which would provide some protection for competitive MVPDs should the exclusive contract prohibition sunset (wholly or partially).[93] Further, the *NPRM* seeks comment on the extent to which undue influence complaints under Section 628(c)(2)(A) may also provide some protection for competitive MVPDs should the exclusive contract

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[85] *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).

[86] *Id.*

[87] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[88] 13 C.F.R. § 121.201, 2007 NAICS code 512120.

[89] *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).

[90] *Id.*

[91] *NPRM* at ¶ 47.

[92] *Id.* at ¶¶ 48-57.

[93] *Id.* at ¶¶ 58-66.

prohibition sunset (wholly or partially).[94] Second, rather than sunsetting the exclusive contract prohibition in its entirety, the Commission seeks comment on whether it should instead relax the exclusivity prohibition, such as by establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the exclusive contract prohibition on a market-by-market basis based on the extent of competition in the market.[95] The Commission seeks comment on the details of any such process for removing the exclusive contract prohibition on a market-by-market basis.[96] Third, the Commission proposes to adopt a 45-day answer period in complaint proceedings alleging a violation of Section 628(b).[97] Fourth, the *NPRM* seeks comment on how the Commission might improve its rules and procedures to avoid impeding the filing of legitimate complaints alleging that particular volume discounts violate Section 628(c)(2)(B) of the Act.[98] Specifically, the Commission asks whether satellite-delivered, cable-affiliated programmers should be required to demonstrate in response to a complaint the increase in advertising revenues resulting from licensing programming to a larger MVPD and how this increase justifies the volume discount provided to the larger MVPD relative to the complaint.[99]

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

27. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed 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 or reporting requirements under the rule for 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 small entities.[100]

28. First, regarding the potential sunset or relaxation of the exclusive contract prohibition, the *NPRM* seeks comment on what impact the retention of the exclusive contract prohibition has had on the general state of competition among MVPDs in the video distribution market.[101] More specifically, the *NPRM* asks how a sunset or relaxation of the exclusive contract prohibition would affect competition in the video distribution market, and how a sunset or relaxation would affect the potential entry of new competitors in the market.[102] The *NPRM* also seeks comment on how the current state of cable system clustering and cable market share in regional markets should affect the Commission's decision on whether to retain, sunset, or relax the exclusive contract prohibition.[103] Further, it asks whether the current state of horizontal consolidation in the cable industry has increased or decreased incentives for

[94] *Id.* at ¶ 67.

[95] *Id.* at ¶¶ 69-71.

[96] *Id.* at ¶ 70.

[97] *Id.* at ¶ 97.

[98] *Id.* at ¶ 100.

[99] *Id.*

[100] 5 U.S.C. § 603(c).

[101] *NPRM* at ¶ 32.

[102] *Id.*

[103] *Id.* at ¶ 41.

anticompetitive foreclosure of access to vertically integrated programming.[104] The *NPRM* asks whether competitive MVPDs have the resources to invest in creating their own video programming.[105] Overall, the Commission's analysis is focused on whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[106]

29. Second, to the extent the exclusive contract prohibition were to sunset (wholly or partially), the *NPRM* seeks comment on ways to reduce burdens on both complainants and defendants in connection with complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b) (or Section 628(c)(2)(B)) of the Act.[107]

30. Third, regarding the potential changes to our procedural rules governing program access complaints, we find that the changes would benefit regulated entities, including those that are small entities. Specifically, small entities may benefit from the proposed lengthier 45-day period within which to file an answer.[108] They may also benefit from rules addressing potentially discriminatory volume discounts and uniform price increases.[109]

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

31. None

[104] *Id.* at ¶ 43.

[105] *Id.* at ¶ 45.

[106] 47 U.S.C. § 548(c)(5).

[107] *NPRM* at ¶¶ 55-57.

[108] *Id.* at ¶ 97.

[109] *Id.* at ¶¶ 98-102.