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

In the Matter of	)	
	)	
Review of the Commission's Program Access	)	MB Docket No. 07-198
Rules and Examination of Programming Tying	)	
Arrangements	)	

FIRST REPORT AND ORDER

Adopted: January 20, 2010 **Released: January 20, 2010**

By the Commission: Chairman Genachowski and Commissioners Copps, Clyburn and Baker issuing separate statements; Commissioner McDowell dissenting and issuing a statement.

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I. INTRODUCTION

1. In this *First Report and Order* ("*Order*"), we take an important step to further promote competition in the video distribution market. We establish rules to address unfair acts, including exclusive contracts, involving terrestrially delivered, cable-affiliated programming.[1] These rules will provide competitors to incumbent cable operators with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer to their subscribers, thereby promoting competition in the delivery of video to consumers. Our existing program access rules have been a boon to such competition, and we anticipate that the rules we adopt today will have similar procompetitive effects. Our efforts to spur competition in the marketplace for video programming are also aimed at increasing consumer benefits, including better services, innovations in technology, and lower prices. Moreover, we believe broadband adoption to be a further benefit from increased competition and diversity in video programming distribution. Specifically, today we adopt rules permitting complainants to pursue program access claims involving terrestrially delivered, cable-affiliated programming similar to the claims that they may pursue with respect to satellite-delivered, cable-affiliated programming, where the purpose or effect of the challenged act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming.[2] The types of claims potentially involved include challenges to: (i) exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; (ii) discrimination in the prices, terms, and conditions for the sale of programming among multichannel video programming distributors ("MVPDs") by a provider of terrestrially delivered programming that is wholly owned by, controlled by, or under common control with one or more of the following: a cable operator or operators, a satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or a satellite broadcast programming vendor or vendors; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated provider of terrestrially delivered programming to sell its programming to a competitor.

2. MVPDs seeking to compete with incumbent cable operators have provided the Commission with examples of actions by cable operators involving terrestrially delivered, cable-affiliated programming that they allege have harmed competition in the video distribution market. In light of these claims, the Commission adopted a Notice of Proposed Rulemaking (the "*NPRM*") in September 2007 seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming.[3] The Commission stated its belief that unfair acts involving

[1] Throughout this *Order*, we use the terms "cable-affiliated programming" and "cable-affiliated programmer" to refer to a cable programming vendor in which a cable operator has an attributable interest, as defined by the Commission's cable attribution rules. *See* 47 C.F.R. § 76.1000(b); *see also* 47 C.F.R. § 76.501, Notes 1-5.

[2] The Commission has previously established goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17856, ¶ 107 (2007) ("*2007 Program Access Order*"), *appeal pending sub nom. Cablevision Systems Corp. et al v. FCC*, No. 07-1425 *et al* (D.C. Cir). These goals will also apply to complaints filed pursuant to the rules established in this *Order*.

[3] *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, 17859-70, ¶¶ 114-138 (2007) ("*NPRM*"). This *Order* addresses only the issues of terrestrially delivered, cable-affiliated programming and a (continued….)

terrestrially delivered, cable-affiliated programming are a significant concern because they can adversely impact competition.[4] Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming.[5]

3. We find below that Section 628 of the Communications Act of 1934, as amended (the "Act"),[6] grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming. Congress expressly declared that a purpose of Section 628 was "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market . . . ."[7] Congress found that the "cable industry has become vertically integrated" and that "[v]ertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[8] Congress "expect[s] the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[9] To arm the Commission for that effort, Congress granted the Commission broad authority in Sections 628(b) and 628(c)(1) of the Act to prohibit unfair acts of cable operators that significantly hinder or prevent their competitors from providing video programming to consumers.[10]

4. In addition to this broad grant of authority, Congress in Section 628(c)(2) required the Commission to adopt specific regulations partly implementing Section 628(b) by prohibiting cable operators or affiliates from engaging in unfair acts involving cable-affiliated programming that is delivered to cable operators via satellite ("satellite-delivered programming").[11] The three unfair acts Congress required the Commission to address were: (i) exclusive contracts between a cable operator and a cable-affiliated programmer; (ii) discrimination by a cable-affiliated programmer in the prices, terms, and conditions for sale of programming among MVPDs; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to competitors.[12] The

(Continued from previous page)
temporary standstill of an existing contract pending resolution of a program access complaint. This *Order* does not address the other issues raised in the *NPRM*.

[4] *See id*. at 17860, ¶ 116.

[5] *See infra* ¶ 17 (discussing these cases).

[6] Section 628 was passed as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 102-628 (1992); S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133; H.R. Rep. No. 102-862 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231.

[7] *See* 47 U.S.C. § 548(a).

[8] *See* H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 2, *reprinted in* 1992 U.S.C.C.A.N. 1231.

[9] *See id*. at 93, *reprinted in* 1992 U.S.C.C.A.N. at 1275.

[10] Section 628(b) provides that it shall be unlawful for a cable operator to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." *See* 47 U.S.C. § 548(b). Section 628(c)(1) authorizes the Commission to prescribe regulations to specify the particular conduct prohibited by Section 628(b). *See* 47 U.S.C. § 548(c)(1). Throughout this *Order*, we use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices."

[11] *See* 47 U.S.C. § 548(c)(2). Section 628(c)(2) pertains only to "satellite cable programming" and "satellite broadcast programming." *See* 47 U.S.C. § 548(c)(2)(A)-(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).

[12] *See* 47 U.S.C. § 548(c)(2)(A)-(D).

Commission has adopted rules to carry out that congressional command (the "program access rules").[13] Those rules are a success. While competitors to incumbent cable operators served less than five percent of video subscribers nationwide when the program access provision of the 1992 Cable Act was passed,[14] that percentage has increased to over 30 percent today.[15] Competitors to incumbent cable operators widely credit the program access rules for this increase in competition.[16] An outgrowth of this increase in competition is an increase in employment in the video programming sector of the economy.[17]

5. Congress did not require the Commission to adopt program access rules for cable-affiliated programming that is delivered to cable operators via terrestrial means, such as programming transmitted to cable operators by fiber ("terrestrially delivered programming"). While an earlier version of the legislation that became Section 628(c)(2) would have encompassed terrestrially delivered programming, Congress did not explain why the final version of its bill removed this provision.[18] This gap in the coverage of Section 628(c)(2) is commonly referred to as the "terrestrial loophole."[19] Under Sections 628(b) and 628(c)(1), however, Congress granted the Commission broad authority to address this "loophole" by adopting additional regulations beyond those listed in Section 628(c)(2) to address unfair acts of cable operators.

6. As discussed below, we take action pursuant to Sections 628(b) and 628(c)(1) of the Act to facilitate competition in the video distribution market by establishing rules for the consideration of complaints alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming. Our action today attempts to chart a middle course between two extremes proposed by commenters. On one hand, vertically integrated cable

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[13] *See* 47 C.F.R. §§ 76.1000-1004.

[14] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, 17326, ¶ 21 (2001).

[15] *See infra* ¶ 27.

[16] *See* Comments of The Coalition for Access to Competitive Content at 2 ("CA2C Comments") ("The exclusivity prohibition and the anti-discrimination provisions in Section 628(c)(2) of the Communications Act were major factors in the development of today's MVPD competition. . . . Even if every other issue that historically has been identified as a potential barrier to competitive video entry (franchising, MDU access, technical standards, etc.) were fully resolved, competition would be seriously impaired if vertically integrated cable operators were allowed to pursue foreclosure strategies related to content."); Comments of Broadband Service Providers Association at 2 ("BSPA Comments"); *see also 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, 12153, n.205 (2002) ("*2002 Program Access Order*") (stating that Direct Broadcast Satellite ("DBS") operators credit the exclusivity prohibition in making DBS a competitive option to cable); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, 1149, ¶ 230 (1998) (stating that the program access rules have been credited as having been a necessary factor in the development of both the DBS and the Multichannel Multipoint Distribution Service industries).

[17] The relationship between competition and employment in an industry is an obvious one. Firms maximize profits in a concentrated industry by reducing output in order to increase prices. This exertion of market power has, as a natural outcome, a negative effect on industry employment. Increasing the level of competition in an industry increases output, reduces prices, and increases employment. This intuitive result has been shown to hold in practice. Christoph Weiss found a negative relationship between the long-run equilibrium level of employment and the level of concentration in U.S. industries. *See* Christoph Weiss, "Is Imperfect Competition in the Product Market Relevant for Labour Markets?" *Labour*, Vol. 12 No. 3, at 451-71 (1998).

[18] *See infra* ¶ 24.

[19] *See, e.g., 2002 Program Access Order*, 17 FCC Rcd at 12157, ¶ 71.

operators argue that there is no need and no statutory authority for the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming. In their view, exclusive arrangements for terrestrially delivered, cable-affiliated programming should be permitted because they enhance innovation, programming diversity, and competition. On the other hand, competing MVPDs urge the Commission to adopt a *per se* prohibition on exclusive arrangements involving most, if not all, terrestrially delivered, cable-affiliated programming. In their view, all such exclusive arrangements should be prohibited because they hamper competition. The case-by-case approach we adopt today establishes a fair process to address those situations in which MVPDs may be significantly hindered from competing, while at the same time allowing cable operators to use exclusive arrangements in cases where competition is not significantly harmed.

7. We begin by analyzing the statutory language and legislative history of Section 628 as well as the Commission's program access rules. We discuss our statutory authority under that section to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. We then discuss the bases for our conclusion that there is a need for Commission action to address such complaints: Cable operators have an incentive and ability to engage in unfair acts involving their affiliated programming; record evidence indicates that cable operators have engaged in unfair acts involving certain terrestrially delivered, cable-affiliated programming; and these unfair acts have impacted competition in the video distribution market in certain cases. We conclude, however, that there is insufficient record evidence to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming will have the purpose or effect set forth in Section 628(b) in every case. Accordingly, we adopt a case-by-case approach rather than a *per se* rule for addressing these unfair acts. We then explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.

8. We next set forth the requirements for complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. A complainant alleging such an unfair act will have the burden of proof that the defendant's activities have the purpose or effect set forth in Section 628(b). We conclude that a complainant is unlikely to satisfy this burden when seeking access to readily replicable programming, such as local news and local community or educational programming. We also explain, however, that some programming may be non-replicable and sufficiently valuable to consumers that an unfair act regarding this programming presumptively – but not conclusively – has the purpose or effect set forth in Section 628(b). Based on Commission precedent in which the Commission has considered certain Regional Sports Networks ("RSNs") and the record in this proceeding, we find that such networks fall within this category. In program access cases alleging an unfair act involving such programming, the defendant will be required to overcome the presumption that arises from our precedent and the record evidence here. In all program access cases involving terrestrially delivered, cable-affiliated programming, we provide the defendant with 45 days – rather than the usual 20 days – from the date of service of the complaint to file an Answer to ensure that the defendant has adequate time to develop a full, case-specific response.

9. This distinction between replicable and non-replicable programming will promote innovation and continued investment in programming. 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 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. In addition, in light of the growing importance of high definition ("HD") programming in the marketplace today and its distinctive characteristics, we will analyze the HD version of a network separately from the standard definition ("SD") version with similar content for purposes of the statutory analysis. Thus, the fact that a complainant offers the SD version of a network to subscribers 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). Similarly, in cases involving the

category of RSN programming addressed by our precedent and the evidence here, withholding the HD feed will be rebuttably presumed to cause significant hindrance even if an SD version of the network is made available to competitors.

10. We next describe how the rules applicable to terrestrially delivered, cable-affiliated programming will differ from the rules applicable to satellite-delivered, cable-affiliated programming. We also discuss how these rules will be applied to common carriers and terrestrially delivered programming that is subject to the program access rules as a result of merger conditions. In addition, we explain that the new rules will apply to existing contracts, but not to the unfair acts of cable operators involving terrestrially delivered, cable-affiliated programming that preceded the effective date of these rules. With respect to pending complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming, complainants may continue to prosecute these complaints pursuant to Section 628(d) of the Communications Act. In addition, a complainant that wants a currently pending complaint considered under the new rules can submit a supplemental filing alleging that the defendant has engaged in an unfair act after the effective date of the rules. Finally, we establish procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

II. BACKGROUND

A. Section 628

11. Congress enacted Section 628 as part of the 1992 Cable Act to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies."[20] To advance these goals, Sections 628(b) and 628(c)(1) grant the Commission broad authority to adopt rules to prohibit unfair acts of cable operators that have the purpose or effect of preventing or hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[21] Section 628(b) provides that:

> [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 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.[22]

Section 628(c)(1) provides that "the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe

[20] 47 U.S.C. § 548(a). The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. § 605). The term "satellite broadcast programming" means "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 U.S.C. § 548(i)(3).

[21] *See* 47 U.S.C. §§ 548(b), (c)(1).

[22] 47 U.S.C. § 548(b).

regulations to specify particular conduct that is prohibited by" Section 628(b).[23] A federal court of appeals recently held that Section 628(b) is written in "broad and sweeping terms" and therefore "'should be given broad, sweeping application.'"[24]

12. In addition to this broad grant of authority, Congress in Section 628(c)(2) directed the Commission to include "minimum contents" in its regulations specifying certain unfair acts, relating to satellite-delivered programming, that are among those prohibited by Section 628(b).[25] First, Congress required 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 or improper influence").[26] Second, Congress required the Commission to address

[23] 47 U.S.C. § 548(c)(1). We find no merit in the argument that the Commission cannot rely on Section 628(c)(1) because that provision "limits" rulemaking authority to the 180 days after the date of enactment of Section 628(c)(1). *See* Letter from Henk Brands, Counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-29 and 07-198, at 2 n.2 (Jan. 8, 2010) ("Cablevision/Brands Jan. 8th *Ex Parte* Letter"). The Commission has an obligation to consider, on an on-going basis, whether its rules should be modified in response to changed circumstances. As the Supreme Court has observed: "'An initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis,' *Chevron, supra,* at 863-864, 104 S.Ct. 2778, for example, in response to changed factual circumstances, or a change in administrations. . . . " *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (*quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863-64 (1984)). That is precisely what the Commission is doing in this *Order*. Cablevision's interpretation would prevent the Commission from fulfilling its obligation to consider whether its rules should be revised based on new evidence that has come to light. There is no evidence that Congress intended to tie the Commission's hands in this manner by carving its initial regulations, which were adopted back in 1993, "in stone." *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 (1993) ("*1993 Program Access Order*"), *recon.*, 10 FCC Rcd 1902 (1994), *further recon*., 10 FCC Rcd 3105 (1994). Nor is there any indication Congress intended to strip the Commission of its rulemaking power under Sections 4(i) and 303(r) after 180 days. *See* 47 U.S.C. §§ 154(i), 303(r).

Moreover, Cablevision's interpretation is at odds with judicial precedent regarding statutory deadlines. Statutory deadlines are generally considered directory, rather than mandatory, and even where an agency has failed to meet such a deadline – which is not the case here – it has not been found to remove an agency's authority to act or impose any other penalty, unless the statute delineates a specific remedy for agency inaction. *See Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984) (*quoting Fort Worth Nat'l Corp. v. Fed. Savings & Loan Ins. Corp.*, 469 F.2d 47, 58 (5th Cir. 1972)); *see also Brock v. Pierce County*, 476 U.S. 253, 260, 262 (1986) (mere use of the word "shall" not enough to remove Secretary of Labor's power to act after lapse of a deadline, and "[w]hen . . . there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act"); *Gottlieb v. Peña*, 41 F.3d 730 (D.C. Cir. 1994) (statute mandating Secretary of Transportation to act by certain deadline was directory, not mandatory); *Ralpho v. Bell*, 569 F.2d 607, 627 (D.C. Cir. 1977) ("Statutes that, for guidance of a government official's discharge of duties, propose 'to secure order, system, and dispatch in proceedings' are usually construed as directory, whether or not worded in the imperative, especially when the alternative is harshness or absurdity." (citations omitted)). Here, there is no indication in the statute that Congress intended the Commission's rulemaking authority to lapse after the 180-day deadline.

[24] *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).

[25] *See* 47 U.S.C. § 548(c)(2).

[26] *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").

discrimination by cable-affiliated programming vendors that provide satellite-delivered programming in the prices, terms, and conditions for sale of programming among MVPDs ("discrimination").[27] Third, Congress required the Commission to prohibit exclusive contracts between cable operators and cable-affiliated programming vendors that provide satellite-delivered programming subject to certain exceptions in areas served by a cable operator as of October 5, 1992 (the "exclusive contract prohibition").[28] These exceptions are: (i) exclusive contracts entered into prior to June 1, 1990 are not subject to the exclusive contract prohibition;[29] (ii) exclusive contracts that the Commission deems to be in the public interest based on the factors set forth in the statute are not subject to the exclusive contract prohibition;[30] and (iii) the exclusive contract prohibition will cease to be effective after October 5, 2002 unless the Commission finds that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[31]

13. Section 628 was intended to address Congress' concern that cable operators or their affiliates would engage in unfair acts, including acts involving programming they own, that impede competition in the video distribution market.[32] The 1992 Cable Act and its legislative history reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical

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[27] *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)).

[28] *See* 47 U.S.C. § 548(c)(2)(D). In areas that were not served by a cable operator as of October 5, 1992, the exclusive contract prohibition is absolute and is not subject to exceptions. *See* 47 U.S.C. § 548(c)(2)(C).

[29] *See* 47 U.S.C. § 548(h)(1); *see also* 47 C.F.R. § 76.1002(e)(1).

[30] *See* 47 U.S.C. § 548(c)(4); *see also* 47 C.F.R. § 76.1002(c)(4). These factors are: (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. *See* 47 U.S.C. § 548(c)(4); *see also* 47 C.F.R. § 76.1002(c)(4).

[31] 47 U.S.C. § 548(c)(5); *see also* 47 C.F.R. § 76.1002(c)(6). The Commission on two prior occasions has found that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. *See generally 2002 Program Access Order*, 17 FCC Rcd 12124 (extending the exclusive contract prohibition until October 5, 2007); *2007 Program Access Order*, 22 FCC Rcd 17791. Pursuant to the *2007 Program Access Order*, the exclusive contract prohibition will cease to be effective after October 5, 2012 unless the Commission finds that it continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. *See 2007 Program Access Order*, 22 FCC Rcd at 17845-46, ¶¶ 79-81.

[32] *See* H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 ("In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."); S. Rep. No. 102-92 (1991), at 26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159 ("[C]able programmers may simply refuse to sell to potential competitors. Small cable operators, satellite dish owners, and wireless cable operators complain that they are denied access to, or charged more for, programming than large, vertically integrated cable operators."); *see id*. ("Restricted access to programming products by a wholesale programmer which is also a retail competitor, reflects the vertically integrated nature of the market and the basic barrier in the development of a competitive market. Without fair and ready access on a consistent, technology-neutral basis, an independent entity . . . cannot sustain itself in the market.").

integration of cable operators and program suppliers, created an imbalance of power between incumbent cable operators and their multichannel competitors.[33] Congress concluded that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, including direct broadcast satellite ("DBS") providers.[34] Through Section 628, Congress intended to encourage entry and facilitate competition in the video distribution market by existing or potential competitors to traditional cable systems by, among other things, making available to those entities the programming they need to compete in the video distribution market.[35] As discussed above, competitors to incumbent cable operators credit the program access rules promulgated under Sections 628(b) and (c) for the increased competition to incumbent cable operators that has emerged since passage of the 1992 Cable Act.[36]

[33] *See* 1992 Cable Act § 2(a)(4); *id*. § 2(a)(5); S. Rep. No. 102-92 (1991), at 24-29, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1157-62; H.R. Rep. No. 102-628 (1992), at 41-43.

[34] *See* 1992 Cable Act § 2(a)(5) ("Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."); S. Rep. No. 102-92 (1991), at 26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159 ("[T]he Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms."); *1993 Program Access Order,* 8 FCC Rcd at 3365-67, ¶ 21.

[35] *See* H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable."); S. Rep. No. 102-92 (1991), at 28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 ("To encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in the price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition.").

[36] *See supra* ¶ 4.

B. Program Access Rules Applicable to Satellite-Delivered, Cable-Affiliated Programming

14. As required by Section 628(c)(2), the Commission has adopted program access rules which specifically prohibit undue or improper influence,[37] discrimination,[38] and exclusive contracts[39] involving cable operators and cable-affiliated programmers that provide satellite-delivered programming. The Commission has also established a complaint process to address claims that a cable operator or a cable-affiliated programmer that provides satellite-delivered programming has violated the program access rules.[40] Consistent with the definitions in the 1992 Cable Act,[41] the Commission's rules define the "satellite cable programming" and "satellite broadcast programming" to which the rules apply to include only programming transmitted or retransmitted by satellite for reception by cable operators.[42] The Commission has previously concluded that terrestrially delivered programming is outside of the direct coverage of Section 628(c)(2) and the Commission's program access rules under Section 628(c)(2).[43]

C. NPRM

15. In September 2007, the Commission adopted an *NPRM* seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming.[44] The Commission noted examples of withholding of terrestrially delivered, cable-affiliated RSNs in San Diego and Philadelphia.[45] The Commission stated its belief that "withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market."[46] To address this concern, the *NPRM* sought comment on whether it would be appropriate to address the terrestrial loophole in the current program access rules pursuant to provisions other than Section 628(c)(2) of the Act, such as Section 628(b) of the Act.[47] The *NPRM* also sought comment on whether extension of program access requirements to terrestrially delivered, cable-affiliated programming by way of a general statutory provision such as Section 628(b) would be barred by the more specific provision in Section 628(c)(2) that requires the promulgating of rules relating only to conduct involving satellite-delivered programming.[48]

16. In their comments filed in response to the *NPRM*, non-incumbent MVPDs contend that the Commission has statutory authority to address the terrestrial loophole in the current rules.[49] They also

[37] *See* 47 C.F.R. § 76.1002(a).

[38] *See* 47 C.F.R. § 76.1002(b).

[39] *See* 47 C.F.R. § 76.1002(c)-(e).

[40] *See* 47 C.F.R. §§ 76.7, 76.1003.

[41] *See supra* n. 20 (defining "satellite cable programming" and "satellite broadcast programming").

[42] *See* 47 C.F.R. § 76.1000(f), (h).

[43] *See DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al.,*15 FCC Rcd 22802, 22807, ¶ 12 (2000), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *see also 2007 Program Access Order*, 22 FCC Rcd at 17844, ¶ 78; *2002 Program Access Order*, 17 FCC Rcd at 12158, ¶ 73.

[44] *See NPRM*, 22 FCC Rcd at 17859-70, ¶¶ 114-138.

[45] *See id*. at 17859-60, ¶ 115.

[46] *See id*. at 17860, ¶ 116.

[47] *See id*.

[48] *See id*.

[49] *See* Comments of AT&T Inc. at 5, 9 ("AT&T Comments"); BSPA Comments at 6; CA2C Comments at 12; Comments of DIRECTV, Inc. at 9-11 ("DIRECTV Comments"); Comments of National Telecommunications Cooperative Association at 5, 11 ("NTCA Comments"); Comments of The Organization for the Promotion and (continued….)

argue that applying the program access rules to terrestrially delivered, cable-affiliated programming would promote competition in the video distribution market and broadband deployment.[50] Conversely, vertically integrated cable operators contend that the Commission does not have the statutory authority to address the terrestrial loophole.[51] Moreover, they argue that the market for video distribution is competitive and that additional regulations are not justified.[52]

D. Pending Program Access Complaints

17. Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming. First, in September 2008, AT&T filed a program access complaint alleging that Cox is withholding a terrestrially delivered RSN (Cox-4) from AT&T in San Diego.[53] In March 2009, the Media Bureau issued a decision denying this complaint without prejudice because (i) there was no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b);[54] and (ii) the pending *NPRM*, rather than an adjudicatory proceeding, is the correct forum for addressing this issue.[55] AT&T has filed an Application for Review of this decision, which is pending.[56] In July 2009, Verizon filed a program access complaint alleging that Cablevision is withholding the terrestrially delivered HD feeds of its RSNs (MSG and MSG+) from Verizon in New York.[57] In August 2009, AT&T filed a program access complaint against

(Continued from previous page)
Advancement of Small Telecommunications Companies, The Independent Telephone and Telecommunications Alliance, The Western Telecommunications Alliance, and The Rural Independent Competitive Alliance at 5-6 ("OPASTCO *et al* Comments"); Comments of The United States Telecom Association at 8 ("USTelecom Comments"); Comments of Verizon at 8 ("Verizon Comments"); Reply Comments of Broadband Service Providers Association at 4-5 ("BSPA Reply"); Reply Comments of The Coalition for Access to Competitive Content at 7-13 ("CA2C Reply"); Reply Comments of DIRECTV, Inc. at 9-10 ("DIRECTV Reply"); Reply Comments of DISH Network at 4 ("DISH Network Reply"); Reply Comments of Verizon at 4-6 ("Verizon Reply").

[50] *See* BSPA Comments at 5; CA2C Comments at 5, 8-10, 18; *cf.* DIRECTV Comments at 13-14; NTCA Comments at 11-12; OPASTCO *et al* Comments at 5-6; USTelecom Comments at 6; Verizon Comments at 3-7.

[51] *See* Comments of Cablevision Systems Corp. at 13-17 ("Cablevision Comments"); Comments of Comcast Corp. at 6-13 ("Comcast Comments"); Comments of The National Cable & Telecommunications Association at 12 ("NCTA Comments"); Reply Comments of Advance/Newhouse Communications at 8-10 ("Advance/Newhouse Reply"); Reply Comments of Cablevision Systems Corp. at 11 ("Cablevision Reply"); Reply Comments of Comcast Corp. at 9-15 ("Comcast Reply"); Reply Comments of Cox Communications, Inc. at 7 ("Cox Reply").

[52] *See* Cablevision Comments at 17; NCTA Comments at 3, 7-8; Advance/Newhouse Reply at 5-6; Comcast Reply at 3-9; Cox Reply at 1-2.

[53] *See* AT&T Services, Inc. *et al*, Program Access Complaint, File No. CSR-8066-P (filed Sept. 11, 2008) ("AT&T Complaint v. Cox"); *see also* CoxCom, Inc., Answer, File No. CSR-8066-P (filed Oct. 27, 2008) ("Cox Answer"); AT&T Services, Inc. *et al*, Reply, File No. CSR-8066-P (filed Nov. 21, 2008) ("AT&T Reply to Cox"). We note that redacted versions of AT&T's complaint, Cox's answer, AT&T's reply, and Cox's response to a declaration and survey included in AT&T's reply were filed in the record of this proceeding. *See* Letter from Christopher M. Heimann, AT&T, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Dec. 16, 2009) ("AT&T Dec. 16th *Ex Parte* Letter"); Letter from David J. Wittenstein, Counsel for CoxCom, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 13, 2010) ("Cox Jan. 13th *Ex Parte* Letter"). We do not reach a decision in this *Order* on the merits of this complaint, including whether AT&T has demonstrated that the defendant's conduct violated Section 628(b).

[54] *See AT&T Services Inc. et al v. Coxcom, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 2859, 2864, ¶ 16 (MB, 2009), *application for review pending*.

[55] *See id*.

[56] *See* AT&T Services, Inc. *et al*, Application for Review, File No. CSR-8066-P (filed April 3, 2009).

[57] *See* Verizon Telephone Companies *et al*, Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009).

Cablevision making a similar claim regarding the withholding of the terrestrially delivered HD feeds of MSG and MSG+ from AT&T in Connecticut.[58] The latter two complaints are pending.

III. DISCUSSION

18. In Section A below, we begin with a discussion of our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. In Section B, we explain the bases for our conclusion that there is a need for Commission action to address such complaints. In Section C, we explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. In Section D, we set forth the requirements for complaints alleging such unfair acts. In Section E, we discuss how these rules will be applied to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions. In Section F, we establish procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

A. The Commission's Statutory Authority to Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

19. In this Section, we discuss our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming in the circumstances described in that provision. Section 628(b) gives the Commission authority to promulgate rules applicable to unfair acts of cable operators (and certain other entities), including acts involving terrestrially delivered programming that have the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[59] Section 628(c)(1) authorizes the Commission to prescribe regulations to specify particular conduct prohibited by Section 628(b).[60] Our analysis reflects the Commission's interpretation of Section 628(b) in the *MDU Order*, where the Commission held that it has authority pursuant to Section 628(b) to adopt rules prohibiting exclusive contracts between cable operators and owners of multiple dwelling units ("MDUs") because those contracts prevent or significantly hinder the ability of competing MVPDs to provide all programming, including "satellite cable programming" and "satellite broadcast programming," in those markets.[61] This interpretation was recently upheld by a federal court of appeals.[62]

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[58] *See* AT&T Services, Inc. *et al*, Program Access and Section 628(b) Complaint, File No. CSR-8196-P (filed Aug. 13, 2009) ("AT&T Complaint v. MSG/Cablevision"); Madison Square Garden, L.P. and Cablevision Systems Corp., Answer, File No. CSR-8196-P (filed Sept. 27, 2009) ("MSG/Cablevision Answer"); AT&T Services, Inc. *et al*, Reply, File No. CSR-8196-P (filed Oct. 2, 2009) ("AT&T Reply to MSG/Cablevision"). We note that redacted versions of AT&T's complaint, the defendants' answer, and AT&T's reply were filed in the record of this proceeding. *See* AT&T Dec. 16th *Ex Parte* Letter; Letter from Howard J. Symons, Counsel to MSG and Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 7, 2010) ("Cablevision/MSG Jan. 7th *Ex Parte* Letter"). We do not reach a decision in this *Order* on the merits of this complaint, including whether AT&T has demonstrated that the defendants' conduct violated Section 628(b).

[59] *See* 47 U.S.C. § 548(b); *see also* AT&T Comments at 8-9; BSPA Comments at 6 n.9; CA2C Comments at 12-18; DIRECTV Comments at 8-11.

[60] *See* 47 U.S.C. § 548(c)(1).

[61] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20249, ¶ 27 (2007) ("*MDU Order*"), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). Several commenters argue that applying the program access rules to terrestrially delivered, cable-affiliated (continued….)

20. Vertically integrated cable operators note that Section 628(c)(2) requires the Commission to prohibit unfair acts involving only satellite-delivered programming and assert that this specific mandate precludes the Commission from addressing terrestrially delivered programming pursuant to the general authority provided in Section 628(b).[63] While Section 628(c)(2) lists specific unfair acts that the Commission is required to address as “minimum contents” in its regulations, the United States Court of Appeals for the District of Columbia Circuit has explained that this list does not preclude the Commission from adopting rules to address additional conduct that also is prohibited under Section 628(b).[64] As the court stated, “Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission’s power solely to that version of the problem.”[65] The court also held that (i) the title of Section 628(c)(2), “Minimum Contents of Regulations,” demonstrates that the Commission’s rules must at least address the unfair acts listed in Section 628(c)(2), but are not limited to addressing those acts[66] and (ii) this interpretation of Section 628(b) is confirmed by Section 628(c)(1), which grants the Commission wide latitude to “specify particular conduct that is prohibited by [Section 628(b)].”[67] The Commission too has explained previously that it is not limited to addressing only the specific unfair acts listed in Section 628(c)(2); rather, “Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action . . . should additional types of conduct emerge as barriers to competition.”[68] Here, the record reflects evidence that unfair acts involving terrestrially delivered, cable-affiliated programming have occurred;[69] such conduct is likely to persist absent Commission action;[70] and this conduct can have the effect in some cases of hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers and consumers.[71] Thus, the plain language of Section 628(b), along with the authority provided by Section 628(c)(1) to adopt rules addressing conduct prohibited by Section 628(b), provide us with authority to adopt rules for the consideration of complaints alleging unfair acts with respect to terrestrially delivered, cable-affiliated programming.

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programming pursuant to Section 628(b) is consistent with the Commission’s analysis in the *MDU Order*. *See* AT&T Comments at 5; CA2C Comments at 13-15; DIRECTV Comments at 8-10; USTelecom Comments at 8-9; AT&T Complaint v. Cox at 17-18; Letter from Joel Kelsey and Chris Murray, Consumers Union, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 5 (Aug. 12, 2008) (“Consumers Union Aug. 12th *Ex Parte* Letter”).

[62] *See NCTA*, 567 F.3d 659.

[63] *See generally* Cablevision Comments at 2, 15; Comcast Comments at 6-8; NCTA Comments at 12-13; Advance/Newhouse Reply at 8-9; Comcast Reply at 11; Cox Reply at 7.

[64] *See NCTA,* 567 F.3d at 664-65.

[65] *Id*. at 665; *see also MDU Order*, 22 FCC Rcd at 20258, ¶ 48 (“nothing in these provisions indicate that they were intended to establish the outer limits of the Commission’s authority under Section 628(b)”).

[66] 47 U.S.C. § 548(c)(2); *see NCTA,* 567 F.3d at 665; *see also MDU Order*, 22 FCC Rcd at 20258, ¶ 48; AT&T Comments at 5; CA2C Comments at 13; Consumers Union Aug. 12th *Ex Parte* Letter at 5.

[67] *See NCTA,* 567 F.3d at 665 (quoting 47 U.S.C. § 548(c)(1)); *see also MDU Order*, 22 FCC Rcd at 20258, ¶ 48.

[68] *See 1993 Program Access Order*, 8 FCC Rcd at 3374, ¶ 41.

[69] *See infra* Section III.B.2 (providing evidence of unfair acts involving terrestrially delivered, cable-affiliated programming).

[70] *See infra* Section III.B.1 (discussing the ability and incentive of cable operators to engage in unfair acts involving terrestrially delivered, cable-affiliated programming).

[71] *See infra* Section III.B.3.a (assessing the impact of unfair acts involving terrestrially delivered, cable-affiliated programming on competition in the video distribution market).

21. Moreover, despite the principle of statutory interpretation that, by mentioning one thing, Congress may have implied the exclusion of another,[72] an explicit congressional directive to ban certain activities does not prevent the agency "from taking similar action with respect to activities that pose a similar danger."[73] The fact that Congress singled out a subset of practices with which it was particularly concerned in Section 628(c)(2) and required the Commission to focus on those practices expeditiously does not limit the broader rulemaking authority expressly granted to the Commission through Sections 628(b) and 628(c)(1). Here, we find that unfair acts involving cable-affiliated programming, regardless of whether that programming is satellite-delivered or terrestrially delivered, pose the danger of significantly hindering MVPDs from providing satellite cable programming or satellite broadcast programming, thereby harming competition in the video distribution market and limiting broadband deployment.[74] As the Commission recognized in the *Adelphia Order,* competitive harm from withholding of programming can occur regardless of how that programming is delivered to MVPDs.[75] Thus, we conclude that Congress' decision to require the Commission to adopt within 180 days program access rules to address unfair acts involving satellite-delivered, cable-affiliated programming does not preclude us from exercising our authority under Section 628(b) to take similar action where appropriate to address unfair acts involving terrestrially delivered, cable-affiliated programming.[76]

22. We are aware that the former Cable Services Bureau stated that Section 628(b) may not be used categorically to preclude programming practices that are related to practices prohibited under

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[72] *See* Cablevision Comments at 15-16; Comcast Comments at 7-8. This principle of statutory interpretation is referred to as *expressio unius est exclusivo alterius*. *See* AT&T Comments at 6.

[73] *See* AT&T Comments at 6-7 (citing *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.,* 940 F.2d 685, 694 (D.C. Circ. 1991)); *see also Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

[74] *See infra* ¶¶ 32, 36; *see also* CA2C Comments at 2 (access to content "is essential to the development and preservation of competition in the [MVPD] market regardless of whether this content is delivered by satellite or any alternate method of terrestrial distribution technology"); *id*. at 17 ("It is simply irrelevant whether the particular programming at issue is delivered by satellite or terrestrially. The touchstone of the violation is the effect of that refusal on the ability of MVPDs to provide satellite programming to consumers."); NTCA Comments at 8-9 ("An MVPD can be injured by exclusive contract practices, refusals to deal, discriminatory practices and other anticompetitive behavior whether the conduct is that of a cable-affiliated programmer that delivers programming terrestrially or one that delivers content by satellite. The manner of delivery makes no difference to the injured party."); USTelecom Comments at 6 ("Rather than focus on *how* programming is delivered, the appropriate Commission analysis should focus on the effect that such delivery has in the MVPD market." (emphasis in the original)); DISH Network Reply at 1-2 ("There also remains a need for competitive MVPDs to access cable-owned programming regardless of how such programming is delivered, *i.e.,* by satellite or terrestrial fiber.").

[75] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, 8276, ¶ 162 (2006) ("*Adelphia Order*").

[76] Section 628(c)(2)(B)(iv) does not conflict with this interpretation. This provision provides that a cable-affiliated programmer that provides satellite-delivered programming does not violate the program access discrimination prohibition by entering into "an exclusive contract that is permitted under [Section 628(c)(2)(D)]." *See* 47 U.S.C. § 548(c)(2)(B)(iv). The Commission has interpreted the phrase "an exclusive contract that is permitted under [Section 628(c)(2)(D)]" to mean an exclusive contract for which the Commission has granted an exception pursuant to the public interest factors listed in Section 628(c)(4). *See 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) ("*1996 OVS Order*"); *see also* 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4); *supra* n.30; *infra* ¶ 44. The Commission has declined to interpret this phrase more broadly to mean any exclusive contract that is not expressly prohibited by Section 628(c)(2)(D). *See 1996 OVS Order*, 11 FCC Rcd at 18319, n.428.

Section 628(c)(2), but not themselves reached by Section 628(c)(2).[77] The Cable Services Bureau qualified these statements, however, by explaining that Section 628(b) may not be used "without more," "standing alone," or "on a *per se* basis" against conduct that is permitted under Section 628(c).[78] In other words, complainants under Section 628(b) are required to show that a covered entity has engaged in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent an MVPD from providing satellite programming to consumers. Our holding today is consistent with that understanding. Moreover, staff-level decisions are not binding on the Commission.[79] The Commission itself has specifically held that unfair acts involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b).[80] In any event, to the extent prior decisions could be read as precluding the consideration of program access complaints involving terrestrially delivered, cable-affiliated programming under Section 628(b), we reject that view. Section 628(b), by its plain language, allows the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis where the other elements of Section 628(b) are satisfied.

23. The legislative history of the 1992 Cable Act also is consistent with our decision to adopt rules addressing unfair acts involving terrestrially delivered, cable-affiliated programming. For example, the Conference Report on Section 628 specifically states an expectation that the Commission will "address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[81] The Conference Report further indicates "that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable."[82] The action we take today fulfills this Congressional mandate by providing a process by which unfair acts involving terrestrially delivered, cable-affiliated programming may be addressed, thereby fostering competition in the video distribution market.

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[77] *See Everest Midwest Licensee v. Kansas City Cable Partners*, 18 FCC Rcd 26679, 26683-84, ¶ 10 (CSB, 2003); *RCN Telecom Servs. v. Cablevision Sys. Corp.*, 14 FCC Rcd 17093, 17105-06, ¶ 25 (CSB, 1999); *EchoStar Commc'ns Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, 2102, ¶ 28 (CSB, 1999); *Dakota Telecom, Inc. v. CBS Broad., Inc*., 14 FCC Rcd 10500, 10507-08, ¶¶ 21-22 (CSB, 1999); *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822, 21837, ¶ 32 (CSB, 1998).

[78] *See Everest Midwest Licensee*, 18 FCC Rcd at 26683-84, ¶ 10; *RCN*, 14 FCC Rcd at 17105-06, ¶ 25; *EchoStar*, 14 FCC Rcd at 2103, ¶ 29; *Dakota Telecom,* 14 FCC Rcd at 10507-08, ¶ 21; *DIRECTV*, 13 FCC Rcd at 21838, ¶ 33; *see also American Cable Co. v. TeleCable of Columbus, Inc.*, 11 FCC Rcd 10090, 10117, ¶ 61 (CSB, 1996); AT&T Reply to Cox at 7; AT&T Reply to MSG/Cablevision at 12-13.

[79] *See Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

[80] *See RCN Telecom Servs. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048,12053, ¶ 15 (2001) ("[T]here may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming. However, we agree with the Bureau that the facts alleged are not sufficient to constitute such a violation here."); *DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802, 22807, ¶ 13 (2000) (same), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *1996 OVS Order*, 11 FCC Rcd at 18325, ¶ 197 n.451 ("[W]e do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."); *see also* CA2C Comments at 15 n.33; DIRECTV Comments at 10-11; DIRECTV Reply at 9.

[81] H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273; *see also MDU Order,* 22 FCC Rcd at 20256-57, ¶ 45.

[82] H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273.

24. We recognize that the Senate version of what became Section 628(c)(2) would have pertained to all programmers, including those that provide terrestrially delivered programming, but that language was, without explanation, removed in the final version of the bill.[83] Contrary to the claims of cable operators,[84] however, we do not find this unexplained change in Section 628(c)(2) relevant in determining Congress' intent with respect to Section 628(b)'s broadly worded prohibition.[85] The change related specifically to the minimum contents of the program access rules that were required to be issued under Section 628(c)(2). Congress did not make any similar limiting amendment to Section 628(b) during its deliberations in 1992, and the inclusive language of Section 628(b) therefore is controlling here, just as it was in the *MDU Order*. Removal of the references to all "national and regional cable programmers" in the final version of the bill relate to Section 628(c)(2), which is thus expressly limited to satellite-delivered programming. We do not believe that this change to Section 628(c)(2) indicates a Congressional intent to limit the broad statutory language of Section 628(b), which contains no such limitation. We find no significance in earlier characterizations of the legislative history, such as that presented in the *2002 Program Access Order,* which viewed the removal of terrestrially delivered programming from the final version of the bill as an "express decision by Congress to limit the scope of the program access provisions to satellite delivered programming."[86] Those discussions were considering the scope of Section 628(c)(2), not Section 628(b), and thus did not address the issue we address here.

B. The Need for Commission Action to Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

25. Having established that we possess authority to address unfair acts involving terrestrially delivered, cable-affiliated programming, in this Section we discuss whether there is a need for such action. As discussed below, we find three reasons for taking action in this area: (i) cable operators continue to have an incentive and ability to engage in unfair acts or practices involving their affiliated

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[83] The Senate version of the legislation that became Section 628(c)(2) would have applied the program access provisions to all "national and regional cable programmers who are affiliated with cable operators." H.R. Rep. No. 102-862 (1992) (Conf. Rep.),at 91-93, *reprinted in* 1992 U.S.C.C.A.N. at 1273-75; *see also* S. Rep. No. 102-92 (1991), at 64, 77-78, 121-22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1197, 1210-11. The House amendment, by contrast, expressly limited the provisions to "satellite cable programming vendor[s] affiliated with a cable operator." *See* H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 91-93, *reprinted in* 1992 U.S.C.C.A.N. at 1273-75. The Conference agreement adopted the House version with amendments. *See id*.

[84] *See* Comcast Comments at 7-8; Cablevision Reply at 11; Comcast Reply at 11-12; Cox Answer at 14-15; MSG/Cablevision Answer at 25.

[85] *See*, *e.g., Drummond Coal Co. v. Watt,* 735 F.2d 469, 474 (11th Cir. 1984) ("Unexplained changes made in committee are not reliable indicators of congressional intent."), *quoted in Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1548 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 911 (1993); *Trailmobile Co. v. Whirls,* 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." (citation omitted)); *see also Mead Corp. v. Tilley,* 490 U.S. 714, 723 (1989). AT&T contends that Congress chose the term "satellite cable programming" because Congress was unaware of, and thus had no reason to consider, unfair acts involving terrestrially delivered programming. *See* AT&T Comments at 5-6; *see also* CA2C Reply at 10-11. While Comcast notes some examples of terrestrially delivered programming that existed at the time the 1992 Cable Act was drafted (*see* Comcast Reply at 12 n.43 (citing Warren Publishing, TELEVISION AND CABLE FACTBOOK: CABLE AND SERVICES, Vol. 60, at F-2, -4, -8, -9, -10, -12 (1992))), we agree with AT&T's broader point that "there is nothing to suggest that the phrase 'satellite cable programming' was anything other than a statement of the nature of the specific problem to be addressed at that time," and that Congress could not be expected to predict future trends in programming delivery. *See* AT&T Comments at 8 n.31; AT&T Reply to Cox at 12.

[86] *See 2002 Program Access Order,* 17 FCC Rcd at 12157-58, ¶ 73; *see also 2007 Program Access Order,* 22 FCC Rcd at 17844-45, ¶ 78; Cablevision Comments at 14 n.36; Comcast Comments at 7-8; Cablevision Reply at 11 n.26; Comcast Reply at 12.

programming, regardless of whether this programming is satellite-delivered or terrestrially delivered; (ii) our judgment regarding this incentive and ability is supported by real-world evidence that vertically integrated cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors; and (iii) there is evidence that, in some cases, this withholding may significantly hinder MVPDs from providing satellite cable programming and satellite broadcast programming to subscribers.

1. Incentive and Ability to Engage in Unfair Acts

26. Cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market.[87] This incentive and ability do not vary based on whether the cable-affiliated programming is delivered to cable operators by satellite or by terrestrial means.[88] A vertically integrated cable operator may raise the costs of its MVPD competitors by increasing the price of its affiliated programming or may choose not to sell its affiliated programming to rival MVPDs.[89] As the Commission noted in the *Adelphia Order,* "the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete."[90] Unfair acts involving cable-affiliated programming may harm the ability of MVPDs to compete with incumbent cable operators, thereby resulting in less competition in the marketplace to the detriment of consumers.[91]

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[87] *See 2007 Program Access Order,* 22 FCC Rcd at 17811-20, ¶¶ 30-42 (concluding that vertically integrated cable operators continue to have the ability to withhold affiliated programming from competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent extension of the ban on exclusive contracts); *see also id*. at 17820-53, ¶¶ 43-63 (concluding that vertically integrated cable operators continue to have the incentive to withhold affiliated programming from competitive MVPDs); *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 151; *2002 Program Access Order*, 17 FCC Rcd at 12124, ¶ 45; AT&T Comments at 1, 3 ("there can be no doubt that cable operators have the incentive and ability to withhold vertically integrated programming that is delivered terrestrially (they already have done so)"); BSPA Comments at 5 ("The Commission has correctly concluded that incumbent cable continues to have both the incentive and ability to use discriminatory access to programming to harm competition."); CA2C Comments at ii, 8 ("Vertically integrated cable operators . . . still have the incentive and ability to withhold such programming if allowed."); OPASTCO *et al* Comments at 4 ("vertically integrated cable programmers retain the incentive to withhold programming from their competitors" (citation omitted)); USTelecom Comments at 3 (in extending the exclusive contract prohibition in the *2007 Program Access Order*, the Commission "appropriately concluded that vertically integrated programmers continue to have both the incentive and ability to favor their affiliated cable operators over competitive MVPDs" (citation omitted)); DISH Network Reply at 1 ("Dominant cable companies still have the incentive and ability to withhold access to programming from both new and existing competitive MVPDs."); Verizon Reply at 13 (until there is a "competitive situation," "incumbent cable operators have an incentive to withhold programming because it is one of their strongest weapons against competition").

[88] *See* OPASTCO *et al* Comments at ii, 4 ("Programmers retain the incentive to restrict or deny access to content regardless of whether the delivery system is satellite or terrestrially based."); *see also* AT&T Comments at 3; CA2C Comments at 3.

[89] This strategy is commonly referred to as the "raising rivals' costs" theory. *See Adelphia Order,* 21 FCC Rcd at 8256, ¶ 117 (citing Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 523-27 (1995)); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209, 234-38 (1986).

[90] *Adelphia Order,* 21 FCC Rcd at 8256, ¶ 117.

[91] For example, the Commission has noted previously that, although competitors have entered the video distribution market, there is evidence that cable prices have risen in excess of inflation. *See 2007 Program Access Order,* 22 FCC Rcd at 17826-27, ¶ 50 (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and*
(continued….)

27. In the *2007 Program Access Order*, the Commission analyzed the incentive and ability of cable operators and their affiliates to engage in one type of unfair act – withholding of affiliated programming from rival MVPDs.[92] If the vertically integrated cable operator engages in withholding, it can recoup profits lost at the upstream level (*i.e.*, by licensing programming) by increasing the number of subscribers of its downstream MVPD division.[93] 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."[94] Although the cable industry's share of MVPD subscribers nationwide has decreased since the 1992 Cable Act was passed, the Commission in the *2007 Program Access Order* concluded that the cable industry's 67 percent market share remained sufficient to enable vertically integrated cable firms to make withholding a profitable strategy.[95] There is no evidence in this proceeding that market shares have changed materially since that time. To the contrary, the cable industry has elsewhere stated that its share of MVPD subscribers nationwide has declined only slightly since the *2007 Program Access Order*, to approximately 63.5 percent at the end of 2008.[96] Moreover, the Commission observed that the regional market shares of cable operators sometimes exceed the national average.[97] This makes withholding of

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Equipment, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15087-88, ¶ 2 (2006)); *see also Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 24 FCC Rcd 259, 260, ¶ 2 (MB, 2009) ("*Cable Price Report*") (concluding that from 1995 to 2008, the price of expanded basic service has grown from $22.35 to $49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period); USTelecom Comments at 4; CA2C Reply at 5.

[92] *See 2007 Program Access Order*, 22 FCC Rcd at 17827-29, ¶ 53.

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

[94] *2007 Program Access Order*, 22 FCC Rcd at 17827-29, ¶ 53.

[95] *See id*.; *see also id*. at 17832-33, ¶ 60 ("[V]ertically integrated programmers are likely to have the incentive to withhold programming only when their affiliated cable operators have a sufficient share of the distribution market to minimize the impact of foregone subscription and advertising revenues from denying access to other distributors. At this time, we conclude that vertically integrated programmers are likely to retain this incentive given the 67 percent share of the video distribution market held by cable operators."). In the *2007 Program Access Order*, the Commission relied on data indicating that the cable industry's share of MVPD subscribers nationwide was approximately 67 percent. *See id*. at 17827-28, ¶ 53 and 17832-33, ¶ 60; *see also* NCTA Comment at 12 (stating that competitors to traditional cable operators have captured 33 percent of MVPD subscribers); USTelecom Comments at 4 (stating that incumbent cable operators continue to control nearly 70 percent of MVPD subscribers).

[96] *See* Comments of The National Cable and Telecommunications Association, MB Docket No. 07-269 (May 20, 2009), at 8.

[97] *See 2007 Program Access Order,* 22 FCC Rcd at 17827-29, ¶ 53. NCTA and Comcast state that cable operators are losing subscribers to competitors. *See* NCTA Comments at 4-5; Comcast Reply at 5-7. CA2C disagrees, noting that "major cable operators dominate" the MVPD market, with regional market shares of 65 percent to 90 percent. *See* CA2C Reply at 5-6; *see also* CA2C Comments at 11, 21; Letter from Stacy Fuller, Vice President, Regulatory Affairs, DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment at 1 (Dec. 16. 2009) ("DIRECTV Dec. 16th *Ex Parte* Letter"); *cf.* DIRECTV Reply at 7-8 (noting that regulation of cable is warranted due to cable's "overwhelming market share"). Based on data from Nielsen Media Research, as of July 2009, the share of MVPD subscribers held by wired cable operators exceeds 70 percent in 78 out of 210 DMAs. *See* DMA Household Universe Estimates July 2009: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink). These include 27 of the Top 50 most-populated DMAs and the following 13 of the Top 20 most-populated DMAs: New York (No. 1; 88.5 percent cable market share); Chicago (No. 3; 77.1 percent cable market share); Philadelphia (No. 4; 83 percent cable market
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local and regional programming, which is often terrestrially delivered[98] and therefore beyond the reach of the program access rules, potentially an even more profitable strategy.[99]

28. The Commission has also found that the grouping of commonly owned cable systems into regional clusters enhances the ability and incentive of vertically integrated cable firms to engage in unfair acts with their affiliated programming.[100] Recent data indicates that over 77 percent of cable subscribers are served by systems that are part of regional clusters.[101] Commenters explain that clustering of a cable operator's systems makes terrestrial delivery of affiliated regional programming more feasible.[102] And

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share); San Francisco-Oakland-San Jose (No. 6; 72.9 percent cable market share); Boston (No. 7; 87.5 percent cable market share); Washington, DC (No. 9; 72.2 percent cable market share); Detroit (No. 11; 76.3 percent cable market share); Tampa-St. Pete (No. 13; 84.2 percent cable market share); Seattle (No. 14; 78.9 percent cable market share); Minneapolis-St. Paul (No. 15; 70.3 percent cable market share); Miami-Ft. Lauderdale (No. 16; 70.4 percent cable market share); Cleveland-Akron (No. 17; 77.1 percent cable market share); Orlando (No. 19; 76.7 percent cable market share). We note that the data refer to the market share held by "wired cable operators," and thus reflect market share data for incumbent cable operators as well as cable overbuilders. Given the minimal market share held by overbuilders, however, we believe the data provide a useful estimate of the market share held by incumbent cable operators. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 591, ¶ 100 and 684, Table B-1 (2009) ("*13th Annual Report*") (concluding that broadband service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers); *see also* USTelecom Comments at 5 (stating that fewer than two percent of the nation's households reside in markets with direct wireline competition); CA2C Reply at 6 (estimating that wireline competitors to incumbent cable operators reach five to six percent of the MVPD market). While Cox notes that it has met the "effective competition" test in certain markets, that test is not relevant here. *See* Cox Reply at 5-6; Cox Answer at 58-61; *but see* AT&T Reply to Cox at 3-4, 25; AT&T Reply to MSG/Cablevision at 31. The Media Bureau's review of data from Cox's effective competition petitions indicated that the DBS penetration rates in nine out of 54 San Diego franchise areas served by Cox exceeded 15 percent, and that a local exchange carrier ("LEC") offered service in other franchise areas. *See Cox Communications San Diego: Petition for Determination of Effective Competition in 27 Communities in California,* 23 FCC Rcd 7106, 7110-11, App. A, B (MB, 2008). These numbers do not demonstrate that the entire San Diego DMA is competitive nor that this level of competition deprives cable operators of the incentive to withhold or to take other anticompetitive actions with their affiliated programming.

[98] *See* Advance/Newhouse Reply at 2 (noting that local, community-oriented programming does not require satellite transmission); *see also* BSPA Comments at 6 ("The use of terrestrial distribution will grow and will potentially become a preferred distribution vehicle for local and regional programming."); CA2C Comments at 7, 10, 21 ("Today's reality is that there can be many circumstances where terrestrial networks are a preferred distribution resource . . . . This happens most frequently when content has regional as compared to national distribution or where the content will have any form of on-demand delivery to consumers. Regional and on-demand content are now expected to be some of the highest growth programming segments."); USTelecom Comments at 6; CA2C Reply at 6.

[99] *See 2007 Program Access Order*, 22 FCC Rcd at 17830, ¶ 55 ("the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming").

[100] *See id*. at 17830-32, ¶¶ 55-59.

[101] *See 13th Annual Report*, 24 FCC Rcd at 684 (Table B-1) and 686 (Table B-2). In the *2007 Program Access Order*, the Commission relied on data indicating that the percentage of cable subscribers that are served by systems that are part of regional clusters was between 85 and 90 percent. *See 2007 Program Access Order*, 22 FCC Rcd at 17810, n.136; *see also* USTelecom Comments at 6; CA2C Reply at 5.

[102] *See* BSPA Comments at 6 ("the extent of incumbent cable regional clusters combined with their scale creates additional incentive and opportunity for a vertically integrated programmer's delivery of programming via terrestrial distribution"); USTelecom Comments at 6 ("[I]ncumbent cable operators are significantly expanding their regional clusters throughout the country. These clusters now extend over major population regions and entire states, and provide incumbent cable operators with both the incentive and opportunity to deliver local and regional
(continued….)

the Commission has previously demonstrated through empirical analyses that clustering enhances the potential profitability of withholding regional programming from rival distributors.[103]

29. The Commission has also concluded that the recent emergence of new wireline entrants in the video distribution market enhances the incentive of incumbent cable operators to engage in unfair acts with their affiliated programming.[104] Data indicate that DBS operators do not constrain the price of cable service to the extent that wireline MVPDs do, thereby implying that incumbent cable operators perceive wireline MVPDs as a more significant competitive threat.[105] In addition, unlike DBS operators, wireline MVPDs can offer combinations of video, voice, and data services similar to those that incumbent cable operators offer to customers (the "triple play"), thus posing a greater competitive threat than DBS to cable operators.[106] Moreover, because recent wireline entrants have relatively small subscriber bases in most areas at this time, withholding affiliated programming from these new entrants would not cause programmers to lose a significant current source of revenue.[107]

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programming terrestrially to thwart video competition and evade the program access rules." (citation omitted)); *see also* CA2C Comments at ii, 3, 8, 10-12; CA2C Reply at 5-6, 21.

[103] *See 2007 Program Access Order*, 22 FCC Rcd at 17830, ¶ 55 ("[I]n many cities where cable [multiple system operators ("MSOs")] have clusters, the market penetration of competitive MVPDs is much lower and cable market penetration is much higher than their nationwide penetration rates. . . . As a result, the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming. Moreover, the affiliated cable operator will obtain a substantial share of the benefits of a withholding strategy because its share of subscribers within the cluster is likely to be inordinately high."); *see id*. at 17831-32, ¶¶ 56-59, and 17883-91, Appendix C (concluding that withholding of an RSN would be profitable in a significant range of cases).

[104] *See 2007 Program Access Order,* 22 FCC Rcd at 17832-34, ¶¶ 60-61; *see also* BSPA Comments at 2-3; CA2C Comments at 12; USTelecom Comments at 3, 6; AT&T Complaint v. Cox at 27.

[105] *See Cable Price Report*, 24 FCC Rcd at 261, ¶ 3; *see also* BSPA Comments at 2-3; CA2C Comments at 12; USTelecom Comments at 4-5; AT&T Complaint v. Cox at 27; AT&T Complaint v. MSG/Cablevision at 4.

[106] The Commission has noted a "shift from competition between stand-alone services to that between service bundles." *See Promotion of Competitive Networks in Local Telecommunications Markets,* Report and Order, 23 FCC Rcd 5385, 5388-89, ¶ 9 (2008). Although DBS operators offer triple play packages to their customers, they partner with outside vendors to do so. For example, DISH Network partners with voice and data providers to offer a triple play to its customers. *See* DISH Network, *Internet and Home Phone Packages,* http://www.dishconnectioncenter.com/. In a report to the U.S. Securities and Exchange Commission, DIRECTV noted that the emergence of wireline video has impacted its ability to bundle its video service with voice and data service provided by wireline partners. *See* The DIRECTV Group, Inc., *SEC Form 10-K for the Year Ended Dec. 31, 2008*, at 23 ("[V]arious telcos and broadband service providers have deployed fiber optic lines directly to customers' homes or neighborhoods to deliver video services, which compete with the DIRECTV service. . . . Some of these various telcos and broadband service providers also sell the DIRECTV service as part of a bundle with their voice and data services. A new broadly-deployed network with the capability of providing video, voice and data services could present a significant competitive challenge and, in the case of the telcos companies currently selling the DIRECTV service, could result in such companies focusing less effort and resources selling the DIRECTV service or declining to sell it at all.").

[107] *See 2007 Program Access Order*, 22 FCC Rcd at 17832-33, ¶ 60 ("Because recent entrants have minimal subscriber bases at this time, the costs that a cable-affiliated programmer would incur from withholding programming from recent entrants are negligible."); USTelecom Comments at 5 (stating that fewer than 2 percent of the nation's households reside in markets with direct wireline competition); AT&T Complaint v. Cox at 28; AT&T Reply to MSG/Cablevision at 4; *see also 13th Annual Report*, 24 FCC Rcd at 591, ¶ 100 and 684, Table B-1 (concluding that broadband service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers). In the *2007 Program Access Order*, the Commission noted the argument that, because of the non-discrimination provision of the program access rules, a vertically integrated programmer that withholds programming from one competitive MVPD in a market (such as a new entrant
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2. Evidence of Unfair Acts

30. Our judgment that cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming, including terrestrially delivered programming, is supported by real-world evidence. Because the program access rules currently apply only to satellite-delivered programming, terrestrial distribution allows a cable-affiliated programmer to bypass the program access rules. The record here, as well as our discussion in the *2007 Program Access Order*, reflects substantial evidence that cable firms withhold affiliated programming from competitors when not barred from doing so.[108] Moreover, the record reflects that terrestrial distribution is becoming more cost effective, and that its use is likely to continue and possibly increase in the future.[109] Below, we provide several examples of withholding of terrestrially delivered, cable-affiliated programming:[110]

- *HD Feeds of MSG and MSG+.* Cablevision has withheld the terrestrially delivered HD feeds of its affiliated MSG and MSG+ RSNs from certain competitors in New York City, Buffalo, and Connecticut.[111]
- *Cox-4 San Diego.* Cox has withheld the terrestrially delivered Cox-4 channel, which has exclusive rights to the San Diego Padres baseball games, from DIRECTV, EchoStar, and AT&T.[112]

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with a minimal subscriber base) would generally need to withhold the programming from all other competitive MVPDs in the market (such as an established competitor with a significant number of subscribers), thereby increasing the foregone revenues resulting from a withholding strategy. *See 2007 Program Access Order*, 22 FCC Rcd at 17832-33, ¶ 60. This condition does not apply in the case of terrestrially delivered, cable-affiliated programming, however, because the program access rules do not currently apply to this programming. Thus, the non-discrimination provision of the program access rules applicable to satellite-delivered, cable-affiliated programming does not preclude a vertically integrated programmer from withholding its terrestrially delivered programming from a new entrant in a market but providing the same programming to established competitors in the market. Moreover, even if the non-discrimination rule applied to terrestrially delivered, cable-affiliated programming, the Commission nonetheless found in the *2007 Program Access Order* that this rule would not deter withholding because the long-term benefits to the vertically integrated cable operator would outweigh any short-term costs. *See id.* at 17832, ¶ 60 and 17834, n.320.

[108] *See 2007 Program Access Order,* 22 FCC Rcd at 17826, ¶ 49.

[109] *See infra* n.128.

[110] This list provides examples of terrestrially delivered, cable-affiliated programming networks that have been withheld from competitive MVPDs. We do not conclude in this *Order* that the withholding of any of these networks is currently significantly hindering or preventing any MVPD from providing satellite cable programming or satellite broadcast programming in violation of Section 628(b). Rather, that would be a point of fact to be proven or rebutted in each case. As discussed in Section III.D, we will consider on a case-by-case basis whether an unfair act involving terrestrially delivered, cable-affiliated programming is significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming.

[111] *See 2007 Program Access Order,* 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9; USTelecom Comments at 7; Verizon Comments at 8; Verizon Reply at 8; Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 2 (July 17, 2008) ("Verizon July 17th *Ex Parte* Letter"); *see also* Verizon Telephone Companies *et al*, Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009); AT&T Complaint v. MSG/Cablevision. Consumers Union states that, even though Cablevision does not provide cable service in Buffalo, Cablevision has "chosen to make this content available only to select MVPDs and has denied access to Verizon." *See* Consumers Union Aug. 12th *Ex Parte* Letter at 4.

[112] *See 2007 Program Access Order,* 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9; DIRECTV Comments at 13; USTelecom Comments at 7; AT&T Complaint v. Cox. As discussed above, the Media Bureau has denied without prejudice a program access complaint regarding access to this programming because (i) there is no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b); and (ii) (continued….)

- *Comcast SportsNet Philadelphia*. Comcast has withheld this terrestrially delivered RSN, which carries regional professional sports programming in Philadelphia, from DBS firms.[113] This RSN was the subject of previous program access complaints, which were denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) there were not sufficient facts alleged to find that Comcast delivered the programming terrestrially to evade the program access rules.[114] As a result of merger conditions adopted in the *Adelphia Order*, Comcast SportsNet Philadelphia is currently subject to the program access rules applicable to satellite-delivered programming with respect to some but not all of the competing MVPDs in Philadelphia.[115]
- *Sports Programming in New York City*. The Commission previously noted evidence that Cablevision withheld certain sports programming from RCN after Cablevision revised its distribution system from satellite to terrestrial delivery.[116] RCN's program access complaint regarding this dispute was denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) Cablevision did not change its distribution system from satellite to terrestrial delivery to evade the Commission's rules.[117]
- *New England Cable News.* The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated regional news network had been withheld temporarily from RCN.[118]
- *CN8 – The Comcast Network*. The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated local news and information channel is available only to Comcast and Cablevision subscribers and is withheld from competitors to incumbent cable operators.[119]
- *iN DEMAND*. The Commission previously noted claims that this terrestrially delivered, cable-affiliated network has been withheld from certain MVPD competitors.[120]

3. Evidence of the Impact of Unfair Acts

31. As discussed below, Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming is also needed because (i) there is evidence suggesting that such

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the pending rulemaking, rather than an adjudicatory proceeding, is the correct forum for addressing this issue. *See AT&T v. Coxcom*, 24 FCC Rcd at 2864, ¶ 16.

[113] *See Adelphia Order,* 21 FCC Rcd at 8276, ¶ 163; *see also 2007 Program Access Order,* 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9; DIRECTV Comments at 13; USTelecom Comments at 7.

[114] *See DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822 (CSB, 1998) and *EchoStar Commc'ns Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (CSB, 1999), *aff'd.*, *DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802 (2000), *aff'd EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

[115] *See Adelphia Order,* 21 FCC Rcd at 8276, ¶ 163 ("[W]e do not require that Comcast SportsNet Philadelphia be subject to [the program access] conditions to the extent it is not currently available to MVPDs. With regard to MVPDs that currently have contracts for SportsNet Philadelphia, both the program access and arbitration conditions will apply as set forth above."); *see also infra* Section III.E.3.

[116] *See 2007 Program Access Order,* 22 FCC Rcd at 17823, ¶ 49; *see also* CA2C Comments at 9.

[117] *See RCN Telecom Servs. v. Cablevision Sys. Corp.*, 14 FCC Rcd 17093 (CSB, 1999), *aff'd RCN Telecom Servs. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048 (2001).

[118] *See 2007 Program Access Order,* 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9.

[119] *See 2007 Program Access Order,* 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9.

[120] *See 2007 Program Access Order,* 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9.

conduct has significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming in some cases and (ii) by significantly hindering MVPDs from providing video programming to subscribers, such conduct may significantly hinder the ability of competitive MVPDs to provide broadband services, particularly in rural areas.

a. Impact on Competition in the Video Distribution Market

32. Our previous decisions, as well as the record here, demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming may "hinder significantly"[121] MVPDs from providing satellite cable programming and satellite broadcast programming in some cases, thereby harming competition in the video distribution market.[122] In 2006, the Commission performed a regression analysis which concluded 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.[123] The analysis also concluded 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 it otherwise would have been.[124] This provides evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming.[125]

[121] 47 U.S.C. § 548(b) (providing that it shall be unlawful for a cable operator to engage in an unfair act "the purpose or effect of which is to hinder significantly or to prevent" any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers).

[122] *See 2007 Program Access Order,* 22 FCC Rcd at 17817-18, ¶¶ 39-41; *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149; *see also* AT&T Comments at 3; CA2C Comments at 10-12; DIRECTV Comments at 13-14; NTCA Comments at 8; OPASTCO *et al* Comments at 4-5; CA2C Reply at 4, 19-21; DIRECTV Reply at 10; DISH Network Reply at 3; Letter from Stephen Pastorkovich, Business Development Director and Sr. Policy Analyst, OPASTCO, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment at 7 (Dec. 10, 2007) ("OPASTCO Dec. 10th Letter"). We note that AT&T and Verizon have submitted studies (some of which contain redacted information) and other evidence in the record of this proceeding to support their view that withholding of the MSG HD and Cox-4 networks has had the purpose or effect that triggers Section 628(b). *See* AT&T Dec. 16th *Ex Parte* Letter (attaching AT&T Complaint v. Cox, AT&T Reply to Cox, AT&T Complaint v. MSG/Cablevision, AT&T Reply to MSG/Cablevision); Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 6, 2010), Attachment 1 ("Verizon Jan. 6th *Ex Parte* Letter"); *but see* Cablevision/MSG Jan. 7th *Ex Parte* Letter (attaching MSG/Cablevision Answer); Letter from Howard J. Symons, Counsel to MSG/Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 13, 2010) (attaching reply to Verizon study attached to Verizon Jan. 6th *Ex Parte* Letter); Cox Jan. 13th *Ex Parte* Letter (attaching Cox Answer and response to AT&T declaration and survey). These studies and other evidence were submitted previously in pending complaint proceedings. *See supra* ¶ 17. We will assess the merits of those studies and other evidence in addressing the relevant complaints.

[123] *See Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149; *see also 2007 Program Access Order,* 22 FCC Rcd at 17817-18, ¶ 39. The empirical model was based on the Wise and Duwadi model, which examines DBS penetration and the variables that affect it. *See* Andrew S. Wise and Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. COMPETITION L. & ECON. 679 (2005). The data used in the analysis came from the Commission's 2005 Cable Price Survey, Nielsen Media Research, and Comcast and Time Warner filings. *See Adelphia Order,* 21 FCC Rcd at 8344-47, App. D, ¶¶ 14, 18-23. In the *2007 Program Access Order*, the Commission responded to and refuted criticisms of the Commission's regression analysis. *See 2007 Program Access Order,* 22 FCC Rcd at 17818-19, ¶ 40 and 17876-82, Appendix B ("The new results, in fact, support the Commission's analysis in the *Adelphia Order*, and in some respects strengthen the conclusions reached in that decision.").

[124] *See Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149; *2007 Program Access Order,* 22 FCC Rcd at 17817-18, ¶ 39.

[125] We note that more than three years have passed since the Commission performed its regression analysis in the (continued….)

33. While the Commission concluded in the *1998 Program Access Order* that the record developed in that proceeding did not demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming were having a "significant anticompetitive effect," that conclusion was based on the limited data that were available more than ten years ago.[126] We now have evidence that unfair acts involving terrestrially delivered, cable-affiliated programming may well have the effect in some cases of significantly hindering MVPDs from providing all programming to subscribers and consumers. Moreover, while the Commission concluded in the *1998 Program Access Order* that the record developed in that proceeding did not demonstrate that programming was being shifted from satellite to terrestrial delivery,[127] the record here demonstrates that the MVPD marketplace has evolved, such that terrestrial distribution is becoming more cost effective and its use is likely to increase for new as well as established programming networks.[128] Indeed, the record reflects that competitively significant networks, such as RSNs, are being delivered terrestrially today.[129]

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Adelphia Order regarding the impact of withholding of Comcast SportsNet Philadelphia and Cox-4 on the market shares of DBS operators in Philadelphia and San Diego, respectively. Commenters claim that there have been important developments in the video distribution markets in Philadelphia and San Diego since this time. *See* Cox Reply at 5-7 (noting that the DBS penetration rate in San Diego increased from 9.5 percent in 2004-2005 to 13.2 percent in 2007); *see also* Cablevision Reply at 15; Comcast Reply at 11 n.41; Cox Answer at 40, 58; Letter from Ryan G. Wallach, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 3 (Jan. 13, 2010) ("Comcast Jan. 13th *Ex Parte* Letter") (stating that DBS penetration rate in Philadelphia has increased to 14.4 percent as of September 2009 and is higher than in some other markets where DBS operators have access to all RSNs); *but see* AT&T Reply to Cox at 24-25 (explaining that DBS market share in San Diego is far below the national average); Letter from Linda Kinney, Vice President, Law and Regulation, DISH Network, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment (Jan. 14, 2010) (providing data indicating that DISH Network's penetration rate in Philadelphia and San Diego remains well below the rate achieved in comparable cities and its average national penetration rate). Our reliance here on the Commission's analysis in the *Adelphia Order* to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming can significantly hinder MVPDs from providing video service in some cases should not be read to imply that withholding of Comcast SportsNet Philadelphia or Cox-4 is currently significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming in Philadelphia or San Diego, respectively. Rather, as discussed in Section III.D.2 below, we establish a rebuttable presumption that an unfair act involving certain terrestrially delivered, cable-affiliated RSNs has the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. A defendant to a program access complaint alleging an unfair act involving an RSN will have the opportunity to rebut this presumption.

[126] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, 15856-57, ¶ 71 (1998) ("*1998 Program Access Order*"); *see also* DIRECTV Comments at 11-12. In that decision, the Commission also noted that Congress was considering legislation at the time which, if enacted, would "introduce important changes to the program access provisions, including clarification of the Commission's jurisdiction over terrestrially-delivered programming." *See 1998 Program Access Order,* 13 FCC Rcd at 15856-57, ¶ 71. The Commission, however, never stated or implied that it did not have jurisdiction over such programming absent such clarification.

[127] *See 1998 Program Access Order,* 13 FCC Rcd at 15856-57, ¶ 71.

[128] *See* BSPA Comments at 6 ("The use of terrestrial distribution will grow and will potentially become a preferred distribution vehicle for local and regional programming."); CA2C Comments at 4-7 ("[T]he use of terrestrial distribution is expected to expand as we continue to move toward all digital networks with expanded regional and on-demand content. . . . High capacity terrestrial networks did not exist as they do today when the program access rules were first enacted in 1992 . . . . The dot-com boom and the continuing development of digital technology have now created terrestrial networks as a significant new resource and alternative to satellite distribution. In addition to the extensive networks that have been built during the past ten years, we continue to increase the capacity of these fiber networks through improved transmission technologies. . . . The result is a new transport capability that can efficiently transport any or all of the content that had been historically limited to satellite distribution as the only cost
(continued….)

34. Vertically integrated cable operators argue that MVPDs are not dependent on vertically integrated cable programming because multiple programming options exist.[130] But that is not always the case. As the Commission concluded in the *2007 Program Access Order*, cable operators own programming for which there may be no good substitutes, and this "must-have" programming is necessary for viable competition in the video distribution market.[131] The Commission explained that this includes both satellite-delivered and terrestrially delivered programming.[132] As the Commission stated in the *2002 Program Access Order*, "cable programming – be it news, drama, sports, music, or children's programming – is not akin to so many widgets."[133] The salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators, but rather the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service.[134]

35. While cable operators claim that unfair acts involving terrestrially delivered, cable-affiliated programming have not significantly hindered their competitors from providing satellite cable programming or satellite broadcast programming,[135] we believe that these general, sweeping claims are

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effective alternative, and the use of terrestrial distribution is only expected to grow."); Verizon Comments at 12 ("[A]s a technological matter, the distinction suggested by Section 628 between programming that is 'satellite' delivered and programming that is terrestrially delivered has largely gone away. Since Section 628 was adopted in 1992, the availability of fiber over which programming can be delivered terrestrially has increased dramatically. Programming can often be delivered now on a cost-effective, terrestrial basis . . . ." (internal citation omitted)); Verizon Reply at 5.

[129] *See supra* ¶ 30.

[130] *See* NCTA Comments at 5; Comcast Reply at 7. Comcast argues that the percentage of vertically integrated programming networks affiliated with a cable operator has dropped from 57 percent in 1992 to less than 15 percent today and contends that no program owner has market power. *See* Comcast Reply at 4, 13 ("no party offered specific, credible evidence that MVPDs are not getting the programming they need to compete"); *see also 13th Annual Report*, 24 FCC Rcd at 550, ¶ 21 (finding that 14.9 percent of programming networks are affiliated with a cable operator). Moreover, cable operators contend that the digital transition will likely foster the development of more programming and that Internet programming is starting to develop as a competitive alternative. *See* NCTA Comments at 5-6; Comcast Reply at 6. In addition, NCTA notes that competitors to incumbent cable operators market themselves as offering superior programming, and contends that such marketing undermines any justification for "retention of the existing regulation of cable-affiliated programming, let alone expansion of those regulations." *See* NCTA Comments at 5; *see also* Comcast Reply at 7-9.

[131] *See 2007 Program Access Order,* 22 FCC Rcd at 17811, ¶ 30 and 17814-16, ¶¶ 37-38; *see also* AT&T Comments at 1 (noting that cable firms control "must have" programming that their MVPD competitors need to compete); *cf.* BSPA Comments at 9 (contending that several markets are not competitive and that incumbents have "extensive control" over critical programming); *see also* CA2C Comments at 2-3; DIRECTV Comments at 2.

[132] *See 2007 Program Access Order,* 22 FCC Rcd at 17817, ¶ 39 (discussing withholding of terrestrially delivered, cable-affiliated RSNs in Philadelphia and San Diego).

[133] *2002 Program Access Order*, 17 FCC Rcd at 12139, ¶ 33.

[134] *See 2007 Program Access Order,* 22 FCC Rcd at 12140, ¶ 38.

[135] For example, some commenters note that DBS operators continue to attract subscribers in San Diego and Philadelphia, despite the fact that cable operators in those markets have withheld the local RSN from the DBS operators. *See* Cox Reply at 5-6; Cablevision Reply at 15; Comcast Reply at 11 n.41. Cox and Cablevision also note that competitors to incumbent cable operators have entered the video distribution market despite the terrestrial loophole. *See* Cox Reply at 6-7; Cablevision Reply at 15. Other commenters contend that withholding of certain terrestrially delivered, cable-affiliated programming, such as local news and community programming, does not raise competitive concerns. *See* NCTA Comments at 7-9; Advance/Newhouse Reply at 2, 6-8. One new entrant MVPD urged the Commission to extend the program access rules only to (i) terrestrially delivered RSNs; and (ii)
(continued….)

refuted by the Commission's conclusion in the *Adelphia Order* that DBS market penetration was significantly reduced as a result of the denial of access to certain terrestrially delivered, cable-affiliated programming.[136] We do not believe, however, that significant hindrance will result in every case. The Commission concluded in the *Adelphia Order,* based on the record evidence in that case, that while lack of access to certain terrestrially delivered RSNs had a significant competitive impact,[137] lack of access to certain other programming did not have a significant hindering effect.[138] Thus, we believe that the potential impact on competition in some cases justifies a case-by-case consideration of the competitive impact of unfair acts involving specific terrestrially delivered, cable-affiliated programming. Rather than adopting a general conclusion about the effect of these unfair acts, we believe 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.[139]

b. Impact on Ability to Provide Broadband Services

36. Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming will have additional benefits, not specifically envisioned by Congress in 1992, because such

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terrestrially delivered HD feeds of programming that is otherwise satellite-delivered. *See* Verizon Comments at 4-8; *see also* Verizon July 17th *Ex Parte* Letter at 1-2.

136 *See supra* ¶ 32; *2007 Program Access Order,* 22 FCC Rcd at 17817, ¶ 39; *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149; *see also* AT&T Comments at 9-10; CA2C Comments at 13-18; DIRECTV Comments at 11-14; USTelecom Comments at 8-9.

137 *See 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; 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); *see also 2007 Program Access Order,* 22 FCC Rcd at 17818-19, ¶ 40 and 17876-82, Appendix B.

138 *See 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 new team that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs); *id.* 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); Cox Reply at 4 n.9.

139 We note that the Commission adopted a different approach in the *MDU Order*, where it concluded that it would be unnecessarily burdensome for the Commission and parties to assess exclusive contracts between cable operators and MDU owners on a case-by-case basis. *See MDU* Order, 22 FCC Rcd at 20253-54, ¶ 38. In that case, however, the Commission explained that "exclusivity clauses protect cable operators from competition in MDUs from new entrants into the MVPD business." *See id*. at 20237, ¶ 3. By definition, exclusive agreements in the MDU context prevent competitors from providing service. *See also NCTA*, 567 F.3d at 664 ("cable operators execute them precisely so that they can be the sole company serving a building. . ."). Thus, the Commission categorically proscribes such agreements. In contrast, while some unfair acts involving terrestrially delivered, cable-affiliated programming can and historically have significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming, the record here indicates that others may not. Accordingly, a case-by-case approach to implementing Section 628(b) is necessary in the present context based on the current record, whereas it was not necessary in the *MDU Order*. We note, however, that on an appropriate record the Commission would have authority to adopt a *per se* ban on particular unfair acts prohibited by Section 628(b). *See supra* ¶ 19; *see also* 47 U.S.C. §§ 548(b), (c)(1); *NTCA*, 567 F.3d 659. Nothing in this *Order* forecloses the Commission from adopting such a *per se* ban on unfair acts involving terrestrially delivered, cable-affiliated programming in the future. We will continue to monitor marketplace developments regarding terrestrially delivered, cable-affiliated programming, as well as the impact of the rules adopted in this *Order* on potential complainants. Based on these developments, we may initiate a new proceeding in the future that explores the adoption of a *per se* ban on unfair acts involving terrestrially delivered, cable-affiliated programming or certain classes of such programming.

acts have the potential to limit the ability of MVPDs to provide broadband services, particularly in rural areas.[140] The Commission has previously concluded that a wireline firm's decision to deploy broadband is linked to its ability to offer video.[141] Thus, by impeding the ability of MVPDs to provide video service, unfair acts involving terrestrially delivered, cable-affiliated programming can also impede the ability of MVPDs to provide broadband services.[142] Allowing unfair acts involving terrestrially delivered, cable-affiliated programming to continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission.[143] This secondary effect heightens the urgency for Commission action.

c. Impact on Investment in Programming and Product Differentiation

37. Vertically integrated cable operators argue that the Commission should refrain from addressing denials of terrestrially delivered, cable-affiliated programming because exclusive distribution contracts for this programming can promote investment in programming and product differentiation.[144] Advance/Newhouse notes that it has developed regional non-sports programming that is terrestrially

[140] *See* NTCA Comments at 11-13 ("Because of the high cost of deploying broadband in rural areas, small ILECs must offer video services along with other applications that support the investment in broadband facilities."); USTelecom Comments at 7-8 ("Because the deployment of broadband networks and the provision of video service are intrinsically linked, abuse of the terrestrial loophole by cable incumbents compromises the ability of wireline competitors to deploy other advanced services to consumers."); *see also* AT&T Comments at 13; CA2C Comments at 18-20; OPASTCO *et al* Comments at 5-7; USTelecom Comments at 7-8; Verizon Comments at 14; CA2C Reply at 4, 11-13; OPASTCO Dec. 10th Letter, Attachment at 7; AT&T Complaint v. Cox at 29; AT&T Complaint v. MSG/Cablevision at 38-39.

[141] *See Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2006) ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated." (citation omitted)), *aff'd., Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); AT&T Comments at 13; CA2C Comments at 18-20; OPASTCO *et al* Comments at 6; CA2C Reply at 13; *see also* Letter from Glenn Reynolds, Vice President, Law and Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment at 4 (Jan. 12, 2010) (stating that NECA reports that ILECs with video offerings have an average of 24 percent higher take rate for broadband).

[142] *See* AT&T Comments at 13; CA2C Comments at 18-20; NTCA Comments at 10-13; OPASTCO *et al* Comments at 5-7; USTelecom Comments at 8; Verizon Comments at 14; CA2C Reply at 4, 11-13; OPASTCO Dec. 10th Letter, Attachment at 7.

[143] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note). We disagree with Cablevision's contention that addressing the terrestrial loophole will not impact broadband deployment because AT&T and Verizon have already invested in broadband infrastructure. *See* Cablevision Comments at 16; Cablevision Reply at 13-14, 18; MSG/Cablevision Answer at 68. The record here contains no evidence that AT&T and Verizon have already deployed broadband networks throughout their service territories or that these providers will not face decisions regarding whether to upgrade existing networks. Moreover, Congress directed the Commission to promote the deployment of broadband throughout the nation, including in markets outside of the service areas of AT&T and Verizon. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (authorizing the Commission to create the National Broadband Plan that "shall seek to ensure that all people of the United States have access to broadband capability"); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 nt. (2008)) (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

[144] *See* Cablevision Comments at 8 (arguing that the exclusive contract prohibition impedes product differentiation and lowers investment in programming); Comcast Reply at 2 (arguing that deregulatory measures, such as retaining the terrestrial loophole, spur new investment); Advance/Newhouse Reply at 3-5.

delivered and therefore not subject to the program access rules applicable to satellite-delivered programming.[145] Advance/Newhouse states that its affiliated cable operators offer this programming exclusively, thereby differentiating their service offerings from MVPD competitors.[146] Advance/Newhouse contends that applying program access requirements to this programming would force its affiliated cable operators to share this programming with their competitors, thereby eliminating any economic incentive to create this programming.[147] Advance/Newhouse states that it is unlikely to continue investing in such programming unless its affiliated cable operators can offer the programming on an exclusive basis.[148]

38. We note that the Commission in the *2007 Program Access Order* found unpersuasive arguments that the program access rules, including the exclusive contract prohibition, have reduced the incentives for cable operators and competitive MVPDs to create and invest in programming.[149] The Commission noted that the number of vertically integrated satellite-delivered national programming networks has in fact more than doubled since 1994 when the rule implementing the exclusive contract prohibition took effect.[150] While evidence was submitted in that proceeding that the percentage of vertically integrated satellite-delivered national programming networks had decreased over time,[151] competitive MVPDs characterized the decrease as "meaningless because it is attributable to an increase in the number of total programming networks available, most of which they contend have minimal subscriber bases and are targeted towards niche markets."[152] Competitive MVPDs argued that the more relevant fact was the control of cable MSOs over "must have" programming, access to which is necessary to compete in the video distribution market.[153] The Commission agreed: "What 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 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."[154] A similar analysis applies to the present matter, given our goal of increasing competition and diversity in the video distribution market.[155] In addition,

[145] *See* Advance/Newhouse Reply at 3-5. Advance/Newhouse manages Bright House Networks, a provider of voice, video, and data services in Florida, Alabama, Indiana, California, and Michigan. *See id*. at 1. Bright House Networks has invested nearly $150 million to provide five channels of original local content in Tampa and has invested more than $80 million to provide five channels of original local content in Orlando. *See id*. at 3-5.

[146] *See id*. at 2, 3, 5.

[147] *See id*. at 2, 3, 5, 8.

[148] *See id.* at 2, 5, 8.

[149] *See 2007 Program Access Order*, 22 FCC Rcd at 17836, ¶ 64; *see also* CA2C Reply at 3. While cable operators claim without empirical support that regional networks are less likely to be created if they are subject to the complaint procedure established in this *Order*, we find no basis for assuming that the impact of the case-by-case approach adopted here on the incentives to create programming will be different than the impact of the *per se* rule applicable to satellite-delivered programming. *See* Letter from Howard J. Symons, Counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 2 (Jan. 8, 2010) ("Cablevision Jan. 8th *Ex Parte* Letter"); Letter from Matthew A. Brill, Counsel to Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 2 (Jan. 6, 2010) ("Time Warner Cable Jan. 6th *Ex Parte* Letter").

[150] *See 2007 Program Access Order*, 22 FCC Rcd at 17836, ¶ 64.

[151] *See id.* at 17811, ¶ 31.

[152] *See id.* at 17811, ¶ 32 (citation omitted).

[153] *See id.*

[154] *See id* at 17814-15, ¶ 37 (citation omitted).

[155] *See infra* ¶ 40; *see also* CA2C Reply at 3.

while vertically integrated cable operators claim that exclusive deals and other unfair acts are justified because they allow a cable operator to differentiate its services from other MVPDs,[156] Section 628(b) specifically precludes such acts where they have the purpose or effect set forth in Section 628(b).[157]

39. In sum, Sections 628(b) and 628(c)(1) of the Act give the Commission authority to address unfair acts of cable operators that have the purpose or effect of hindering significantly or preventing any MVPD from providing "satellite cable programming or satellite broadcast programming to subscribers or consumers."[158] The focus of the statute is not on the ability of an MVPD to provide a particular terrestrially delivered programming network, but on the ability of the MVPD to compete in the video distribution market by selling satellite cable and satellite broadcast programming to subscribers and consumers. To be sure, unfair acts involving terrestrially delivered, cable-affiliated programming generally do not absolutely bar an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. For example, an incumbent cable operator's exclusive contract with a terrestrially delivered, cable-affiliated RSN does not totally preclude a rival MVPD from providing other programming, including satellite cable programming and satellite broadcast programming, to subscribers or consumers.[159] As discussed above, however, in some cases the effect of denying an MVPD the ability to provide certain terrestrially delivered, cable-affiliated programming may be to significantly hinder the MVPD from providing video programming in general, including satellite cable programming and satellite broadcast programming, as well as terrestrially delivered programming.[160] The result of this conduct may be to discourage MVPDs from entering new markets or to limit the ability of MVPDs to provide a competitive alternative to the incumbent cable operator. The reduction in robust competition in the video distribution market that results may allow cable operators to raise rates and to refrain from innovating, thereby adversely impacting consumers.[161] Consumers Union, for instance, asserts that large cable operators use the terrestrial loophole "to hold consumers hostage . . . ."[162] This is consistent with the Commission's analysis in the *MDU Order*. In that decision, the Commission found that exclusivity clauses significantly hinder MVPDs from providing satellite cable programming and satellite broadcast programming throughout a market, including to subscribers who do

[156] *See* Cablevision Comments at 8; Advance/Newhouse Reply at 2, 3, 5; MSG/Cablevision Answer at 5-6, 34-38, 40-41, 59-60, 73-75.

[157] *See infra* n.200; *see also* AT&T Complaint v. MSG/Cablevision at 28; AT&T Reply to MSG/Cablevision at 16-17, 28-29.

[158] 47 U.S.C. § 548(b); *see* 47 U.S.C. § 548(c)(1).

[159] *See* Cablevision/Brands Jan. 8th *Ex Parte* Letter at 2-3; Letter from Daniel L. Brenner, Counsel to Bright House Networks, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment at 2 (Jan. 6, 2010) ("Bright House Networks Jan. 6th *Ex Parte* Letter"); Letter from Howard J. Symons, Counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 14-15 (Nov. 13, 2009) ("Cablevision Nov. 13th *Ex Parte* Letter"); Cox Answer at 4, 27; MSG/Cablevision Answer at 30-31.

[160] *See supra* Section III.B.3.a; *2007 Program Access Order,* 22 FCC Rcd at 17817, ¶ 39; *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149; *see also* AT&T Comments at 9-10; CA2C Comments at 13-18; DIRECTV Comments at 11-14; USTelecom Comments at 8-9; DIRECTV Reply at 10; DISH Network Reply at 3; AT&T Reply to MSG/Cablevision at 8-9.

[161] *See supra* n.91.

[162] Consumers Union Aug. 12th *Ex Parte* Letter at 4; *see* Verizon Comments at 13 ("[V]ertically integrated cable operators exploit[] their control over RSNs and HD feeds of programming covered by the program access rules in order to protect their position in the video market to the detriment of consumers."); *see also* OPASTCO *et al* Comments at 4 (stating that the terrestrial loophole thwarts competition in the video market); AT&T Complaint v. Cox at 28.

not reside in MDUs, because exclusivity clauses "deter[] new entry into the MVPD market in many areas because they put a significant number of new customers off limits to new entrants."[163]

40. In addition to satisfying the plain language of Section 628(b), our action here will also further the goals established by Congress in Sections 628(a) and 628(c)(1) of the Act.[164] First, our action will increase competition and diversity in the video distribution market by providing MVPDs with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer.[165] Second, our action will increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and unserved areas by eliminating a barrier to entry in the video distribution market.[166] Third, our action will spur the development of communications technologies by promoting the provision of broadband services by MVPDs.[167]

C. Constitutional Issues

41. We conclude that addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. As the D.C. Circuit explained in rejecting a facial challenge to the constitutionality of the program access provisions dictated by Section 628(c)(2) and applicable to satellite-delivered, cable-affiliated programming, 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."[168] We conclude that the rules we adopt today with respect to terrestrially delivered, cable-affiliated programming comport with the First Amendment.

42. First, in *Time Warner*, the court found that the governmental interest Congress intended to serve in enacting the program access provisions was "the promotion of fair competition in the video marketplace," and that this interest was substantial.[169] Moreover, the court noted Congress' conclusion that "the benefits of these provisions -- the increased speech that would result from fairer competition in

[163] *MDU Order*, 22 FCC Rcd at 20242, ¶ 13; *id*. at 20245, ¶ 19 ("Even if exclusivity clauses do not completely bar new entrants from the MVPD market everywhere, they foreclose new entrants from many millions of households, a significant part of the national marketplace. Such clauses could therefore deter new entrants from attempting to enter the market in many areas."); *id.* at 20255, ¶ 43; *id.* at 20261, ¶ 54; *see also* CA2C Comments at 17.

[164] *See* 47 U.S.C. § 548(a) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies."); 47 U.S.C. § 548(c)(1) (providing the Commission with authority to "prescribe regulations to specify particular conduct that is prohibited by" Section 628(b) "in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies"); *1993 Program Access Order*, 8 FCC Rcd at 3360, ¶ 1 ("Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems . . . .").

[165] *See* 47 U.S.C. §§ 548(a), (c)(1); *supra* Section III.B.3.a.

[166] *See* 47 U.S.C. § 548(a); *supra* Section III.B.3.a.

[167] *See* 47 U.S.C. §§ 548(a), (c)(1); *supra* ¶ 36.

[168] *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (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))).

[169] *Id*. Moreover, one of Congress' express findings in enacting the 1992 Cable Act was that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 1992 Cable Act, § 2(a)(6).

the video programming marketplace -- outweighed the disadvantages [resulting in] the possibility of reduced economic incentives to develop new programming."[170] We find that this governmental interest remains substantial today. As the Commission concluded in the *2007 Program Access Order*, cable operators still have a dominant share of MVPD subscribers, there is evidence that cable prices have risen in excess of inflation, and cable operators still own significant programming.[171] These factors lead us to believe that regulations intended to promote competition in the video distribution market in accordance with the objectives of Congress are still warranted.[172] Our decision here furthers this substantial governmental interest by providing competitive MVPDs with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer, thereby promoting competition in the video distribution market for the benefit of consumers.

43. Second, in *Time Warner*, the court held that the governmental objective served by the statutory program access provisions was unrelated to the suppression of free expression.[173] Similarly, our decision to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis is not based on programming content but is instead intended to address significant hindrances to competition in the video distribution market. It responds to concerns about competition, not content. Thus, the regulations are content-neutral and unrelated to the suppression of free speech.

44. Third, any alleged restriction on speech resulting from our decision "is no greater than is essential to the furtherance" of Congress' interest in promoting competition in the video distribution market.[174] The analysis in *Time Warner* applies here as well. Indeed, *Time Warner* upheld as narrowly tailored the categorical, prophylactic program access rules, whereas here we adopt a tailored case-by-case approach that examines actual competitive harms in each instance. Noting the Commission's decision in the 2007 *Program Access Order*, Comcast contends that applying an exclusive contract prohibition to all cable-affiliated programming is overinclusive because it regulates at least some programming that is not competitively significant.[175] But that argument misconceives the action we take today. In the *2007*

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[170] *Time Warner,* 93 F.3d at 979 (citing S. Rep. No. 102-92 (1991), at 26-28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159-61).

[171] *See 2007 Program Access Order,* 22 FCC Rcd at 17837, ¶ 65; *see also supra* ¶¶ 27, 30, 34 and n.91 (noting recent data that are consistent with the Commission's finding in the *2007 Program Access Order*).

[172] We note that a federal court of appeals in recently vacating the Commission's horizontal cable ownership cap stated that competition has increased in the video distribution market since the 1992 Cable Act was passed. *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("[T]he record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years."); Cablevision Nov. 13th *Ex Parte* Letter at 11; MSG/Cablevision Answer at 5, 38; *see also* Comcast Comments at 2-5; NCTA Comments at 3-7, 10-11; Cablevision Reply at 15; Comcast Reply at 3-7; *cf.* Comments of Time Warner Inc. at 11-12 ("Time Warner Comments"); Reply Comments of the Motion Picture Association of America at 3; Reply Comments of Time Warner Inc. at 2. While competition has increased since the 1992 Cable Act was passed, cable operators still control close to two-thirds of all pay television subscribers, and their market share exceeds 70 percent in many markets. *See supra* ¶ 27; *see also* Verizon Comments at 3-4; AT&T Reply to MSG/Cablevision at 30-31. Accordingly, we believe that promoting competition in the video marketplace remains a substantial governmental interest. *See 2007 Program Access Order,* 22 FCC Rcd at 17837, ¶ 65.

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

[174] *Id.*

[175] *See* Comcast Comments at 13.

Program Access Order, the Commission was implementing Section 628(c)(2)(D), which establishes a broad prophylactic rule that subjects all satellite-delivered, cable-affiliated programming to an exclusive contract prohibition, subject to a procedure whereby individual programmers can seek Commission approval to enter into exclusive arrangements.[176] Here, we are not implementing the statutory scheme set forth in Section 628(c)(2)(D). Rather, we act pursuant to Sections 628(b) and 628(c)(1), which give the Commission broad authority to adopt rules to address unfair acts of cable operators that have the purpose or effect of hindering significantly any MVPD from providing satellite cable programming or satellite broadcast programming.[177] We decline to adopt a broad prophylactic rule that subjects all terrestrially delivered, cable-affiliated programming to the program access rules because we lack sufficient record evidence to reach general conclusions that unfair acts involving terrestrially delivered, cable-affiliated programming will always prevent or significantly hinder an MVPD from providing video services. Rather, we adopt rules whereby the Commission will consider on a case-by-case basis whether an unfair act involving terrestrially delivered, cable-affiliated programming has the purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers, as required by Section 628(b). The complaint process we establish today requires showings over and above those required by the program access rules applicable to satellite-delivered programming, and these additional showings (including a purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable or satellite broadcast programming) prevent overinclusiveness. In short, our action today addresses any legitimate concerns about tailoring by adopting a case-by-case evaluation rather than a broad prophylactic rule.

45. Again noting the Commission's decision in the 2007 *Program Access Order*, Comcast contends that an exclusive contract prohibition that covers only cable-affiliated programming is underinclusive because it exempts programmers affiliated with non-cable MVPDs and unaffiliated programmers that may offer "must have" programming.[178] We are in fact considering in this proceeding whether to expand the exclusive contract prohibition to apply to programmers affiliated with non-cable MVPDs.[179] We also note that program-access-type conditions already apply to DIRECTV by virtue of its merger with Liberty Media.[180] Finally, with respect to unaffiliated programmers, the Commission in the *2007 Program Access Order* found no record evidence to conclude that exclusive arrangements involving unaffiliated programmers have harmed competition in the video distribution market.[181] Commenters offer no evidence in the record of this proceeding that would cause us to revisit this conclusion.[182]

D. Complaint Filing Requirements

46. In this Section, we review the types of complaints that MVPDs may file regarding unfair acts involving terrestrially delivered, cable-affiliated programming pursuant to the rules we establish in this

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

[177] *See* 47 U.S.C. § 548(b), (c)(1).

[178] *See* Comcast Comments at 13; *see also* NCTA Comments at 3-4.

[179] *See NPRM*, 22 FCC Rcd at 17861, ¶ 118. We do not resolve this issue in this *Order*.

[180] *See Applications for Authority to Transfer Control, News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee,* Memorandum Opinion and Order, 23 FCC Rcd 3265, 3340-41, Appendix B, § III (2008) ("*Liberty/DIRECTV Order*").

[181] *See 2007 Program Access Order,* 22 FCC Rcd at 17843, ¶ 77.

[182] While some commenters express concern with DIRECTV's exclusive arrangements for certain out-of-market, non-regional sports programming, they fail to provide evidence in the record of this proceeding of any harm to competition resulting from these arrangements. *See* NTCA Comments at 13-14; *see also* BSPA Reply at 19-20.

Order.[183] We also discuss below four related ways in which the rules we adopt to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming: (i) there is no *per se* prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; rather, the Commission will assess such contracts on a case-by-case basis in response to a program access complaint; (ii) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption, as explained below) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; (iii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides terrestrially delivered programming (rather than an entity specifically listed in Section 628(b)), the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; and (iv) defendants will have 45 days – rather than the usual 20 days -- from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.

1. Types of Claims

47. Section 628(c)(1) gives the Commission authority to adopt regulations defining "particular conduct" that is within the scope of the "unfair methods of competition or unfair or deceptive acts or practices" prohibited by Section 628(b).[184] In Section 628(c)(2), Congress itself defined certain conduct that must be included in the Commission's implementing regulations. Congress thereby made a conclusive legislative judgment that the categories of conduct involving satellite-delivered programming that are enumerated in Section 628(c)(2) satisfy the requirements of Section 628(b), including the requirement of constituting an "unfair method[] of competition or unfair or deceptive act[] or practice[]."[185] The unfair or deceptive conduct that Congress specifically identified in Section 628(c)(2) is: (i) an exclusive contract between a cable operator and a cable-affiliated programmer;[186] (ii) discrimination by a cable-affiliated programmer in the prices, terms, and conditions for sale of programming among MVPDs;[187] and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to a competitor.[188]

48. In this *Order*, we adopt rules specifically permitting complainants to pursue case-by-case claims involving conduct with respect to terrestrially delivered, cable-affiliated programming that is similar to the categorically prohibited conduct concerning satellite-delivered, cable-affiliated

[183] The rules we adopt herein do not limit the right of aggrieved parties to file complaints pursuant to Section 628(d) alleging other violations of Section 628(b). *See* 47 U.S.C. § 548(d); *see also infra* n.191.

[184] 47 U.S.C. §§ 548(b), (c)(1).

[185] 47 U.S.C. § 548(b).

[186] *See* 47 U.S.C. § 548(c)(2)(C)-(D).

[187] *See* 47 U.S.C. § 548(c)(2)(B).

[188] *See* 47 U.S.C. § 548(c)(2)(A). In the *1993 Program Access Order,* the Commission explained that the undue or improper influence provision of the program access rules "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. Although such conduct may be difficult for the Commission or complainants to establish, its regulation provides a useful support for direct discrimination and contracting regulation." *See 1993 Program Access Order,* 8 FCC Rcd at 3424, ¶ 145.

programming. We determine that this conduct constitutes "unfair methods of competition or unfair or deceptive acts or practices" under Section 628(b). Congress has already established that these can be unfair acts for purposes of Section 628(b) by including them in Section 628(c)(2). The record here, moreover, indicates that these acts involving terrestrially delivered programming – like comparable acts involving satellite-delivered programming – have the potential to impede entry into the video distribution market and to hinder existing competition in the market.[189] We note that our determination here is consistent with the *MDU Order*, in which the Commission generally defined an "unfair method of competition or unfair act or practice" to include an act that "can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings."[190]

49. We thus conclude that actions by cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendors involving terrestrially delivered, cable-affiliated programming that would be prohibited by the program access rules under Section 628(c)(2) but for the terrestrial loophole (*i.e.*, exclusive contracts, discrimination, and undue or improper influence) are "unfair methods of competition or unfair or deceptive acts or practices" within the meaning of Section 628(b).[191] Accordingly, an MVPD may initiate a complaint proceeding alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor has engaged in one or more of these three unfair acts involving terrestrially delivered, cable-affiliated programming, with the purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[192] While our program access procedural rules

[189] *See MDU Order,* 22 FCC Rcd at 20255, ¶ 43; *supra* Section III.B.3.a (assessing the impact of unfair acts involving terrestrially delivered, cable-affiliated programming on competition in the video distribution market).

[190] *MDU Order,* 22 FCC Rcd at 20255, ¶ 43 ("[A]lthough we have never specifically defined what constitutes an 'unfair method of competition' or 'unfair . . .act or practice' beyond that conduct specifically proscribed in Section 628(c)(2), we have recognized that there is additional conduct that could be proscribed under Section 628(b). . . . [T]he use of an exclusivity clause by a cable operator to 'lock up' a MDU owner is an unfair method of competition or unfair act or practice because it can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." (citations omitted)). Cablevision asks the Commission to add an additional element to the definition of an "unfair act," specifically that the "conduct complained of was undertaken other than in pursuit of legitimate business or competitive purposes." *See* Cablevision Jan. 8th *Ex Parte* Letter at 3. The Commission did not include this additional element in the *MDU Order* when it previously defined the term "unfair act" for purposes of Section 628(b). *See MDU Order,* 22 FCC Rcd at 20255, ¶ 43. In that decision, despite acknowledging that contracts granting cable operators exclusive access to MDUs may have legitimate business purposes, such as helping to obtain financing to wire an entire building, the Commission nonetheless concluded that such contracts are "unfair acts" because they "can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." *See id*. at 20247, ¶ 24 and 20255, ¶ 43

[191] We note that there may be other acts or practices that are "unfair methods of competition or unfair acts or practices" under Section 628(b). *See, e.g.*, *MDU Order,* 22 FCC Rcd at 20255, ¶ 43 (holding that the use of an exclusivity clause by a cable operator to "lock up" an MDU owner is an unfair method of competition). This *Order* pertains only to exclusive contracts, discrimination, and undue or improper influence involving programming that is both terrestrially delivered and, consistent with Section 628(c)(2), cable-affiliated. 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.

[192] Cable operators argue that a "cable operator" and a "satellite cable programming vendor" cannot violate Section 628(b) by withholding terrestrial programming. *See* Cablevision/Brands Jan. 8th *Ex Parte* Letter at 1-2. They claim that these entities are "captured" by Section 628(b) only to the extent that they are engaged in activities that meet the statutory definition of "cable operator" and "satellite cable programming vendor" (which do not include distribution (continued….)

provide a defendant with 20 days after service to file an Answer to a complaint,[193] we will provide the defendant with 45 days from the date of service of the complaint to file an Answer to a complaint involving terrestrially delivered programming to ensure that the defendant has adequate time to develop a response. We believe that additional time is appropriate because program access complaints involving terrestrially delivered programming, unlike complaints involving satellite-delivered programming, entail an additional factual inquiry regarding whether the unfair act has the purpose or effect set forth in Section 628(b). With the exception of the additional burdens described below and the additional time for defendants to file an Answer, these proceedings will be subject to the same procedures set forth in Sections 76.7 and 76.1003 of the Commission's rules that apply to program access complaints involving satellite-delivered, cable-affiliated programming.[194] Among other things, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply.[195]

2. Additional Burdens in Program Access Complaint Proceedings Alleging Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

50. We are adopting rules to address unfair acts involving terrestrially delivered, cable-affiliated programming pursuant to the authority Congress provided the Commission in Sections 628(b) and 628(c)(1) of the Act. Unlike the program access rules for satellite-delivered programming, which the Commission adopted pursuant to Section 628(c)(2), Section 628(b) requires that the "purpose or effect" of the unfair act 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."[196] Accordingly, to run afoul of Section 628(b), an unfair act involving terrestrially delivered,

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of terrestrial programming). *See* 47 U.S.C. §§ 522(5) ("the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system"); 548(i)(2) (the "term 'satellite broadcast programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor"); *see also* 47 U.S.C.§§ 522(6) (defining "cable service"); 522(7) (defining "cable system"); 548(i)(1) (defining "satellite broadcast programming"). They claim that to the extent they are engaged in other activities, such as the distribution of terrestrial programming, they are not covered under that section. This argument effectively reads into the statute an additional condition that is not there. Nothing in the statute excludes an otherwise covered entity from the reach of Section 628(b) simply because the conduct at issue is not covered by the statutorily defined activities of a "cable operator" or "satellite cable programming vendor." To the contrary, under Section 628(b), so long as the provider itself meets the statutory definition of a covered entity, it is prohibited from engaging in any unfair or deceptive acts or practices that hinder significantly or prevent any MVPD from providing satellite cable or satellite broadcast programming to consumers. In contrast, when Congress intends to restrict the circumstances under which an entity is covered under a category of providers, it has done so expressly. *See* 47 U.S.C. §153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services"). There is no such restriction contained in Section 628(b). For this reason, we reject this argument.

[193] *See* 47 C.F.R. § 76.1003(e).

[194] 47 C.F.R. §§ 76.7, 76.1003.

[195] *See id.*; *see generally 1993 Program Access Order*, 8 FCC Rcd 3359. We remind potential complainants that filing a frivolous program access complaint is unlawful and an abuse of process subject to sanctions. *See* 47 C.F.R. § 76.6(c); *see also* 47 U.S.C. § 548(f)(3); *1993 Program Access Order*, 8 FCC Rcd at 3426-28, ¶¶ 154-56; *1998 Biennial Regulatory Review*, Report and Order, 1999 WL 4984 (1999) (adopting 47 C.F.R. § 76.6(c)).

[196] 47 U.S.C. § 548(b); *see 2002 Program Access Order*, 17 FCC Rcd at 12154, n.206 ("Section 628(b) addresses 'unfair or deceptive acts or practices' generally and carries with it an added burden 'to demonstrate that the purpose
(continued….)

cable-affiliated programming (which, as defined in this *Order*, includes an exclusive contract, discrimination, or undue or improper influence) must have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[197]

51. For most terrestrially delivered, cable-affiliated programming, the record contains no evidence that unfair acts involving such programming generally have the purpose or effect of significantly hindering or preventing MVPDs from providing satellite cable programming or satellite broadcast programming.[198] Nonetheless, such an act may have the purpose or effect set forth in Section 628(b) in a particular case, especially given predictions that programming will increasingly shift to terrestrial delivery.[199] Accordingly, in a program access complaint alleging an unfair act involving terrestrially delivered, cable-affiliated programming, the complainant will have the burden of proving that the unfair act has the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming.[200] This burden under Section 628(b) is in

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or effect of the conduct complained of was to 'hinder significantly or to prevent' an MVPD from providing programming to subscribers or customers.'" (quoting *1993 Program Access Order*, 8 FCC Rcd at 3377-78, ¶ 49)). The unfair acts listed in Section 628(c)(2) pertaining to satellite-delivered programming are presumed to harm competition, and complainants alleging such unfair acts are not required to demonstrate harm. *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 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) ("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.").

[197] The prohibition in Section 628(b) makes unlawful any unfair or deceptive act or practice that has the "*purpose* or effect" of hindering significantly or preventing competitors from providing service. 47 U.S.C. § 548(b) (emphasis added). Under the broad language of the statute, a case involving only a prohibited purpose, even without a likelihood of material effects, may nonetheless support a finding of a violation of Section 628(b). In the antitrust context, however, courts have found that a "desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws." *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, 883 F.2d 1101, 1113 (1st Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990); *see also Wisconsin Music Network v. Muzak Ltd. P'ship*, 5 F.3d 218, 222 (7th Cir. 1993) (under rule of reason standard in antitrust context, "the factfinder must determine from all of the circumstances of a case whether a practice unreasonably restrains competition"); *Alliance Shippers v. Southern Pac. Trasp. Co*., 858 F.2d 567, 570 (9th Cir. 1988) (essential element in antitrust context is injury to competition); *United States Football League v. NFL*, 842 F.2d 1335, 1359 (2d Cir. 1988) ("hopes and dreams alone cannot support a Section 2 claim of monopolization"). We leave for another day the question whether some additional showing analogous to that required under the antitrust standard should be required when a complainant under Section 628(b) alleges only a prohibited purpose to hinder or prevent competition, and not a prohibited effect.

[198] *See supra* n.138.

[199] *See supra* n.128; *see also* 47 U.S.C. § 548(b).

[200] We note that to satisfy its burden, a complainant cannot, consistent with the statute, simply rely on the fact that some impairment to providing service may have occurred because of its lack of access to cable-affiliated, terrestrially delivered programming. *Cf. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 389 (1999). Rather, the statute requires a complainant to show that it was "hindered significantly" or "prevented" from providing service. We will thus review individual complaints in light of the higher standard imposed under Section 628(b). It is not our intent, moreover, to remove incentives for MVPDs to improve their program offerings in order to differentiate themselves in the marketplace as long as such efforts do not have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. For example, (continued….)

addition to any other burdens imposed by the Commission's rules on a complainant pursuing a program access complaint regarding an exclusive contract, discrimination, or undue or improper influence.[201]

52. We do identify one class of programming that, as shown by both Commission precedent and record evidence in this proceeding, is very likely to be both non-replicable and highly valued by consumers. In the *Adelphia Order*, the Commission analyzed the impact of the withholding of three terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators. In two cases, the Commission found a significant impact on predicted market share.[202] In the third case, the Commission found no statistically significant impact[203] where the RSN showed the games of a relatively new team "that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs."[204] Other evidence supports the conclusion that RSNs typically offer non-replicable content[205] and are considered "must have" programming by MVPDs.[206] Although we reject the argument that the

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we believe it highly unlikely that an unfair act involving local news and local community or educational programming will have the prescribed purpose or effect under Section 628(b). Unlike RSN programming, local news and local community or educational programming is readily replicable by competitive MVPDs. *See infra* n.205; Verizon Comments at 5; Advance/Newhouse Reply at 6-8; Time Warner Cable Jan 6th *Ex Parte* Letter at 2 ("[T]here is nothing proprietary about Time Warner Cable's ability to provide news coverage; any MVPD can invest in comparable programming services of its own."); Verizon Jan. 6th *Ex Parte* Letter at 6 n.15 (stating that Verizon has invested in its own local news and other local content and noting that "cable incumbents do not own or have exclusive rights to the news or other programming"). Indeed, the record indicates that at least one competitive MVPD, Verizon, has created its own local news channels. *See* Verizon Jan. 6th *Ex Parte* Letter at 6 n.15; Bright House Networks Jan. 6th *Ex Parte* Letter, Attachment at 1; *see also* Advance/Newhouse Reply at 7-8. Moreover, the Commission previously found that exclusivity plays an important role in the growth and viability of local cable news networks and that permitting such exclusivity "should not . . . dissuade new MVPDs from developing their own competing regional programming services." *See New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231, 3236, ¶¶ 38-38 and 3237, ¶ 43 (1994).

201 *See* 47 C.F.R. § 76.1003; *see also 1993 Program Access Order*, 8 FCC Rcd at 3390, ¶ 76 (discussing complainant's burden in a program access complaint alleging an exclusive contract); *id*. at 3416-17, ¶¶ 125-26 (discussing complainant's burden in a program access complaint alleging discrimination); *id*. at 3425, ¶ 148 (discussing complainant's burden in a program access complaint alleging undue or improper influence).

202 *See 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; 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); *see also 2007 Program Access Order,* 22 FCC Rcd at 17818-19, ¶ 40 and 17876-82, Appendix B (addressing comments concerning the *Adelphia Order* study).

203 *See 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).

204 *See id*.

205 Both the Commission and commenters have noted that RSN programming is unique and cannot be duplicated. *See Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189; *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*"); *see also* Verizon Comments at 5 ("Whereas a new entrant may be able to create a competing entertainment or news channel if denied access to such programming, the new entrant cannot replace the games of a popular local team."); CA2C Comments at 2; Verizon Reply at 6-7; Verizon Jan. 6th *Ex Parte* Letter at 6 n.15; DIRECTV Dec. 16th *Ex Parte* Letter, Attachment at 1; AT&T Complaint v. MSG/Cablevision at 24-25, 32; AT&T Reply to MSG/Cablevision at 27.

206 *See 2007 Program Access Order,* 22 FCC Rcd at 17819-20, ¶ 41; *Liberty/DIRECTV Order*, 23 FCC Rcd at 3305, ¶ 87 and 3306-07, ¶ 90; *Adelphia Order*, 21 FCC Rcd at 8258-59, ¶ 124; *News/Hughes Order,* 19 FCC Rcd at 535, ¶ 133; OPASTCO *et al* Comments at 5 n.17; USTelecom Comments at 6-7; Verizon Reply at 6-7; AT&T Reply to (continued….)

empirical evidence concerning RSNs is so uniform that it supports a *per se* rule that an unfair act involving a terrestrially delivered, cable-affiliated RSN always significantly hinders or prevents the MVPD from providing satellite cable programming or satellite broadcast programming,[207] we will not require litigants and the Commission staff to undertake repetitive examinations of our RSN precedent and the relevant historical evidence. Instead, we recognize the weight of the existing precedent and categorical evidence concerning RSNs by allowing 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).[208] In a program access complaint alleging an unfair act involving a terrestrially delivered, cable-affiliated RSN, the defendant may overcome the presumption by establishing that the unfair act does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming, as required by the language of Section 628(b).[209] We reiterate that we are adopting a case-by-case approach that allows us to consider the facts and circumstances of each case. Moreover, as discussed above, while our program access procedural rules provide a defendant with 20 days after service to file an Answer to a complaint,[210] we will provide the defendant with 45 days from the date of service of the complaint to file an Answer in all cases involving terrestrially delivered, cable-affiliated programming, to ensure that the defendant has adequate time to develop a full, case-specific response.[211]

53. For purposes of the foregoing paragraph, we define "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,

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MSG/Cablevision at 20. The Commission on two prior occasions has extended the sunset date of the *per se* ban established by Congress on exclusive contracts involving satellite-delivered, cable-affiliated programming. *See generally 2002 Program Access Order*, 17 FCC Rcd 12124 (extending the exclusive contract prohibition until October 5, 2007); *2007 Program Access Order*, 22 FCC Rcd 17791 (extending the exclusive contract prohibition until October 5, 2012). In the most recent decision, the Commission stated that "the record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes." *See 2007 Program Access Order,* 22 FCC Rcd at 17816-18, ¶¶ 38-39. In that decision, the Commission was implementing Section 628(c)(5), which requires the Commission to assess the marketplace and extend the *per se* ban if it finds it "necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5). The Commission did not consider the question at issue here: Whether there are specific categories of programming that are non-replicable and sufficiently valuable to consumers such that an unfair act involving such programming has the "purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming." 47 U.S.C. § 548(b).

[207] *See* Verizon Jan. 6th *Ex Parte* Letter at 1 (advocating a *per se* rule for RSNs); Letter from John Goodman, CA2C, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment at 1 (Jan. 6, 2010) (same).

[208] Cablevision maintains that adopting special rules for implementing Section 628(b) in the context of RSNs, based on the content of the programming, would violate the First Amendment. *See* Letter from Howard J. Symons, Counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (January 13, 2010), at 1-2. Here, however, we place no content-related burden on a defendant in a case brought under Section 628(b) that involves RSN programming. We only recognize the import of existing precedent and record evidence before us in this matter.

[209] Except in the situation of a temporary standstill order, a terrestrially delivered, cable-affiliated RSN is not required to provide its programming to an MVPD under the rules we establish in this *Order* unless and until the Commission (or Bureau on delegated authority) concludes that the complainant is entitled to relief that includes access to the programming.

[210] *See* 47 C.F.R. § 76.1003(e).

[211] *See supra* ¶ 49.

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."[212] The Commission has recently reaffirmed the appropriateness of this definition for purposes of program access merger conditions.[213] A complainant would have the burden of showing that the network at issue satisfies this definition.

54. One commenter has further urged a *per se* ban on unfair acts and practices involving terrestrially delivered HD "feeds" of programming.[214] According to Verizon, vertically integrated programmers are seeking to compete unfairly by withholding from competitive providers the HD version of programming subject to the program access rules by transporting the "HD feed" terrestrially, thus allowing the affiliated cable operator to offer a more robust line-up of HD programming.[215] There is substantial evidence regarding consumers' preference for HD programming in the context of MVPD services, and the record shows that MVPD subscribers do not consider SD programming to be an acceptable substitute for HD programming.[216] The SD and HD versions of the same network have

[212] In the *Liberty/DIRECTV Order*, the Commission expanded the definition of an RSN originally adopted in the *Adelphia Order* to include sports programming likely to be valued highly by residents of Puerto Rico. *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3308-09, ¶¶ 94-95; *see also Adelphia Order*, 21 FCC Rcd at 8275, ¶ 158.

[213] *See Comcast Corporation, Petition for Declaratory Ruling that The America Channel Is Not a Regional Sports Network*, Order, 22 FCC Rcd 17938, 17946-47, ¶ 24 (2007) ("*TAC Order*"); *Liberty/DIRECTV Order*, 23 FCC Rcd at 3308-09, ¶¶ 94-95. The Commission suspended the program carriage merger condition for reasons that are not at issue here. *See TAC Order*, 22 FCC Rcd at 17946-47, ¶ 24.

[214] *See* Verizon Comments at 4-18; Verizon Reply at 8-9; *see also NPRM*, 22 FCC Rcd at 17861, ¶ 117 (seeking comment on whether the program access rules applicable to satellite-delivered, cable-affiliated programming should apply to all "feeds" of the same programming, including both the SD and HD feeds, even if a particular feed is delivered terrestrially).

[215] *See* Verizon Comments at 8 (explaining that one programmer continues to refuse to sell its HD feeds of its RSNs, claiming that the HD feeds are terrestrially delivered; at the same time, the programmer's affiliated cable operator trumpets through its advertising that it is the only source for certain regional sports programming in HD).

[216] *See* Verizon Comments at 4, 7-8, 13 (stating that HDTV sales are growing at 50 percent per year and that CEA has estimated that, by 2011, the number of HDTVs sold in the United States will reach 170 million, which is roughly one set for every two Americans); Verizon Reply at 2, 3-4, 8 ("HD programming has evolved from an innovative feature to a competitive necessity for video programming providers, as evidenced by recent advertising campaigns of incumbent cable operators touting their carriage of HD programming. As the number of American households with HD television sets continues to increase, HD is rapidly becoming the preferred technology for consumers."); Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to Acting Chairman Copps *et al*, FCC, MB Docket No. 07-198, at 4 (May 28, 2009) (stating that HD is "increasingly essential to consumers"; stating that "consumer demand for a robust selection of HD programming is skyrocketing," with more than 45 percent of American households owning an HD television set, up from less than 20 percent in 2006; providing online postings from consumers commenting on the importance of HD programming); Letter from John Goodman, BSPA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 3 (Aug. 18, 2008) (referring to the importance of HD programming); AT&T Complaint v. MSG/Cablevision at 2, 3-4, 23-24, 27 (stating that the HD format has become the "must-have format for RSN programming" and that Cablevision's advertising campaign touting exclusive carriage of the HD format of an RSN is "unambiguous evidence that the HD format of RSN programming has tremendous competitive significance"); AT&T Reply to MSG/Cablevision at 8; *see also* AT&T Complaint v. MSG/Cablevision at 23 (citing 2005 CEA survey concluding that "45 percent of HDTV sports fans would consider switching to another source of HD sports if superior to their current package"); *but see* MSG/Cablevision Answer to AT&T at 48, 50-51.

different technical characteristics and sometimes even different content.[217] HD programming has thus become an important part of a competitive MVPD offering.[218]

55. Based on the record evidence described above, in particular the fact that SD and HD versions of the same network have different technical characteristics and sometimes even different content, we conclude that the HD version of a particular programming channel should be treated as a distinct service from the SD version of the same network. Thus, in considering a complaint regarding an unfair act involving terrestrially delivered HD programming, the mere fact that the complainant offers the SD version of the same network to subscribers will not alone be sufficient to refute a claim under Section 628(b); and, in the case of a covered RSN, it will not establish that the unfair act lacks the purpose or effect set forth in Section 628(b).[219] In that regard, nothing in the statute requires a competitive provider to show complete foreclosure from particular programming to make a claim under Section 628(b).[220] Rather, the competitive provider must show that a covered entity was engaged in an unfair act or practice that has the purpose or effect of hindering significantly or preventing a competitor from providing service. We note that in two pending complaints, the complainant is seeking access to the HD feed of a cable-affiliated RSN; at this time, only the satellite-delivered SD version of the programming is being made available to the competitive provider.[221] As explained below, to the extent the complainants do not supplement their pleadings in the pending adjudicatory matter,[222] their claims fall outside the framework established in this rulemaking, and we do not prejudge whether the records in those cases are sufficient to state a case under Section 628(b) based on the facts alleged.

56. We decline to adopt specific evidentiary requirements with respect to proof, in a complaint brought under Section 628(b), that the defendant's alleged activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming. 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. In order to provide some guidance to potential litigants, however, we provide the following illustrative examples of evidence that they might consider providing. A litigant might rely on 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.[223] A litigant might also rely on statistically reliable survey data indicating the

[217] *See* MSG/Cablevision Answer to AT&T at 66, 78-79 (noting that resolution, depth, audio, display, and even content may differ between the HD and SD versions of the same network).

[218] *See* Verizon Comments at 13 ("access to RSNs and HD feeds of programming otherwise covered by the program access rules is critical to a video provider's ability to offer a viable competitive video offering").

[219] Similarly, we will treat other terrestrially delivered formats of programming, such as VOD, 3D, and other new formats, as distinct services subject to the rules established in this *Order*. We do not have precedents or record evidence at this point with respect to such new formats on which to base a conclusion whether any presumption should apply to complaints involving them, thus no presumptions will apply to them at this time.

[220] *See* Letter from Howard J. Symons, Counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (January 13, 2010), at 2.

[221] *See* Verizon Telephone Companies *et al,* Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009); AT&T Complaint v. MSG/Cablevision.

[222] *See infra* n. 237.

[223] *See, e.g., Adelphia Order,* 21 FCC Rcd at 8343-50, Appendix D; *2007 Program Access Order,* 22 FCC Rcd at 17876-82, Appendix B. A regression analysis might be particularly appropriate for an MVPD that is an established competitor operating in a large number of geographic areas that seeks access to an established programming network. Operation in a large number of geographic areas allows for an assessment in the variation in the MVPD's penetration levels between areas where programming is withheld and where it is available to estimate the effect of (continued….)

likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming. We recognize that not all potential complainants will have the resources to perform a regression analysis or market survey, thus, we reiterate that these examples should be considered illustrative only. We will assess the reliability of the regression analysis, survey data, or other empirical data on a case-by-case basis. In that regard, we note that defendants, as well as complainants, are likely to have unique access to certain relevant evidence. For instance, although a competing MVPD seeking access to a cable-affiliated RSN has unique access to information about its own subscribership and the reasons consumers give for declining or terminating the MVPD's service, a defendant cable operator or cable-affiliated programmer is likely to have the best information about the competitive significance of its RSN (*e.g.,* value of subscribers and local demand for the RSN). Moreover, both complainants and defendants are capable of compiling survey data to assess the likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming. The discovery process enables parties to obtain additional evidence needed to satisfy their burdens.[224]

57. We note that the language of Section 628(b) requires the Commission to address the unfair acts of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors, but not the unfair acts of other programmers delivering programming only by terrestrial means.[225] We conclude that Section 628(b) allows complaints against the entities listed in Section 628(b) based on the unfair acts of their affiliated programmers delivering programming by terrestrial means, where the facts establish that the programmer is wholly owned by, controlled by, or under common control with one or more of these entities.[226] Under these circumstances, the cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor can appropriately be held responsible for the discriminatory acts of its program supplier affiliate because it controls the supplier and the supplier's unfair actions are designed to benefit these entities. This coverage is necessary to give Section 628(b) practical effect. For example, absent a Commission rule to address such discrimination, a cable-controlled terrestrial program supplier could insist that a competitive MVPD pay an exorbitant rate for carriage that far exceeds the rate charged to the incumbent cable system, thereby precluding the MVPD from obtaining the programming on reasonable terms and achieving the same result as an exclusive contract. We believe that we have authority under Section 628(b) to prevent this and similar situations in which a terrestrial programmer that is wholly owned by, controlled by, or under common control with an entity covered by Section 628(b) acts presumptively to further the interests of such an entity. Accordingly, in program access complaints alleging that a cable-affiliated programmer that provides only terrestrially delivered programming has discriminated against an MVPD, the complainant will have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators,

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withholding. Moreover, a regression analysis might be particularly appropriate for an established competitor, where it can be assumed that its market penetration may be approaching an equilibrium level, rather than a recent entrant, where it can be assumed that its market penetration will increase as consumers become more familiar with its service.

[224] *See* 47 C.F.R. § 76.1003(j).

[225] *See* 47 U.S.C. § 548(b) (providing that it shall be unlawful for a "cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" to engage in unfair acts that hinder significantly an MVPD from providing satellite cable programming or satellite broadcast programming).

[226] If two or more cable operators each have a minority interest in a terrestrial programmer but those interests exceed 50 percent in the aggregate, we will consider the programmer to be cable-controlled. For example, if three cable operators each have a 20 percent ownership interest in a terrestrial programmer, we would consider the programmer to be cable-controlled, despite the fact that no individual cable operator has a controlling interest, because the aggregate interests held by the cable operators exceed 50 percent.

satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors.[227]

3. Exclusive Contracts

58. The rules we adopt here pursuant to Section 628(b) to address exclusive contracts between cable operators and cable-affiliated programmers that provide terrestrially delivered programming differ from the rules applicable to satellite-delivered, cable-affiliated programming pursuant to Section 628(c)(2)(C)-(D).[228] The program access rules applicable to cable-affiliated programmers that provide satellite-delivered programming generally prohibit exclusive contracts with a cable operator subject to certain exceptions.[229] Because we are adopting rules for terrestrially delivered, cable-affiliated programming pursuant to the authority provided in Sections 628(b) and 628(c)(1), we do not apply here the statutory scheme set forth in Section 628(c)(2)(C)-(D) for satellite-delivered, cable-affiliated programming. Our approach to exclusive contracts for terrestrially delivered, cable-affiliated programming will differ from the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming in the following ways.

59. First, the Commission's program access rules applicable to satellite-delivered, cable-affiliated programming generally prohibit exclusive contracts unless the cable operator or cable-affiliated programmer demonstrates that an exclusive contract serves the public interest based on the factors set forth in Section 76.1002(c)(4).[230] The rules we adopt in this *Order*, however, assign the burden of proof

[227] If it appears that a regulated entity has been organized in a manner to shield its terrestrial programming activities from the reach of Section 628(b) and the Commission's regulations, we may look beyond the corporate structural formalities to ensure that the goals of the statute and rules are not frustrated. Moreover, in cases where one or more of the entities listed in Section 628(b) does not have *de jure* control of a terrestrial programmer, we do not foreclose complaints alleging that one or more of the entities listed in Section 628(b) has nonetheless influenced the programmer to engage in discrimination. *See* Letter from John Goodman, CA2C, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 2 (Dec. 29, 2009) ("CA2C Dec. 29th *Ex Parte* Letter"). We will assess such claims of alleged influence on a case-by-case basis. In addition, as noted above, there may be acts or practices other than those specified in this *Order* that are "unfair methods of competition or unfair acts or practices" under Section 628(b). *See supra* n.191. For example, nothing in this *Order* forecloses a complaint alleging that the execution or enforcement of a discriminatory contract by one of the entities listed in Section 628(b) violates this section. *See* CA2C Dec. 29th *Ex Parte* Letter at 3.

[228] By contrast, with the exception of the additional burdens and the additional response time for defendants to file an Answer described above, we will apply the same rules, policies, and procedures to address claims of discrimination and undue or improper influence involving terrestrially delivered, cable-affiliated programming that currently apply to such claims involving satellite-delivered, cable-affiliated programming. *See* 47 C.F.R. § 76.1002(b)(1)-(3) (listing actions that a cable-affiliated programmer is not precluded from taking under the discrimination provision of the program access rules); *id*. § 76.1003(c)(4)-(5) (listing specific requirements for a program access complaint alleging discrimination); *id*. § 76.1003(e)(3)-(4) (listing specific requirements for an answer to a program access complaint alleging discrimination); *see also 1993 Program Access Order*, 8 FCC Rcd at 3400-23, ¶¶ 95-141 (adopting rules, policies, and procedures for complaints alleging program access discrimination); *see id*. at 3423-26, ¶¶ 142-53 (adopting rules, policies, and procedures for complaints alleging undue or improper influence).

[229] *See supra* ¶ 12.

[230] 47 C.F.R. § 76.1002(c)(4); *see 2002 Program Access Order*, 17 FCC Rcd at 12154, n.206 ("While Section 628(c)(2)(D) remains in effect, exclusive contracts generally are prohibited unless the Commission finds that exclusivity is in the public interest. The burden is placed on the party seeking exclusivity to show that a specific exclusive contract meets the statutory public interest standard before any such contract can be enforced." (citing *1993 Program Access Order*, 8 FCC Rcd at 3384, ¶ 63 and 3386, ¶ 66)).

to the complainant to demonstrate (sometimes with the benefit of a presumption) that the exclusive contract has the purpose or effect set forth in Section 628(b).[231]

60. Second, while the Commission's rules applicable to satellite-delivered, cable-affiliated programming draw distinctions between exclusive contracts in served areas and unserved areas,[232] the rules we adopt in this *Order* for terrestrially delivered, cable-affiliated programming do not. Section 628(b) does not draw such a distinction, and our case-by-case approach will enable us to take into account relevant factual circumstances of a particular case.

61. Third, while the exclusive contract prohibition generally applicable to satellite-delivered, cable-affiliated programming will sunset on a Commission determination that the categorical prohibition is no longer necessary to preserve and protect competition,[233] the rules we adopt in this *Order* for terrestrially delivered, cable-affiliated programming do not contain a sunset provision because Section 628(b) does not contain such a provision. If the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets, we will still consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis unless and until we repeal the rule with respect to terrestrially delivered programming. Of course, the facts supporting a sunset of the exclusive contract prohibition under Section 628(c)(2) may bear on a particular complaint brought under Section 628(b).

E. Application of the Rules

62. In this Section, we discuss how the rules adopted here apply to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions.

1. Common Carriers

63. The rules we adopt in this *Order* will apply to common carriers and open video systems as well as cable operators because the Act so requires. Although Section 628(b) requires the Commission to address the unfair acts of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors, Section 628(j) states that "[a]ny provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers."[234] Similarly, Section 653(c)(1)(A) provides that "[a]ny provision that applies to a cable operator under [Section 628] of this title shall apply . . . to any operator of an open video system [OVS]."[235] Thus, pursuant to Sections 628(j) and 653(c)(1)(A), the rules we adopt to address unfair acts involving terrestrially delivered, cable-affiliated programming must also apply to common carriers and OVS operators, and their affiliated programmers, to the extent that these entities provide video programming to subscribers or consumers.[236]

[231] *See supra* ¶¶ 51-52.

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

[233] *See* 47 C.F.R. § 76.1002(c)(6); *see also* 47 U.S.C. § 548(c)(5).

[234] 47 U.S.C. § 548(j).

[235] 47 U.S.C. § 573(c)(1)(A).

[236] Accordingly, we are amending Section 76.1004(a) of our rules, which contains a limitation on what constitutes an attributable interest held by a common carrier in a satellite cable programming vendor, to also apply to an attributable interest held by a common carrier in a terrestrial cable programming vendor. *See* 47 C.F.R. § 76.1004(a); *see also* 47 U.S.C. § 628(j); *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996,* Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5956-57, ¶¶ 46-48 (1996).

2. Existing Contracts

64. Given the potential harms to video competition and broadband deployment that arise from unfair acts involving terrestrially delivered, cable-affiliated programming, we conclude that the public interest requires us to apply the rules adopted in this *Order* to existing contracts or other arrangements for terrestrially delivered, cable-affiliated programming, to the extent a cable operator's reliance on or enforcement of those contracts or arrangements following the effective date of the rules is found to violate Section 628(b). Accordingly, although a cable operator may have entered into an exclusive contract prior to the effective date of the rules adopted in this *Order*, an MVPD may file a program access complaint after the effective date of the rules alleging that the cable operator's continued reliance on or enforcement of this contract violates these rules. We decline, however, to apply the rules adopted in this *Order* to the unfair acts of cable operators involving terrestrially delivered, cable-affiliated programming that preceded the effective date of these rules. Thus, to the extent a terrestrially delivered, cable-affiliated programmer refused to deal with an MVPD prior to (and not after) the effective date of these rules, we would not entertain a program access complaint alleging that such conduct is unlawful under the rules adopted in this *Order*.[237] Rather, an MVPD filing a program access complaint pursuant to the rules adopted in this *Order* regarding the allegedly unlawful conduct would need to demonstrate that the unfair act occurred after the effective date of the rules. Applying the rules to existing contracts in this manner is not impermissibly retroactive.[238]

65. Additionally, application of the rules to existing contracts will not pose economic hardship on cable operators or their affiliated programmers or constitute a "regulatory taking" under the Fifth Amendment. The Supreme Court has outlined the following framework to evaluate regulatory takings claims: "'In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the

[237] As discussed above, program access complaints filed pursuant to Section 628(d) are pending before the Commission that allege unfair acts involving terrestrially delivered, cable-affiliated programming that have the purpose or effect set forth in Section 628(b). *See supra* ¶ 17. Complainants may continue to prosecute these complaints pursuant to Section 628(d). Because these complaints allege unfair acts that occurred before the effective date of the rules adopted in this *Order*, they will not be considered pursuant to these rules, unless supplemented as described below. A complainant that wants a currently pending complaint considered under these rules must submit a supplemental filing alleging that the defendant has engaged in an unfair act (such as a further refusal to provide programming) after the effective date of the rules. In such case, the complaint and supplement will be considered pursuant to the rules adopted in this *Order*, including the rebuttable presumption for RSNs. The defendant will have an opportunity to answer the supplemental filing within 45 days of service, and the complainant will have an opportunity to reply, as set forth in the rules. *See* 47 C.F.R. § 76.1003(f); *supra* ¶ 49.

[238] *See, e.g., Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (changing the grace period on auction debt was not impermissibly retroactive where new rule applied to payment delays occurring after the rule's adoption; although it altered the future effect of the initial license issuance, it did not alter past legal consequences); *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (a regulation that governs future rates "is not made retroactive merely because it draws upon antecedent facts for its operation") (quotations and citations omitted); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 and n. 24 (1994) (a law does not act retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based in prior law; rather, the issue is whether the new provision attaches new legal consequences to events completed before its enactment); *Chemical Waste Mgmt., Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking").

character of the governmental action.'"[239] None of these factors counsels in favor of finding a regulatory taking here.

66. Under the first prong of this test, applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above would not have a material adverse economic impact on cable operators or their affiliated programmers. Specifically, these rules would not interfere with the ability of cable operators to provide this programming to their subscribers or potential subscribers or the ability of cable-affiliated programmers to sell programming to MVPDs. Our decision may in fact expand the number of customers (*i.e.*, MVPDs) to whom terrestrially delivered, cable-affiliated programmers sell their programming. This will result in increased revenues for the cable-affiliated programmer, which can be used to partially offset the decreased revenues its affiliated cable operator will experience as some subscribers switch to competitive MVPDs that now have access to the formerly withheld programming. Moreover, as the record demonstrates, unfair acts involving terrestrially delivered, cable-affiliated programming have in some cases enabled cable firms to significantly hinder competition in the video distribution market.[240] Thus, under the first prong of the takings analysis, any economic impact on cable operators and terrestrially delivered, cable-affiliated programmers arising from compliance with these rules stems from correcting current market failures, and is outweighed by our public interest objective of promoting competition in the video distribution market.

67. Under the second prong of the Supreme Court's test, applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above would not interfere with distinct investment-backed expectations. Several of the Commission's prior decisions have reflected a concern about unfair acts involving terrestrially delivered, cable-affiliated programming, and our desire to craft appropriate remedies. The Commission has stated in previous program access complaint proceedings that vertically integrated cable operators that migrate their programming to terrestrial delivery could violate Section 628(b) in some instances.[241] Moreover, past Commission Orders in program access rulemaking proceedings have demonstrated continued concern with the harms associated with the terrestrial loophole.[242] The Commission has also stated in Annual Reports to Congress on the

[239] *MDU Order*, 22 FCC Rcd at 20262, ¶ 56 (quoting *Connolly v. Pension Ben. Guaranty Corp.,* 475 U.S. 211, 224-25 (1986) (citations and internal quotation marks omitted)). Moreover, because our decision does not involve the permanent condemnation of physical property, it does not constitute a *per se* taking. *Cf. Loretto v. Teleprompter Manhattan City Corp.,* 458 U.S. 419, 427 (1982) ("when faced with a constitutional challenge to a permanent physical occupation of real property, this court has invariably found a taking"); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

[240] *See supra* Section III.B.3.a.

[241] *See RCN*, 16 FCC Rcd at 12053, ¶ 15 ("We acknowledge that there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming."); *DIRECTV,* 15 FCC Rcd at 22807, ¶ 13; *EchoStar*, 14 FCC Rcd at 2102-03, ¶¶ 27-29; *RCN*, 14 FCC Rcd at 17104-06, ¶¶ 24-25; *DIRECTV,* 13 FCC Rcd at 21837, ¶ 33 ("Section 628(b) remains, as the Commission has stated previously, 'a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming.'" (quoting *1993 Program Access Order,* 8 FCC Rcd at 3374, ¶ 41)); *see also 1996 OVS Order,* 11 FCC Rcd at 18325, ¶ 197 n.451 ("we do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs").

[242] *See 2002 Program Access Order,* 17 FCC Rcd at 12158, ¶ 73 (noting that withholding of terrestrially delivered, cable-affiliated programming "could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market" but finding that the specific language of Section 628(c) applies only to satellite-delivered

(continued….)

status of competition in the video distribution market that unfair acts involving terrestrially delivered, cable-affiliated programming could have a substantial impact on the ability of competitive MVPDs to compete and that the Commission will "continue to monitor this issue and its impact on the competitive marketplace."[243] In the *Adelphia Order*, the Commission demonstrated that it would act to mitigate the harm to competition resulting from withholding of terrestrially delivered, cable-affiliated programming. In the *Adelphia Order,* the Commission applied the program access rules, as well as arbitration conditions, to terrestrially delivered RSNs affiliated with the merger applicants based on record evidence demonstrating that withholding of terrestrially delivered, cable-affiliated programming had an adverse impact on competition in the video distribution market.[244] In addition, in September 2007, the Commission adopted the *NPRM* in this proceeding, seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming.[245] Thus, for many years now, cable operators and their affiliated programmers have been on notice that withholding of

(Continued from previous page)
programming); *1998 Program Access Order,* 13 FCC Rcd at 15856-57, ¶ 71 (concluding that the record developed in this proceeding did not demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming were having a significant anticompetitive effect, but stating that "we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace" and that "the Commission will continue to monitor this issue and its impact on competition in the video marketplace"); *see also 2007 Program Access Order,* 22 FCC Rcd at 17844, ¶ 78. Moreover, the Commission noted in the *1993 Program Access Order* that the objectives of Section 628(b) were to proscribe conduct "beyond those more specifically referenced in 628(c). The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition . . . . Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming." *1993 Program Access Order,* 8 FCC Rcd at 3373-73, ¶¶ 40-41.

[243] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Sixth Annual Report*, 15 FCC Rcd 978, ¶ 16 (2000) ("We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We will continue to monitor this issue and its impact on the competitive marketplace."); *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Third Annual Report*, 12 FCC Rcd 4358, ¶ 154 (1997) ("We recognize that improved technology and lower costs are improving the efficiency of terrestrial distribution of programming, particularly over fiber-optic facilities. As a result, it appears that it may become possible for a vertically integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning access to programming. If a trend of such conduct were to occur, we would have to consider an appropriate response to ensure continued access to programming."); *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Seventh Annual Report*, 16 FCC Rcd 6005, ¶ 15 (2001); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Eighth Annual Report*, 17 FCC Rcd 1244, ¶ 14 (2002); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Ninth Annual Report*, 17 FCC Rcd 26901, ¶ 14 (2002); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Tenth Annual Report*, 19 FCC Rcd 1606, ¶ 17 (2004); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Eleventh Annual Report*, 20 FCC Rcd 2755, ¶ 155 (2005); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Twelfth Annual Report*, 21 FCC Rcd 2503, ¶ 170 (2006).

[244] *See Adelphia Order,* 21 FCC Rcd at 8275, ¶¶ 159-62. Moreover, in the *News/Hughes Order*, the Commission noted that it has "long recognized that the terrestrial distribution of programming—particularly RSN programming—by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming." *News/Hughes Order*, 19 FCC Rcd at 535, ¶ 133 (citations omitted).

[245] *See NPRM*, 22 FCC Rcd at 17859-70, ¶¶ 114-138.

terrestrially delivered, cable-affiliated programming is a source of concern for the Commission, and that any programming investments had the potential to be impacted by the rules we adopt in this *Order*. Moreover, as the Commission explained in the *MDU Order*, a cable operator does not have a legitimate investment-backed expectation in profits obtained through anticompetitive behavior.[246]

68. Under the third prong of the regulatory takings test, we find that applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above substantially advances the legitimate governmental interest in protecting consumers from "'unfair methods of competition or unfair acts or practices' – an interest Congress has explicitly recognized and protected by statute… and commanded the Commission to vindicate by adopting appropriate regulations."[247] It also comports with Congress' directive to spur the development of communications technologies and to encourage the deployment of advanced telecommunications capabilities.[248] The rules we adopt here will further these governmental interests by promoting competition in the video distribution market and facilitating efforts to deploy broadband.

3. *Adelphia Order* Merger Conditions

69. Pursuant to merger conditions adopted in the *Adelphia Order*, certain terrestrially delivered RSNs ("Covered RSNs") affiliated with Comcast or Time Warner Cable are currently required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming.[249] These Covered RSNs continue to be subject to these conditions until they expire or the program access rules applicable to satellite-delivered, cable-affiliated programming are modified.[250] The rules we adopt in this *Order* do not trigger modification of these conditions.[251] Accordingly, exclusive contracts,

[246] *See MDU Order,* 22 FCC Rcd at 20263, n.182 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (antitrust law proscribing monopolies "assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency," and a monopolist may not "substitute for competition anticompetitive uses of its dominant power"); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp*., 902 F.2d 174, 178 (2d Cir. 1990) ("A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.")).

[247] *See id.* at 20263, ¶ 59 (quoting 47 U.S.C. § 548(b)).

[248] *See* 47 U.S.C. § 157 nt. (2008); 47 U.S.C. § 548(a); *see also supra* ¶ 36.

[249] *See Adelphia Order,* 21 FCC Rcd at 8274, ¶¶ 156-157 (requiring terrestrially delivered RSNs in which Comcast or 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 Applications for Consent to the Assignment and/or Transfer Control, Time Warner Inc., Assignor/Transferor, and Time Warner Cable Inc., Assignee/Transferee,* Memorandum Opinion and Order, 24 FCC Rcd 879, 893, ¶ 26 (MB, WCB, WTB, IB, 2009) (approving transaction separating Time Warner from Time Warner Cable and explaining that the *Adelphia Order* program access conditions will continue to apply to Time Warner Cable post-restructuring but will no longer apply to Time Warner). A Covered 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." *See Adelphia Order*, 21 FCC Rcd at 8336, Appendix B, § A.

[250] *See Adelphia Order,* 21 FCC Rcd at 8274, ¶ 157; *id*. at 8336, Appendix B, § B(1)(d) ("These exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their Covered RSNs for six 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.").

[251] The program access conditions adopted in the *Adelphia Order* provide that "if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission." *See Adelphia Order,* 21 FCC Rcd at 8274, ¶ 157; *id*. at 8336, Appendix B, § B(1)(d); *see also id*. at 8274, n.528 (noting (continued….)

discrimination, and undue influence involving these Covered RSNs continue to be prohibited without the need for any showing as to whether the purpose or effect of the unfair act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming.[252] Moreover, any terrestrially delivered network affiliated with Comcast or Time Warner Cable that is not a Covered RSN may be the subject of a complaint pursuant to the rules we adopt in this *Order* upon the effectiveness of these rules.

70. We also note that the Commission in the *Adelphia Order* exempted Comcast SportsNet Philadelphia from these conditions to the extent that it was not available to an MVPD at the time of the *Adelphia Order*.[253] Because Comcast SportsNet Philadelphia was delivered terrestrially before it was acquired by Comcast, the Commission found no anticompetitive "purpose" in Comcast's decision to deliver this network terrestrially.[254] Section 628(b), however, requires the Commission to prohibit unfair acts of cable operators that have the "purpose *or* effect" of significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming.[255] Accordingly, although Comcast SportsNet Philadelphia was not available to certain MVPDs at the time of the *Adelphia Order* and the program access conditions adopted in the *Adelphia Order* accordingly do not apply to its dealings with those MVPDs, it may be the subject of a complaint pursuant to the rules we adopt in this *Order* upon the effectiveness of these rules. Thus, an MVPD that did not have access to Comcast SportsNet Philadelphia at time of the *Adelphia Order* may file a program access complaint alleging an unfair act in accordance with the rules adopted in this *Order*.[256]

(Continued from previous page)
that the merger conditions could be modified if the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets). The Covered RSNs subject to the *Adelphia Order* merger conditions are required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming. *See supra* n.249. With the exception of the procedure for requesting a standstill discussed below, this *Order* does not modify the program access rules applicable to satellite-delivered, cable-affiliated programming; rather, we adopt new rules that address unfair acts of cable operators involving a class of programmers that are not currently subject to the rules: cable-affiliated programmers that provide terrestrially delivered programming. Accordingly, the rules adopted in this *Order* do not trigger modification of the merger conditions adopted in the *Adelphia Order*. The program access conditions adopted in the *Liberty/DIRECTV Order* contain a similar modification clause. *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3341, Appendix B, § III(6) ("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"). For the reasons stated above, because the program access rules are not modified by this *Order*, this modification clause is not triggered.

[252] *See supra* Section III.D. If the conditions expire or the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets, then exclusive contracts for these Covered RSNs will not be precluded. Rather, in accordance with the rules we adopt in this *Order*, we will consider exclusive contracts for these RSNs on a case-by-case basis in response to a program access complaint, where we will assess whether the defendant has rebutted the presumption that an exclusive contract for the RSN has the purpose or effect of significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming. *See supra* Section III.D.

[253] *See Adelphia Order,* 21 FCC Rcd at 8276, ¶ 163 ("we do not require that Comcast SportsNet Philadelphia be subject to those conditions to the extent it is not currently available to MVPDs"). With regard to MVPDs that had contracts for Comcast SportsNet Philadelphia at the time of the *Adelphia Order*, the program access conditions adopted in the *Adelphia Order* apply. *See id*.

[254] *See id*.

[255] 47 U.S.C. § 548(b) (emphasis added).

[256] As discussed above, the complainant would need to demonstrate that the defendant engaged in an unfair act after the effective date of the rules. *See supra* ¶ 64. Comcast argues that the doctrine of res judicata precludes DIRECTV and DISH Network from bringing program access complaints alleging an unfair act involving Comcast SportsNet Philadelphia under Section 628(b) because they have previously brought such claims and were denied. *See* Comcast
(continued….)

F. Temporary Standstill of Existing Contract Pending Resolution of a Program Access Complaint

71. We establish specific procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.[257] The specific procedures adopted herein only apply to requests for a standstill involving program access complaints filed pursuant to Sections 76.1001 or 76.1003 of the Commission's rules. Thus, a complainant may use these procedures to seek a temporary standstill in program access complaint proceedings involving terrestrially, cable-affiliated delivered programming as well as satellite-delivered, cable-affiliated programming.[258] As competitive MVPDs note, such a process will have several benefits, such as minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint;[259] limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations);[260] encouraging settlement;[261] and increasing the usefulness of the program access complaint process.[262]

(Continued from previous page)
Jan. 13th *Ex Parte* Letter at 8-10 (citing *DIRECTV, Inc. v. Comcast Corp*., 13 FCC Rcd 21822 (CSB, 1998) and *EchoStar Commc'ns Corp. v. Comcast Corp*., 14 FCC Rcd 2089 (CSB, 1999), *aff'd sub nom. DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al*., 15 FCC Rcd 22802 (2000), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002)). Comcast would have an opportunity to present such claim-specific arguments in the context of a specific complaint proceeding involving Comcast SportsNet Philadelphia, should such a complaint be filed.

[257] *See NPRM*, 22 FCC Rcd at 17868-70, ¶¶ 136-138.

[258] We note that of particular concern would be a situation where a cable-affiliated network that is satellite-delivered, and therefore subject to the *per se* prohibitions in Section 76.1002, moves to terrestrial delivery and threatens to withhold the programming from an MVPD that formerly had access to the network. In such a case, absent a standstill, the MVPD's subscribers would be deprived of the programming unless and until the Commission resolves a program access complaint in favor of the MVPD and grants relief to the MVPD, including carriage of the network.

[259] *See* Verizon Comments at 15 ("A standstill requirement would ensure that the customers being served by the MVPD alleging a violation of the program access rules can continue to enjoy the programming they are currently receiving while the Commission considers the merits of the provider's allegations."); *see also* DISH Network Comments at 5; OPASTCO *et al* Comments at 18.

[260] *See* BSPA Comments at 14 ("Vertically integrated programmers covered by the program access rules have . . . incentives to use temporary foreclosure strategies during the pendency of a complaint . . . ."); DISH Network Comments at 5 ("Too often cable-affiliated programmers use the threat of denying access to programming as leverage in programming disputes."); OPASTCO *et al* Comments at 17; Verizon Comments at 15. As the Commission explained in the *Adelphia Order*, "by temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier. In order for a vertically integrated firm successfully to employ temporary foreclosure or the threat of temporary foreclosure as a strategy to increase its bargaining position, there must be a credible risk that subscribers would switch MVPDs to obtain the programming for a long enough period to make the strategy profitable." *See Adelphia Order,* 21 FCC Rcd at 8262, ¶ 129.

[261] *See* NTCA Comments at 34.

[262] *See* Verizon Reply at 9, 10, 12 ("[W]ithout a standstill requirement, filing a complaint may accomplish little since, by the time a complaint is resolved, the damage to the provider's business has already occurred."); *see also* Reply Comments of the American Cable Association at 25.

72. The Commission has statutory authority to impose a temporary standstill of an existing contract in appropriate cases pending resolution of a program access complaint.[263] The Commission is authorized to "make such rules and regulations . . . as may be necessary in the execution of its functions," and to "[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act."[264] The Supreme Court has affirmed the Commission's authority to impose interim injunctive relief, in the form of a standstill order, pursuant to Section 4(i).[265]

73. Pursuant to the rules we adopt herein, a complainant may submit along with its program access complaint a petition for a temporary standstill of its existing programming contract pending resolution of the complaint. We encourage complainants to file the petition and complaint sufficiently in advance of the expiration of the existing contract to provide the Commission with sufficient time to act prior to expiration. In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay.[266] As part of a showing of irreparable harm, a complainant may discuss, among other things, the impact on subscribers and the likelihood that subscribers will switch MVPDs to obtain the programming in dispute. In order to ensure an expedited decision, the defendant will have ten days after service to file an answer to the petition for a standstill order. In acting on the petition, the Commission may limit the length of the standstill to a defined period or may specify that the standstill will continue until the Commission resolves the program access complaint. In any event, the Commission may lift the temporary standstill to the extent that it finds that the stay is having a negative effect on settlement negotiations or is otherwise no longer in the public interest.

74. If the Commission grants the temporary standstill, its decision acting on the complaint will make the terms of the new agreement between the parties, if any, retroactive to the expiration date of the

[263] *See* BSPA Comments at 14-15 (citing *Alabama Cable Telecomm. Assoc. v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12217 (2001)); Verizon Reply at 11; *but see* Comcast Comments at 16; NCTA Comments at 16; Time Warner Comments at 2-6; Comcast Reply at 15.

[264] 47 U.S.C. §§ 154(i), 303(r).

[265] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *see also AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998) (standstill order issued pursuant to 47 U.S.C. § 154(i) temporarily preventing Ameritech from enrolling additional customers in, and marketing and promoting, a "teaming" arrangement with Qwest Corporation pending a decision concerning the lawfulness of the program); *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22566 ¶ 159 and n.464 (1997) (stating that the Commission has authority under section 4(i) of the Act to award injunctive relief); *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016 (MB, 2006) (standstill order issued pursuant to section 4(i) denying a stay and reconsideration of the Media Bureau's order requiring Time Warner temporarily to reinstate carriage of the NFL Network on systems that it recently acquired from Adelphia Communications and Comcast Corporation until the Commission could resolve on the merits the Emergency Petition for Declaratory Ruling filed by the NFL); NCTA Comments at 16.

[266] *See, e.g.*, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted); Time Warner Comments at 14 n.42 ("when a party seeks injunctive relief (which is precisely what a standstill is), the law is clear that this is a request for 'extraordinary relief,' and courts therefore require such party to demonstrate, on a case-by-case basis with a sufficient evidentiary record, that it satisfies" the criteria set forth in *Virginia Petroleum Jobbers Ass'n*).

previous agreement.[267] For example, if carriage of the programming has continued uninterrupted during resolution of the complaint, and if the Commission's decision requires a higher amount to be paid than was required under the terms of the expired contract, the MVPD will make an additional payment to the programmer in an amount representing the difference between the amount that is required to be paid pursuant to the decision and the amount actually paid under the terms of the expired contract during resolution of the complaint.[268] Conversely, if carriage of the programming has continued uninterrupted during resolution of the complaint, and if the Commission's decision requires a lesser amount to be paid than was required under the terms of the expired contract, the programmer will credit the MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during resolution of the complaint and the amount that is required to be paid pursuant to the Commission's decision.[269]

75. Vertically integrated cable operators contend that the Commission should not adopt a temporary standstill process,[270] claiming that such an option will tilt the balance of negotiating leverage in favor of MVPDs;[271] encourage MVPDs to file program access complaints to guarantee continued access to programming;[272] and impede parties from settling disputes by removing any incentive for the MVPD to negotiate.[273] On balance, we conclude that the benefits of establishing a temporary stay process outweigh these purported harms. We expect parties to deal and negotiate with one another in good faith to come to settlement while the program access complaint is pending at the Commission. Moreover, there is no reason to assume that carriage negotiations and attempts at a settlement during a temporary stay will necessarily be protracted. In this regard, we note that in three previous merger orders, the Commission adopted a standstill requirement in connection with arbitration of program access disputes.[274] Commenters, however, provide no evidence that any of the purported harms actually resulted from the standstill in those cases.[275] Moreover, the standstill requirement imposed in connection with those merger conditions is automatic upon notice of the MVPD's intent to arbitrate,[276] whereas the process we adopt here requires a complainant to seek Commission approval based on the four-criteria test described

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[267] *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, § 3(h); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[268] *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, § 3(h); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[269] *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, § 3(h).

[270] *See* Comcast Comments at 16-17; NCTA Comments at 16; Time Warner Comments at 3-6, 12-19; Comcast Reply at 15-18.

[271] *See* Time Warner Comments at 13; Comcast Reply at 17.

[272] *See* Comcast Comments at 16; Time Warner Comments at 14; Comcast Reply Comments at 18. Verizon notes that the Commission has authority under Section 628(f) to issue sanctions for filing frivolous complaints, which addresses concerns about an increase in the use of the complaint process. *See* Verizon Reply at 10; *see also supra* n.195.

[273] *See* Time Warner Comments at 14.

[274] *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[275] *See* DISH Network Reply at 5 ("[R]eal-world experience under the *News/Hughes* and *Adelphia/Comcast/Time Warner* merger conditions – which included standstill protection for consumers – does not support the view that program access complaints have been filed more often.").

[276] *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

above.[277] Thus, the Commission will be able to take into account all relevant facts in each case.[278] Moreover, because the new carriage terms will be applied retroactively to the expiration of the previous contract, we believe that complainants will not have an incentive to seek a temporary standstill solely to continue the *status quo* or to gain leverage.[279]

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

76. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[280] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *First Report and Order* in MB Docket No. 07-198. The FRFA is set forth in Appendix C.

B. Final Paperwork Reduction Act Analysis

77. This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13 (44 U.S.C. 3501-3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the *Federal Register* inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix C, *infra*.

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[277] *See supra* ¶ 73.

[278] For example, Time Warner claims that, depending on the terms of the contract, it may be impractical to apply those terms beyond the expiration date of the contract. *See* Time Warner Comments at 15. In addition, Time Warner notes unique concerns regarding a standstill imposed on a contract for a premium network. *See id*. at 16-19 (claiming that an MVPD could argue that it is not required to participate in a joint advertising campaign with the premium network beyond the expiration of an existing agreement, thereby allowing the MVPD to enjoy the benefits of the prior contract without meeting the obligations of the contract). DISH Network states that Time Warner has overstated the complexity of a standstill, because the existing contract terms – including rate, carriage terms, as well as marketing and promotion provisions – would apply during the pendency of the complaint proceeding. *See* DISH Network Reply at 5. To the extent difficulties arise, we believe we will be able to resolve such issues on a case-by-case basis when acting on a petition for a standstill.

[279] *See* Verizon Comments at 16 ("This approach would lessen any concern that an aggrieved provider would bring a complaint to freeze the status quo indefinitely, and it would give both sides the incentive to negotiate diligently and in good faith . . . ."); Verizon Reply Comments at 10-11 ("[A]ny potential concerns about misuse of the program access complaint procedure could readily be addressed by applying any increase in subscriber fees retroactively to the date of the complaint."); *see also* DISH Network Comments at 5-6; BSPA Reply Comments at 16; DISH Network Reply Comments at 4.

[280] *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. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 ("CWAAA").

C. Congressional Review Act

78. The Commission will send a copy of this *First Report and Order* in MB Docket No. 07-198 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

79. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the *First Report and Order* in MB Docket No. 07-198 **IS ADOPTED**.

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

81. **IT IS FURTHER ORDERED** that the rules adopted herein **WILL BECOME EFFECTIVE** 30 days after the date of publication in the *Federal Register*, except for Sections 76.1001(b)(2), 76.1003(c)(3), and 76.1003(l) which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA) and **WILL BECOME EFFECTIVE** after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective date.

82. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *First Report and Order* in MB Docket No. 07-198*,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

83. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *First Report and Order* in MB Docket No. 07-198 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

Comments filed in MB Docket No. 07-198

American Cable Association ("ACA")
AT&T Inc.
Broadband Service Providers Association ("BSPA")
Cablevision Systems Corp.
The Coalition for Competitive Access to Content ("CA2C")
Comcast Corporation
Community Broadcasters Association ("CBA")
DIRECTV, Inc.
DISH Network
Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. ("Fox")
Liberty Cablevision of Puerto Rico, Ltd.
McKinnon Group and Virginia Broadcasting Corp.
National Association of Broadcasters ("NAB")
National Cable and Telecommunications Association ("NCTA")
National Telecommunications Cooperative Association ("NTCA")
NBC Universal, Inc. and NBC Telemundo License Co. ("NBC")
The Organization for the Promotion and Advancement of Small Telecommunications Companies; The Independent Telephone and Telecommunications Alliance; The Western Telecommunications Alliance; and The Rural Independent Competitive Alliance ("OPASTCO *et al*")
The Rural Iowa Independent Telephone Association ("RIITA")
Small Cable Operators for Change
Time Warner Inc.
The United States Telecom Association ("USTelecom")
Verizon
Viacom Inc.
The Walt Disney Company

Reply Comments filed in MB Docket No. 07-198

Advance/Newhouse Communications
A&E Television Networks
American Cable Association ("ACA")
Broadband Service Providers Association ("BSPA")
Cablevision Systems Corp.
CBS Corporation
The Coalition for Competitive Access to Content ("CA2C")
Comcast Corporation
Consumers Union and the Consumer Federation of America
Cox Communications, Inc.
DIRECTV, Inc.
Discovery Communications, LLC
DISH Network
Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. ("Fox")
Hearst-Argyle Television, Inc.
John Staurulakis, Inc.
LIN Television Corporation
Motion Picture Association of America ("MPAA")

National Association of Broadcasters ("NAB")
National Telecommunications Cooperative Association ("NTCA")
NBC Universal, Inc. and NBC Telemundo License Co. ("NBC")
Public Utility District No. 1 of Chelan County, Washington
Time Warner Inc.
Sí TV, Inc.
TuTv LLC
Verizon
Viacom Inc.
The Walt Disney Company

APPENDIX B

Revised Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 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 revising the first sentence of paragraph (b), revising paragraph (c)(1), revising the first sentence of paragraph (j), and adding paragraphs (l) and (m) to read as follows:

* * * * *

(b) *Cognizable interests*. In applying the provisions of this subpart, ownership and other interests in cable operators, satellite cable programming vendors, satellite broadcast programming vendors, or terrestrial cable programming vendors will be attributed to their holders and may subject the interest holders to the rules of this subpart. * * *

* * * * *

(c) * * *

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

* * * * *

(j) Similarly situated. The term “similarly situated” means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor or by a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1)(ii) of this part, that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of § 76.1001(a) or § 76.1002(b) of this part has occurred. * * *

* * * * *

(l) *Terrestrial cable programming*. The term “terrestrial cable programming” means video programming which is transmitted terrestrially or by any other means other than satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming or satellite cable programming.

(m) *Terrestrial cable programming vendor*. The term “terrestrial cable programming vendor” means a person engaged in the production, creation, or wholesale distribution for sale of terrestrial cable programming, but does not include a satellite broadcast programming vendor or a satellite cable programming vendor.

3. Section 76.1001 is amended to read as follows:

(a) *Unfair practices generally*. No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

(b) *Unfair practices involving terrestrial cable programming and terrestrial cable programming vendors*. (1) The phrase "unfair methods of competition or unfair or deceptive acts or practices" as used in paragraph (a) of this section includes, but is not limited to, the following:

(i) Any effort or action by a cable operator that has an attributable interest in a terrestrial cable programming vendor to unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms, and conditions for the sale of, terrestrial cable programming to any unaffiliated multichannel video programming distributor.

(ii) Discrimination in the prices, terms, or conditions of sale or delivery of terrestrial cable programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors, or their agents or buying groups, by a terrestrial cable programming vendor that is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; except that the phrase does not include the practices set forth in § 76.1002(b)(1)-(3) of this part. The cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors that wholly own or control, or are under common control with, such terrestrial cable programming vendor shall be deemed responsible for such discrimination and any complaint based on such discrimination shall be filed against such cable operator, satellite cable programming vendor, or satellite broadcast programming vendor.

(iii) Exclusive contracts, or any practice, activity, or arrangement tantamount to an exclusive contract, for terrestrial cable programming between a cable operator and a terrestrial cable programming vendor in which a cable operator has an attributable interest.

(2) Any multichannel video programming distributor aggrieved by conduct described in paragraph (b)(1) of this section that it believes constitutes a violation of paragraph (a) of this section may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part, as modified by § 76.1003 of this part, with the following additions or changes:

(i) The defendant shall answer the complaint within forty-five (45) days of service of the complaint, unless otherwise directed by the Commission.

(ii) The complainant shall have the burden of proof that the defendant's alleged conduct described in paragraph (b)(1) of this section has the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. An answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.

(iii) A complainant alleging that a terrestrial cable programming vendor has engaged in conduct described in paragraph (b)(1)(ii) of this section shall have the burden of proof that the terrestrial cable programming vendor is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors. An answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.

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

* * * * *

(b) * * *

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

* * * * *

5. Section 76.1003 is amended by revising paragraph (c)(3), by revising the first sentence of paragraph (e)(1), by revising paragraph (g)(1)-(3), and by adding paragraph (l) to read as follows:

§ 76.1003 Program access proceedings.

* * * * *

(c) * * *

(3) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor or a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1) of this part;

* * * * *

(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. * * *

* * * * *

(g) * * *

(1) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor; or

(3) The complainant has notified a cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming, satellite broadcast programming, or terrestrial cable programming, or has made a request to amend an existing contract pertaining to such programming pursuant to § 76.1002(f) of this part that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

* * * * *

(l) *Petitions for temporary standstill.* (1) A program access complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

(i) the complainant is likely to prevail on the merits of its complaint;

(ii) the complainant will suffer irreparable harm absent a stay;

(iii) grant of a stay will not substantially harm other interested parties; and

(iv) the public interest favors grant of a stay.

(2) The defendant cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the Commission's decision acting on the complaint will provide for remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous programming contract.

6. Section 76.1004 is amended by revising the last sentence of paragraph (a) to read as follows:

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

(a) * * * 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).

* * * * *

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* in MB Docket No. 07-198 (hereinafter referred to as the *NPRM)*.[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Rules Adopted

2. Section 628(a) of the Communications Act establishes that the goals of Section 628 are to increase competition and diversity in the video distribution market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.[4] Section 628(b) of the Act prohibits unfair acts and practices of cable operators that have the purpose or effect of hindering significantly any multichannel video programming distributor ("MVPD") from providing satellite cable programming or satellite broadcast programming to consumers.[5] Section 628(c)(1) provides the Commission with authority to adopt rules to specify the conduct prohibited by Section 628(b).[6] As required by Section 628(c)(2) of the Act,[7] the Commission adopted rules in 1993 (the "program access rules") which specifically prohibit: (i) a cable operator from unduly or improperly influencing the decision of its affiliated satellite cable programming vendor to sell, or unduly or improperly influencing the vendor's prices, terms, and conditions for the sale of, satellite cable programming to any unaffiliated MVPD (the "undue or improper influence" rule);[8] (ii) a cable-affiliated satellite cable programming vendor from discriminating in the prices, terms, and conditions of sale or delivery of satellite cable programming among or between competing MVPDs (the "non-discrimination" rule);[9] and (iii) a cable operator from entering into an exclusive contract for satellite cable programming with a cable-affiliated satellite cable programming vendor, subject to certain exceptions (the "exclusive

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See 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, 17859-70, ¶¶ 114-138 (2007) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] 47 U.S.C. § 548(a).

[5] 47 U.S.C. § 548(b) ("it shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers").

[6] 47 U.S.C. § 548(c)(1).

[7] 47 U.S.C. § 548(c)(2).

[8] *See* 47 C.F.R. § 76.1002(a).

[9] *See* 47 C.F.R. § 76.1002(b).

contract prohibition").[10] The Commission has also adopted procedures for resolving complaints alleging a violation of these program access rules.[11]

3. Consistent with the text of Section 628(c)(2), the Commission's program access rules currently apply to "satellite cable programming" and "satellite broadcast programming."[12] The Act and the Commission's rules define both terms to apply only to programming transmitted or retransmitted by satellite for reception by cable operators.[13] The Commission has previously concluded that terrestrially delivered, cable-affiliated programming (such as programming transmitted to cable operators by fiber) is outside of the direct coverage of Section 628(c)(2) and the Commission's program access rules under Section 628(c)(2).[14] This is commonly referred to as the "terrestrial loophole," because it allows cable-affiliated programmers to transmit their programming to cable operators via terrestrial means and thereby avoid application of the program access rules.[15]

4. In the *Order* adopted herein, the Commission establishes rules for the consideration of complaints on a case-by-case basis alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order*, includes exclusive contracts, discrimination, and undue or improper influence).[16] The *Order* discusses the Commission's statutory authority for adopting rules to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. The Commission concludes that Section 628(b) grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming.[17]

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[10] *See* 47 C.F.R. § 76.1002(c)-(e).

[11] *See* 47 C.F.R. § 76.1003.

[12] 47 U.S.C. § 548(c)(2).

[13] The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); *see also* 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "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 U.S.C. § 548(i)(3); *see also* 47 C.F.R. § 76.1000(f).

[14] *See DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802, 22807, ¶ 12 (2000), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *see also Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17844, ¶ 78 (2007), *appeal pending sub nom. Cablevision Systems Corp. et al v FCC*, No. 07-1425 (D.C. Cir); *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, 12158, ¶ 73 (2002) ("*2002 Program Access Order*").

[15] *See 2002 Program Access Order*, 17 FCC Rcd at 12157, ¶ 71.

[16] The *Order* notes that there may be other acts or practices that are "unfair" under Section 628(b). The *Order*, however, pertains only to exclusive contracts, discrimination, and undue or improper influence involving programming that is both terrestrially delivered and, consistent with Section 628(c)(2), cable-affiliated. The *Order* does not reach any conclusions regarding other acts that may be "unfair" under Section 628(b), nor does it foreclose potential complaints. *See Order* at n.191.

[17] *See id.* at Section III.A.

5. The *Order* next establishes the following reasons for Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming: (i) cable operators continue to have an incentive and ability to engage in unfair acts involving their affiliated programming, regardless of whether this programming is satellite-delivered or terrestrially delivered;[18] (ii) the Commission's judgment regarding this incentive and ability is supported by real-world evidence that cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors;[19] and (iii) there is evidence that this withholding may significantly hinder MVPDs from providing video service in some cases.[20] The *Order* concludes that Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming will facilitate broadband deployment and promote the goals of Section 628 to increase competition and diversity in the video distribution market.[21] The *Order* also concludes that addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.[22]

6. The *Order* next explains that complainants may pursue similar claims involving terrestrially delivered, cable-affiliated programming that they may pursue with respect to satellite-delivered, cable-affiliated programming under the program access rules: exclusive contracts, discrimination, and undue or improper influence.[23] The *Order* also describes four ways in which the rules adopted to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming: (i) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers;[24] (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming, the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors;[25] (iii) there is no *per se* prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; rather, the Commission will assess such contracts on a case-by-case basis in response to a program access complaint;[26] and (iv)defendants will have 45 days – rather than the usual 20 days -- from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.[27] The *Order* then discusses how these rules will be applied to common carriers, existing contracts, and

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[18] *See id.* at Section III.B.1.

[19] *See id*. at Section III.B.2.

[20] *See id*. at Section III.B.3.

[21] *See id*.

[22] *See id*. at Section III.C.

[23] *See id*. at Section III.D.1.

[24] *See id*. at Section III.D.2.

[25] *See id.*

[26] *See id*. at Section III.D.3.

[27] *See id*. at Section III.D.1.

terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions.[28] Finally, the *Order* establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.[29]

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

7. In its Comments on the *NPRM*, the National Telecommunications Cooperative Association ("NTCA") stated that program access rules may have a significant economic impact on a substantial number of small entities, such as small rural MVPDs.[30] NTCA stated further that its proposed amendments to the Commission's program access rules, which would include extending the program access rules to terrestrially delivered, cable-affiliated programming, would reduce the impact on small rural MVPDs.[31] NTCA also stated that its proposed amendments will "promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market and spur development of new communications technologies."[32] We conclude that allowing MVPDs to pursue program access claims involving terrestrially delivered, cable-affiliated programming will reduce the impact on small rural MVPDs by promoting competition and diversity in the MVPD market.

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.[33] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[34] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[35] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[36]

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[28] *See id*. at Section III.E.

[29] *See id.* at Section III.F.

[30] *See* Comments of National Telecommunications Cooperative Association at 5, 41 ("NTCA Comments"); Reply Comments of National Telecommunications Cooperative Association at 7 ("NTCA Reply").

[31] *See* NTCA Comments at 5, 41-42; NTCA Reply at 8.

[32] *See* NTCA Comments at 5, 42; NTCA Reply at 8.

[33] 5 U.S.C. § 603(b)(3).

[34] 5 U.S.C. § 601(6).

[35] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[36] 15 U.S.C. § 632.

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."[37] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[38] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.[39] Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more.[40] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

10. *Wired Telecommunications Carriers -- Cable and Other Program Distribution.* This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The data we have available as a basis for estimating the number of such entities were gathered under a superseded SBA small business size standard formerly titled Cable and Other Program Distribution. The former Cable and Other Program Distribution category is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small.[41] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[42] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[43] Thus, we believe that a substantial number of entities included in the former Cable and Other Program Distribution category may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution. With respect to OVS, the Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[44] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS

[37] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[38] 13 C.F.R. § 121.201, NAICS code 517110.

[39] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size: 2002 (Including Legal Form of Organization)," Table 5, NAICS code 517110 (issued November 2005).

[40] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[41] *See supra* ¶ 9. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts.

[42] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

[43] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[44] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2006, BSPs served approximately 1.4 million subscribers, representing 1.46 percent of all MVPD households.[45] Among BSPs, however, those operating under the OVS framework are in the minority.[46] The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

11. *Cable System Operators (Rate Regulation Standard)*. 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.[47] As of 2006, 7,916 cable operators qualify as small cable companies under this standard.[48] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[49] Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[50] Thus, under this standard, most cable systems are small.

12. *Cable System Operators (Telecom Act Standard)*. 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."[51] There are approximately 65.3 million cable subscribers in the United States today.[52] Accordingly, an operator serving fewer than 654,000 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.[53] Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.[54] We note that the Commission

[45] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 684, Table B-1 (2009) ("*13th Annual Report*").

[46] OPASTCO reports that fewer than 3 percent of its members provide service under OVS certification. *See id*. at 607, ¶ 135 n.473.

[47] 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).

[48] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[49] 47 C.F.R. § 76.901(c).

[50] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[51] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[52] *See 13th Annual Report*, 24 FCC Rcd at 684, Table B-1.

[53] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[54] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at (continued….)

neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[55] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

13. *Wired Telecommunications Carriers - 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 is now included in the category of Wired Telecommunications Carriers.[56] The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, *i.e.*, Cable and Other Program Distribution.[57] Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).[58] All three currently offer subscription services. Two of these three DBS operators, DIRECTV[59] and EchoStar Communications Corporation ("EchoStar"),[60] report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than 500,000 subscribers.[61] Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as 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 licensee.

14. *Wired Telecommunications Carriers - Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems*. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs 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. PCOs are now included in the category of Wired Telecommunications Carriers.[62] The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, *i.e.*, Cable and

(Continued from previous page)
7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[55] 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).

[56] *See* NAICS code 517110. The size standard for that definition is 1,500 employees.

[57] *See supra* ¶ 9. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts.

[58] *See 13th Annual Report*, 24 FCC Rcd at 580, ¶ 74.

[59] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See id*. at 687, Table B-3.

[60] DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id*.

[61] *See id*. at 581, ¶ 76 .

[62] *See* NAICS code 517110. The size standard for that definition is 1,500 employees.

Other Program Distribution.[63] The Independent Multi-Family Communications Council ("IMCC"), the trade association that represents PCOs, indicates that PCOs serve about 1 to 2 percent of the MVPD marketplace.[64] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 900,000 subscribers.[65] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.

15. *Wired Telecommunications Carriers -- Home Satellite Dish ("HSD") Service*. HSD is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small.[66] 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. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2005 and June 2006, HSD subscribership fell from 206,538 subscribers to 111,478 subscribers.[67] The Commission has no information regarding the annual revenue of the four C-Band distributors.

16. *Wireless Telecommunications Carriers (except Satellite) -- Broadband Radio Service and Educational Broadband Service*. Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new category of Wireless Telecommunications Carriers (except Satellite).[68] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[69] The Broadband Radio Service (BRS) is composed of Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service

[63] *See supra* ¶ 9. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts.

[64] *See 13th Annual Report*, 24 FCC Rcd at 609, ¶ 140. Previously, the Commission reported that IMCC had 250 members. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004).

[65] *See 13th Annual Report*, 24 FCC Rcd at 684, Table B-1.

[66] *See supra* ¶ 9. The data we use herein to estimate the number of HSD services is based on a superseded SBA-recognized definition. Because HSD provides subscription services, HSD fell within the SBA-recognized definition of Cable and Other Program Distribution, which has been superseded by the category of Wired Telecommunications Carriers. The definition of Cable and Other Program Distribution provided that a small entity was one with $13.5 million or less in annual receipts. 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[67] *See 13th Annual Report*, 24 FCC Rcd at 684, Table B-1.

[68] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[69] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). 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).

(MDS).[70] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).[71] We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005.[72]

17. *Broadband Radio Service and Educational Broadband Service – Auction Data*. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[73] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[74] In the MDS auction, 67 bidders won 493 licenses.[75] Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[76]

18. *Broadband Radio Service and Educational Broadband Service – Licenses Not Received Via Auction*. MDS (now BRS) licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall within the new category of Wireless Telecommunications Carriers (except Satellite).[77] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[78] Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution.[79] The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts.[80] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are

[70] *Amendment of Parts 1, 21 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

[71] *See id.*

[72] Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. 13 C.F.R. § 121.201 (2002 NAICS code 517510). The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts. *See id.*

[73] 47 C.F.R. § 21.961(b)(1) (2002).

[74] *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, Report and Order*, 10 FCC Rcd 9589 (1995).

[75] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

[76] 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 standards for "other telecommunications" (annual receipts of $13.5 million or less). *See* 13 C.F.R. § 121.201 (2007 NAICS code 517910).

[77] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[78] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). 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).

[79] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[80] *See id*.

approximately 850 small entity MDS (or BRS) providers under the now superseded SBA small business size standard for Cable and Other Program Distribution.

19. *Educational Broadband Service.* Educational institutions are included in the analysis above as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).[81] We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

20. *Wireless Telecommunications Carriers (except Satellite) -- Local Multipoint Distribution Service*. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[82] Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new category of Wireless Telecommunications Carriers (except Satellite).[83] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[84] Previously, LMDS providing wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution.[85] The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts.[86]

21. *Wireless Telecommunications Carriers (except Satellite) -- Local Multipoint Distribution Service (Auctions)*. The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,[87] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[88] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years.[89] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[90] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS

[81] In addition, the term "small entity" under 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 ITFS licensees.

[82] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997) ("*LMDS Order*").

[83] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[84] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). 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).

[85] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[86] *See id*.

[87] The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998 (104 bidders won 864 licenses). Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999 (40 bidders won 161 licenses).

[88] *See LMDS Order,* 12 FCC Rcd at 12545.

[89] *Id.*

[90] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the Commission's auction rules and the now superseded SBA small business size standard for Cable and Other Program Distribution.

22. *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."[91] The SBA has developed a small business size standard for firms within this category, which is all firms with $15 million or less in annual receipts.[92] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[93] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[94] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

23. *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."[95] The SBA has developed a small business size standard for firms within this category, which is all firms with $29.5 million or less in annual receipts.[96] According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year.[97] Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999.[98] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

24. *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

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[91] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[92] 13 C.F.R. § 121.201 (NAICS code 515210).

[93] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

[94] *Id*. An additional 40 firms had annual receipts of $25 million or more.

[95] *See* U.S. Census Bureau, 2007 NAICS Definitions, "512110 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N512110.

[96] 13 C.F.R. § 121.201 (NAICS code 512110).

[97] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51211) (issued November 2005).

[98] *Id*.

exhibitors."[99] The SBA has developed a small business size standard for firms within this category, which is all firms with $29.5 million or less in annual receipts.[100] According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year.[101] Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999.[102] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

25. *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."[103] 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.[104] We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

26. *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.[105] According to Commission data,[106] 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

27. *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

[99] *See* U.S. Census Bureau, 2007 NAICS Definitions, "512120 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N512120.

[100] 13 C.F.R. § 121.201 (NAICS code 512120).

[101] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51212) (issued November 2005).

[102] *Id*.

[103] 15 U.S.C. § 632.

[104] 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).

[105] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[106] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (February 2007) ("Trends in Telephone Service"). This source uses data that are current as of October 20, 2005.

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.[107] According to Commission data,[108] 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. 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.

28. *Electric Power Generation, Transmission and Distribution*. The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[109] The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."[110] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[111] Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

D. Description of Reporting, Recordkeeping and Other Compliance Requirements

29. The rules adopted in the *Order* will impose additional reporting, recordkeeping, and compliance requirements on MVPDs, cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors. The *Order* allows MVPDs to file complaints with the Commission alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in an unfair act involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order*, includes exclusive contracts, discrimination, and undue or improper influence). The complaint proceeding will be subject to the same procedures set forth in Sections 76.7 and 76.1003 of the Commission's rules that apply to program access complaints involving

[107] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[108] *See* Trends in Telephone Service at Table 5.3.

[109] U.S. Census Bureau, 2007 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211.

[110] 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

[111] U S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122) (issued November 2005).

satellite-delivered, cable-affiliated programming,[112] except that (i) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers;[113] (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming, the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors;[114] and (iii) defendants will have 45 days -- rather than the usual 20 days -- from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.[115] In addition, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply.[116] The *Order* also establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.[117]

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

30. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, 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.[118] The *NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities.[119]

31. As discussed in Section A, the decision to establish rules to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis, and to establish procedures for the Commission's consideration of requests for a temporary standstill, will facilitate competition in the video distribution market and promote broadband deployment. The decision therefore confers benefits upon various MVPDs, including those that are smaller entities. Thus, the decision benefits smaller entities as well as larger entities. In general, because the decision confers these benefits on smaller entities, a discussion of alternatives to the adopted rules is of secondary importance. We note that the Commission found a lack of record evidence to reach a general conclusion that unfair acts involving

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[112] *See* 47 C.F.R. §§ 76.7, 76.1003.

[113] *See id*. at Section III.D.2.

[114] *See id*.

[115] *See id*. at Section III.D.1.

[116] *See* 47 C.F.R. §§ 76.7, 76.1003.

[117] *See Order* at Section III.F.

[118] 5 U.S.C. § 603(c).

[119] *See NPRM*, 22 FCC Rcd at 11871-72, ¶ 144 and 17900-14, App. F.

this programming will significantly hinder an MVPD from providing video services in every case.[120] A case-by-case approach is less burdensome than declining to consider complaints alleging that a cable operator has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming, because small MVPDs would lack relief in such situations. Moreover, while the *Order* provides illustrative examples of evidence a complainant may provide, such as a regression analysis or market survey, it also recognizes that not all potential complainants will have the resources to provide this type of evidence.[121] In addition, a case-by-case approach is consistent with the First Amendment.[122]

F. Report to Congress

32. The Commission will send a copy of the *First Report and Order* in MB Docket No. 07-198, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[123] In addition, the Commission will send a copy of the *First Report and Order* in MB Docket No. 07-198, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *First Report and Order* in MB Docket No. 07-198 and FRFA (or summaries thereof) will also be published in the *Federal Register*.[124]

[120] *See Order* at Section III.B.3.a.

[121] *See Order* at ¶ 56.

[122] *See id*. at Section III.C.

[123] *See* 5 U.S.C. § 801(a)(1)(A).

[124] *See* 5 U.S.C. § 604(b).

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198

Today, the Commission takes an important step in promoting competition, empowering consumers, and fostering innovation by closing a loophole in our Program Access rules. The loophole gives free rein to cable-TV operators to lock up local sports events and other popular programming and withhold them from rival providers. Locking up a much-loved local sports franchise could be game, set, match for cable competition. Consumers who want to switch video providers shouldn't have to give up their favorite team in the process. Today the Commission levels the competitive playing field.

This flows directly from both the record in this proceeding, and the steps that Congress and the Commission have taken in recent years to promote competition in the delivery of video programming. As a result of policies consistently implemented, consumers can increasingly choose their video service provider from among cable, direct broadcast satellite, and telephone company providers. But as Congress recognized in the Cable Act of 1992, for competition to remain vibrant, cable operators cannot unjustly deny competitors access to "must have" programming.

As we've heard, Commission rules implementing the Cable Act prohibited cable operators from using their control of the *satellite*-delivered programming that they own to harm competitors. At the time the rules were adopted, there was no inconsistency between the limitation to 'satellite' and the objective of promoting competition. However, over the years since the rules were first adopted, technological developments have made it increasingly cost effective for content providers to deliver their programming -- including local and regional content -- through fiber-optic or other non-satellite means. And so what originally was immaterial became a major loophole in our video competition rules.

In our 2007 Program Access Order, the FCC recognized that cable operators have a financial incentive to withhold programming from competitors. And indeed the record contains many examples of incumbent providers denying rivals access to terrestrially-delivered programming, particularly regional sports networks. This inhibits competition. The bottom line is that viewers should not be unfairly forced to choose between the sports teams they love and the provider they prefer. Our new rules allow competitors to seek recourse when they have been unreasonably denied access to terrestrially delivered programming.

Today's action represents a major step toward realizing the promise of a competitive marketplace for video services -- while also supporting innovation in the video marketplace. Our new rules are structured to preserve incentives for cable operators to develop innovative programming such as local news networks. The new rules also create a fair process for the Commission to adjudicate claims.

During the course of this proceeding, we received extremely helpful input from my fellow Commissioners, and the suggestions are reflected in a strong and balanced order. I'm grateful to our Media Bureau and General Counsel's office for their excellent work in studying the law, the economics, and the facts in the marketplace -- and developing rules to promote competition and innovation, thereby benefiting consumers. And I'm grateful to my colleagues on the Commission who have improved the outcome through their active engagement in the development of this order.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* MB Docket No. 07-198

Drilled down to its core, the purpose of this item is to minimize unfair behavior in such a way to benefit consumers through more competition. When it comes to competition and diversity in video programming distribution, it is essential for the FCC to determine how unfair behavior short-changes consumers by stifling competition. I believe the Program Access Order before us today can go a long way toward giving consumers the benefits of some additional competition.

Congress gave us more-than-adequate authority in Section 628 of the Communications Act to prohibit unfair acts by cable operators that significantly hinder or prevent competitors from providing programming to consumers. The record developed in response to the Commission's Notice of Proposed Rulemaking looked at whether to extend the program access rules to terrestrially-delivered programming. That record makes clear that lack of program access is a serious concern precisely because it limits competition. Today's action by the Commission addresses these concerns in what I believe is a balanced, consumer-friendly way.

The item deals in a significant way with the Regional Sports Networks that have been used as a wedge by companies to deny non-replicable programming to interested consumers. With the advent of HD, the sports viewing experience—and the expectations for that experience—have changed. This is must-have programming in standard definition; it is also must-have programming in high definition. Today we determine for good reason that withholding an HD feed is withholding a separate channel, even where a standard definition version of the network is available.

A more difficult issue is how to treat news programming. It will come as no surprise to anyone that I consider news to be critically-important programming. Getting it from a diversity of sources is what enhances our civic dialogue, so the scales tip, in my mind, against mandating access to one local news show and in favor incentivizing the production of diverse news programming. That's what localism and diversity are all about.

Today's Order adopts rules for complainants to pursue program access claims and addresses the fact that some players in these disputes will be larger and more powerful than others and that it is imperative to have a process that is reasonably accessible to all. For this reason I am pleased that language is included to indicate that factual evidence, and not just time-consuming and expensive analyses, can be the basis for a showing of harm by potential complainants. By the same token, the inclusion of a standstill to continue service during disputes, along with the inclusion of good faith language, should assist in preventing the process from being unduly lengthy and expensive. Protracted, expensive and unnecessary procedures too often translate into consumer harm.

I thank the Chairman and colleagues for working to more fully realize the potential of the draft Order. This item has been awaiting action for years and today, thanks to the Chairman's leadership; it's action that we get. And good action, too. Thanks also to the Media Bureau staff as well as the Office of General Counsel for their extraordinary efforts to address the challenging, and often deep-in-the-weeds, issues related to program access in a way that will undoubtedly benefit consumers.

DISSENTING STATEMENT OF
COMMISSIONER ROBERT MCDOWELL

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* MB Docket No. 07-198

Sometimes life hands us moments where we would like to follow our friends and colleagues and share in the spirit of their collective actions. Yet, at other times, as much as we would like to venture with them, we know that we should not for many good reasons. This is one of those times. I respectfully dissent from this First Report and Order ("Order") based on my reading of the Commission's statutory authority under Section 628 of the Communications Act.

This does not mean that I take issue with the general policy objectives behind the Order. To the contrary, I sympathize with them – and I already am on record in supporting many FCC initiatives designed to foster greater competition in the multichannel video marketplace. More video competition ultimately spurs greater demand for, and deployment of, broadband facilities. Among the efforts I have supported over the years are the Commission's *Video Franchising Reform Order*, the *Inside Wiring Order*, the *Program Access Extension Order* and the *Multiple Dwelling Unit ("MDU") Access Order*.[1] Even more to the point, I supported merger conditions in the 2006 Adelphia transaction concerning regional sports network ("RSN") programming because I recognized that the unavailability of RSNs can impair competition in certain circumstances.[2] The Commission's action there, however, was based on the agency's broad merger-review authority, not its more limited power under Section 628.

My colleagues and the Commission staff have worked hard to discern a basis for the extension of authority here. Nevertheless, I am not persuaded that the language and structure of the statute adequately support the action taken. Section 628 refers to "satellite"-delivered programming 36 times throughout the length of the provision, including 14 references in the subsections most at issue here. The plain language of Section 628 bars the FCC from establishing rules governing disputes involving terrestrially delivered programming, whether we like that outcome or not. To paraphrase Justice Kennedy in a different kind of case, "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law … as we see [it], compel[s] the result."[3]

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[1] *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2006) ("*Video Franchising Reform Order*"); *Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring; and Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, 22 FCC Rcd 10640 (2007) *("Inside Wiring Order"*); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition Report and Order*, 22 FCC Rcd 17791 (2007) (*"Program Access Extension Order"*); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 21828 (2007) (*"MDU Access Order"*).

[2] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, Assignors, to Time Warner Cable, Inc Assignees; Adelphia Communications Corporation, Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc., Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee*, 21 FCC Rcd 8203 (2006).

[3] *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (invaliding state ban on flag burning).

Nor am I convinced that the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *NCTA v. FCC*,[4] which upheld the Commission's *MDU Access Order*, supports as broad a reading of the statute as that adopted by the majority here. Although the court in *NCTA* spoke of "section 628's broad and sweeping terms," it also included a cautionary note about so broadly employing the provision in other settings that the action would raise "the spectre of a statutory grant without bounds."[5] Specifically, the D.C. Circuit warned just seven months ago that "[i]n proscribing an overbroad set of practices with the statutorily identified effect, an agency might stray so far from the paradigm case as to render its interpretation unreasonable, arbitrary, or capricious."[6] I am concerned that the Order here – the first Commission rulemaking action taken under Section 628 since the *NCTA* decision – does just that. In short, the FCC is not Congress. We cannot rewrite statutes.

My analysis starts, as it must, with the plain language of the provision. The main substantive basis of the Order is Section 628(b), which expressly identifies the competitive distribution of "satellite cable programming" and "satellite broadcast programming" to consumers as the key Congressional concern underlying the entire provision. Section 628(c)(2), which also is relevant here, sets forth the detailed statutory scheme for the regulatory concept known as "program access," which requires vertically integrated cable operators and their programming affiliates to sell their content to competing multichannel video distributors such as satellite TV, cable overbuilders and, more recently, telephone companies that have entered the video arena. That section of the statute also speaks only of "satellite cable programming" and "satellite broadcast programming." Accordingly, for nearly 18 years until today, the Commission's program access regulations likewise have been limited to programming delivered to cable headends by satellite.

Now, to push the Commission's authority beyond Section 628's plain language to reach terrestrially delivered programming, the Order contends, as it must, that the meaning of the statute is ambiguous – and that a reviewing court would find it so, just as the D.C. Circuit did in *NCTA*. But is the statute ambiguous here? To me, there are critical differences between the facts the Commission addressed in the MDU Access docket and the facts in this proceeding. Those differences, in turn, undercut the contention that the Commission is entitled to *Chevron* deference[7] in its interpretation of Section 628 here.

First, the Order here conflicts with the language of Section 628(b) in a way that the Commission's *MDU Access Order* did not. As I have noted, Section 628(b) is the critical subsection for this Order. It expressly prohibits unfair methods of competition or unfair acts or practices that, at a minimum, significantly hinder a competing MVPD "from providing *satellite* cable programming or *satellite* broadcast programming" to would-be subscribers (emphasis added). The Order relies on the court's *NCTA* opinion for the proposition that this language covers terrestrially delivered programming as well, in any or all contexts. It is true that in upholding the Commission's authority to prohibit cable

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[4] 567 F.3d 659 (D.C. Cir. 2009).

[5] *Id*. at 664.

[6] *Id*. at 665 (citing *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005).

[7] Courts use the well established two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), to determine whether an agency's interpretation of a statute is entitled to judicial deference. "[E]mploying traditional tools of statutory construction," a court first determines whether "Congress has an intention on the precise question at issue." *Id*. at 843 n. 9. If so, "that intention is the law and must be given effect." *Id*. If Congress has not directly spoken to the issue, the court moves to the second step – and must defer to the agency's interpretation of the statute as long as it is reasonable and not "manifestly contrary to the statute." *Id*. at 844-45.

operators from enforcing building exclusivity clauses in their contracts with MDU owners, the D.C. Circuit did not let the potential co-mingling of terrestrially delivered programming with satellite delivered programming in one multichannel package stymie the legal analysis. But it also is true that terrestrial delivery of programming was not a significant matter of contention in that proceeding. Instead, the focus in *NCTA* was on the multichannel package as a whole, and no party disputed that satellites were used in transmitting "most programming" in that package.[8] By contrast, the Order here affects only terrestrially delivered programming – and it concedes that consumers suffer no lack of access to the satellite cable programming or satellite broadcast programming that Section 628(b) expressly concerns.

Second, the Order glosses over a conflict between Section 628(b) and Section 628(c)(2) that was not directly implicated in the Commission's MDU Access proceeding. I supported the *MDU Access Order* in part because the factual scenario addressed in that case – building exclusivity clauses – was not specifically contemplated by any other subsection of the statute. Here, however, Section 628(c)(2) speaks directly to the "the primary evil that Congress had in mind,"[9] namely competing multichannel distributors' access to the popular programming of vertically integrated cable operators, and it expressly limits the statute's reach to programming delivered to cable headends by satellite. I find arguments for a more expansive reading of the statute based on the title of Subsection C, "Minimum Contents of Regulations," to be unpersuasive. While I agree that the language and structure of Section 628 supports Commission action in "a broader field" in areas beyond those enumerated in Subsection (c), I cannot find that Section 628(b) allows the Commission to take action in conflict with the "paradigm case" established by Section 628(c)(2).[10] That the objective is meritorious as a policy matter cannot trump the statutory constraints on the FCC's authority, no matter how earnestly we may wish to be a "roving commission to go about doing good."[11]

In addition, I find it perplexing that the analysis in the Order finds some, but not all, of the terminology of Section 628(c)(2) to be relevant in interpreting key phrases within Section 628(b). In particular, the Order finds that the withholding of programming by a vertically integrated cable operator or its programming affiliate is an "unfair act" *per se* under the general terms of Subsection (b) because Congress already has determined that such withholding is an unfair act *per se* under the more explicit terms of Subsection (c)(2).[12] Yet the latter, of course, includes the limiting adjective of "satellite" in describing the prohibited acts. Why then doesn't that adjective also matter under Subsection (b)?

All of these points, to me, indicate that the Order oversteps the language and structure of Section 628, as well as the intent of Congress behind the provision. But even assuming, *arguendo*, that the

[8] *NCTA*, 567 F.3d at 666.

[9] *Id*. at 664.

[10] The *expressio unius* canon of statutory construction may not prevail in every instance when it is invoked, but the Supreme Court has explained that it remains relevant when (1) Congress specifies a number of related items in a provision, (2) an item very closely associated with those items is left off of the list, and (3) it can be shown that Congress also considered the item that was left off. *See Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168-69 (2003). Here, as the Order notes, Congress considered and rejected broader language for what became Section 628(c)(2). Order at ¶ 20.

[11] Transcript of Oral Argument at 46, Comcast Corp. v. FCC, Docket No. 08-1291 (D.C. Cir.) (argued Jan. 8, 2010). The Order also signals the Commission's willingness to entertain arguments that it has power to enact a broad *per se* ban on unfair acts involving terrestrially delivered programming, without regard to any showing of harm to competition on a case-by-case basis. Order at n. 139. I would find such an outcome manifestly contrary to the statute, and I therefore wonder why the Order even raises this possibility.

[12] Order at ¶ 43.

meaning of Section 628 is ambiguous in the context of terrestrially delivered programming, the matter is such a close case that the better approach would be to seek explicit direction from Congress before taking further action. Ambiguity alone is not a sufficient reason to justify new extension of government regulation. The action still must be reasonable, and I am not convinced that this Order is.[13]

The conduct of Congress and the Commission since Section 628 was enacted as part of the Cable Television Consumer Protection and Competition Act of 1992 supports my call for further guidance from lawmakers. Controversy over the so-called "terrestrial loophole" or "terrestrial exemption" is not, to put it mildly, new. The Order details how the Commission has, until recently, repeatedly declined to extend its program access authority to terrestrially delivered programming absent further statutory direction. And in the years since 1992, various members of Congress have attempted – on a bipartisan basis – to make the very changes to the law that are at issue here.[14] This history suggests that, at least until the D.C. Circuit issued its *NCTA* opinion, there was broad consensus that a fundamental expansion of the program access regime to encompass terrestrially delivered programming required Congressional action. In short, the court's opinion does not give the Commission the authority to rewrite a statute.

I also am troubled by a tension in the Order concerning the duration of the new rules. I find it impossible to square the unlimited duration for the new "terrestrial program access" regime under Section 628(b) with the express, time-limited sunset provision applicable to the exclusivity ban in the "original" satellite-oriented program access rules under Subsection (c)(2). There is no indication in this record that terrestrially delivered programming is *more* important to competition than satellite-delivered programming – which, as the D.C. Circuit in *NCTA* noted, constitutes most of the programming at issue in this arena. The explicit sunset provision concerning exclusive deals for satellite-delivered programming requires the Commission to review the marketplace periodically and rejustify any extensions based on current competitive conditions. It is difficult to comprehend how the Commission can reasonably ignore the implications of this Congressional balancing act concerning exclusive arrangements for satellite-delivered programming, "the primary evil that Congress had in mind," when fashioning new restrictions for the lesser, correlative concern here of terrestrially delivered programming.

Finally, this Order illustrates a point that I have made several times in recent months: Offering the proposed text of a new rule for public comment before adoption of the regulation would help to better inform our deliberations.[15] One example of the value of adhering to such a practice is the new "standstill" provision, which applies to program access negotiations concerning either terrestrial or satellite-delivered programming. Under it, parties seeking extension of existing carriage agreements may seek a Commission order requiring interim carriage while negotiations continue. Although the general concept of a standstill provision was discussed, along with many others, in the 2007 NPRM, specific language concerning the new rule first appeared in a draft that circulated just 24 hours before our Sunshine Agenda rules cut off significant public debate. Some contend that establishing regular procedures for standstill orders will substantially, and unfairly, alter the bargaining leverage that Congress generally left to private

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[13] "[W]hen statutory language is ambiguous it is not a foregone conclusion that an agency's interpretation is a reasonable one to which the court must defer." *AFL-CIO*, 409 F.3d at 384 (citing, *e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 480 (2001)).

[14] *See, e.g.*, H.R. 4352, Video Competition and Consumer Choice Act of 1998, 105th Cong. 2d Sess. (co-sponsored by Reps. Tauzin and Markey and proposing new Subsection (c)(2) without the term "satellite"); S.1504, Broadband Investment and Consumer Choice Act, 109th Cong., 1st Sess. (co-sponsored by Sen. Ensign and McCain and proposing new Subsection (c)(2) without the term "satellite").

[15] The U.S. Government Accountability Office ("GAO") very recently made the same point. *See* U.S. Government Accountability Office, FCC Management: Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning 27-31 (December 2009) (rel. Jan. 19, 2010).

parties in program access negotiations. The time left to us to explore this concern was inadequate. Rather than moving directly to an order, I would have preferred that the Commission issued a Further Notice with the proposed mechanics of the new rules and sought further comment on them.

I thank the staff for their efforts on the Order and their willingness to engage in open and frank conversation with me about the legal analysis. I look forward to considering future proposals to advance competition and spur broadband deployment that, in my estimation, stand on firmer legal ground.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198

Today's Order is a very positive development for American consumers. In enacting Section 628 of the Act, Congress sought to, among other things, "increase[] competition and diversity in the multichannel video programming market," and to "spur the development of communications technologies." By developing a mechanism through which competitors can gain access to programming that has been unfairly withheld, we hopefully will put an end to a practice that undermines our congressional mandate.

It makes little sense in today's market to have two wholly distinct rules for satellite- and terrestrially-delivered programming. There is nothing inherent in either mode of delivery that ensures that there will be adequate competition in the MVPD market. Indeed, most consumers likely have no idea by what means any given network is delivered; what they do understand, however, is which providers actually carry the programming they most desire. The result, therefore, is that those operators who do not have access to critical programming may fail to produce the meaningful competition and diversity envisioned by Congress.

As the Order itself notes, the best example of the problem we address today is the practice of withholding access to Regional Sports Networks. There is no secret why vertically-integrated operators would choose to withhold such programming . . . it is a make-or-break proposition for many consumers. They simply would not switch to a competitor who does not offer that programming. In my view, not only do these actions severely limit competition, including the opportunities of new entrants, but also they can serve as a way in which an MVPD can gain a stranglehold on the market without having to innovate in other ways that meet consumer demands. So, instead of lowering prices, improving customer service, or generating new and diverse programming due to competitive pressure, an operator can simply withhold access to important programming it owns in some form or fashion, and watch its competitors scramble to stay afloat.

The bottom line is that under our prior regime, consumers were caught in the crosshairs and have been the ultimate losers in an unfortunate battle among MVPD competitors. Section 628 aims to eliminate such a result, and I am pleased that we have developed a thoughtful approach to this chronic problem.

I thank both the Media Bureau and the Office of General Counsel for their fantastic work on this item. You approached the item with an open mind and therefore were able to make some important improvements to it as the process unfolded. Your work has been exemplary and the end product is a reflection of your expertise and your commitment to ensuring competition that will benefit the American people. Thank you.

STATEMENT OF
COMMISSIONER MEREDITH A. BAKER

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* MB Docket No. 07-198

I would like to thank each of my fellow Commissioners, the Media Bureau and the Office of General Counsel for their hard work on this item. These issues have troubled consumers and multichannel video programming distributors ("MVPDs") alike for years, so I'm very pleased to support a well-reasoned, legally sound and narrowly tailored Order that effectively considers both legal precedent and policy concerns.

At the outset, I would like to reiterate my belief that a competitive marketplace serves the public interest. The issue before the Commission, framed by the purpose of section 628, stems from Congressional intent to "promote the public interest, convenience and necessity by increasing competition and diversity in the video programming market. . . ."[1] That clear purpose guided me towards an outcome that maximizes the potential for innovation-driven competition.

Regulation must, however, be accomplished with statutory authority, and rules of general applicability must be adopted via rulemaking.

I am pleased that we are addressing this issue in a rulemaking proceeding rather than through the narrow lens of a specific adjudication, such as a merger. Equally important is our decision to limit this rulemaking to vertically integrated video providers. Our action today demonstrates the value of collaboration to create judicious, balanced, enforceable regulation.

I appreciate concerns regarding statutory construction and do not take them lightly. Section 628 prohibits certain conduct regarding satellite-delivered programming but does not specifically address terrestrially delivered programming.[2] Some have argued that this disparity accounts for, and justifies, the so-called terrestrial exemption, but I read the statute in a different light. Section 628 provides authority to promulgate rules beyond those "minimum contents of regulation" specified in section 628(c)(2).[3]

This is consistent with the Commission's position in the *MDU Order*[4] and the D.C. Circuit Court in its decision to uphold that order.[5] The Circuit Court stated that 628(b) should be given "broad, sweeping application,"[6] thus affirming our authority to adopt rules prohibiting conduct not expressly mentioned within section 628 when such regulation is consistent with the intention of the statute.

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[1] *See* 47 U.S.C. § 548(a).

[2] *See* 47 U.S.C. § 548.

[3] *See* 47 U.S.C. § 548(c)(2).

[4] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20249, ¶ 27 (2007) ("*MDU Order*"), *aff'd*. *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

[5] *NCTA*, 567 F.3d 659.

[6] *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).

Important policy considerations merit the action in this Order. Terrestrial means have been increasingly relied upon to deliver programming. Although not necessarily undertaken for anticompetitive reasons, terrestrial distribution has in some cases limited the ability of MVPDs and consumers to access popular, non-replicable programming.

It is particularly significant to me that this Order is narrowly tailored. As the Order explains, "the record contains no evidence" to suggest that most terrestrially delivered programming has the "purpose or effect of significantly hindering or preventing MVPDs from providing satellite cable programming or satellite broadcast programming."[7] As the Order points out, terrestrial distribution of local news and similar local programming is unlikely to qualify as proscribed conduct under section 628.[8] We have adopted specific standstill procedures that only apply to program access complaints. These determinations, along with our effort to distinguish replicable and non-replicable programming, serve to encourage innovation, investment and competition generally.

Our decision to utilize a case-by-case approach and an extended Answer period allows for balanced adjudications. I am optimistic that these procedures will provide for consideration of nuanced, particularized scenarios that exist or may develop. The 1992 Program Access Rules were designed to foster competition, a force that, in my mind, best regulates the marketplace. It is my hope and expectation that this Order will complement those rules to enhance competition and better serve consumers.

[7] First Report and Order, MB Docket 07-198, in the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Paragraph 51.

[8] *See* 47 U.S.C. § 548.