Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and Diversity In Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

In this proceeding, the Commission is considering whether the statutory prohibition on exclusive contracts between cable operators and satellite-delivered program networks in which a cable operator has an attributable interest should finally be allowed to sunset, as mandated by Section 628(c)(5) of the Communications Act. In addition, it has asked whether the rules and procedures for considering program access complaints under Section 628 need to be modified to expedite such consideration.

Five years ago, the Commission decided that the ban on exclusive contracts between cable operators and satellite-delivered program networks in which a cable operator has an attributable interest remained "necessary to preserve and protect competition and diversity in the distribution of video programming." It therefore extended the sunset of the prohibition, which was to occur that year, for five years. During that period, all the pro-competitive trends that had made the Commission's 2002 decision a "very close call" have continued, and it's now time to eliminate this artificial constraint on marketplace competition.

When the prohibition was enacted in 1992, Congress was concerned that cable operators, had the incentive and the ability to thwart the emergence of new competitors – especially direct broadcast satellite (DBS) providers – by refusing to make their vertically integrated program networks available to those competitors. By 2002, when the prohibition was due to sunset, two national DBS providers had grown, as Congress hoped, into vibrant competitors of cable operators, and one out of every four multichannel households were receiving their service from a competitor of their incumbent cable operator. Moreover, the percentage of cable program networks in which any cable operator had an attributable interest had sharply decreased.

The Commission expected that if these trends continued, a five year extension of the rules would be sufficient to address its concerns. In fact, cable's facilities-based competitors have steadily continued to increase their share of multichannel households – to more than one in *three.* Meanwhile, the percentage of satellite-delivered national programming services in which cable operators have an attributable interest declined from 53% in 1993, to 35% in 2002, to only 21.8% today. While seven of the 15 top-rated networks were vertically integrated with cable operators, in 2002, only three are cable-affiliated today.

In addition, there is now significant vertical integration between non-cable distributors (including a DBS provider that serves more customers than all but one cable operator) and programmers. Moreover, those non-cable distributors have themselves sought and acquired program exclusivity as a means of competing with their cable competitors. In these fully competitive circumstances, a ban that singles out cable operators and their affiliated program networks has surely become anachronism. Removing such a one-sided ban would not foreclose the irreversible development of competition in the multichannel video marketplace. It only serves to distort marketplace competition.

Furthermore, the Commission has already crafted and amended its rules to ensure expedited consideration of program access complaints. There is no evidence of any problem that warrants further changes. To the contrary, program access complaints have been few in number, and most have resulted in settlements. Providing for mandatory arbitration would improperly delegate the Commission's responsibilities to an outside party – or, assuming that the Commission would provide for de novo review of the arbitrator's decision, would add an extra, time-consuming layer to what is now an expeditious process.

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The National Cable & Telecommunications Association ("NCTA") hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high speed Internet access after investing more than $100 billion in the past ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art telephone service to millions of American consumers.

I. THE PROHIBITION ON EXCLUSIVE CONTRACTS BETWEEN CABLE-OWNED PROGRAM NETWORKS AND CABLE OPERATORS SHOULD SUNSET.

Fifteen years ago – before DBS launched commercially, before there was the World Wide Web, before there was digital television, and before anyone could imagine the convergence that now has cable operators and telephone companies competing in each other's core business –

Congress enacted the program access provisions of the Communications Act. The purpose of those provisions, including a specific prohibition on exclusive contracts between cable operators and any satellite-delivered program network in which any cable operator had an attributable interest, was to jump-start and incubate the development of a competitive multichannel video programming marketplace.

Congress did not intend for the bar on exclusive contracts to be permanent. Indeed, Congress recognized that in a competitive marketplace, exclusive contracts can often be harmless and even pro-competitive. The prohibition precludes such pro-competitive benefits. Moreover, it distorts the marketplace by precluding one group of competitors – vertically integrated networks and cable operators – from using a competitive approach available to others.

Congress provided that the prohibition would sunset after ten years unless the Commission found that it "continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming."[1] When the sunset date arrived five years ago, the Commission found that the video marketplace had dramatically "changed for the better."[2] In particular, two national DBS services had, in just ten years, already "garner[ed] nearly one-fifth of MVPD subscribers."[3]

Despite the emergence of DBS as a strong and vibrant competitor, the Commission was not yet fully convinced that the ban on exclusive contracts was no longer necessary. It found that "[c]ontrolling 78 percent of all MVPD subscribers, cable operators continue to decisively dominate the market for the distribution of programming."[4] In addition, it noted that

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1 47 U.S.C. § 548(c)(5).

2 Report and Order, CS Docket No. 01-290, 17 FCC Rcd 12124, 12153 (2002) ("*Sunset Report and Order*").

3 *Id.*

4 *Id.*

"[v]ertically integrated programming, although not as pervasive as it was in 1992, continues to play a significant part in the channel package of any viable MVPD."[5] For these reasons, it concluded that "were the prohibition on exclusive contracts permitted to sunset in the current market conditions, competition and diversity in the distribution of video programming would not be preserved and protected."[6]

As then-Commissioner Martin made clear, this was "a very close call."[7] He pointed out that there was a "high burden" to overcome if the prohibition was to remain in effect. In his view,

> the Commission must let the exclusivity ban sunset *unless* it can determine based on specific evidence – not solely the Commission's "expert" or "predictive" judgment – that the ban is essential to preserving and protecting competition and diversity in the distribution of video programming. Thus, I believe that a finding that the exclusivity ban is "beneficial" to or "promotes" competition and diversity would not be sufficient.[8]

If the question of whether the prohibition remained necessary was "a very close call" five years ago, it should be an easy call today. As documented by the Commission's own annual video competition reports, all the trends that the Commission identified in 2002 have continued, and it is undeniable that competition in the video marketplace has fully taken hold. Meanwhile, to the extent that vertical integration of cable operators and program networks ever posed a threat to competition in the video marketplace, it cannot credibly be argued that it does so now.

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5 *Id.*

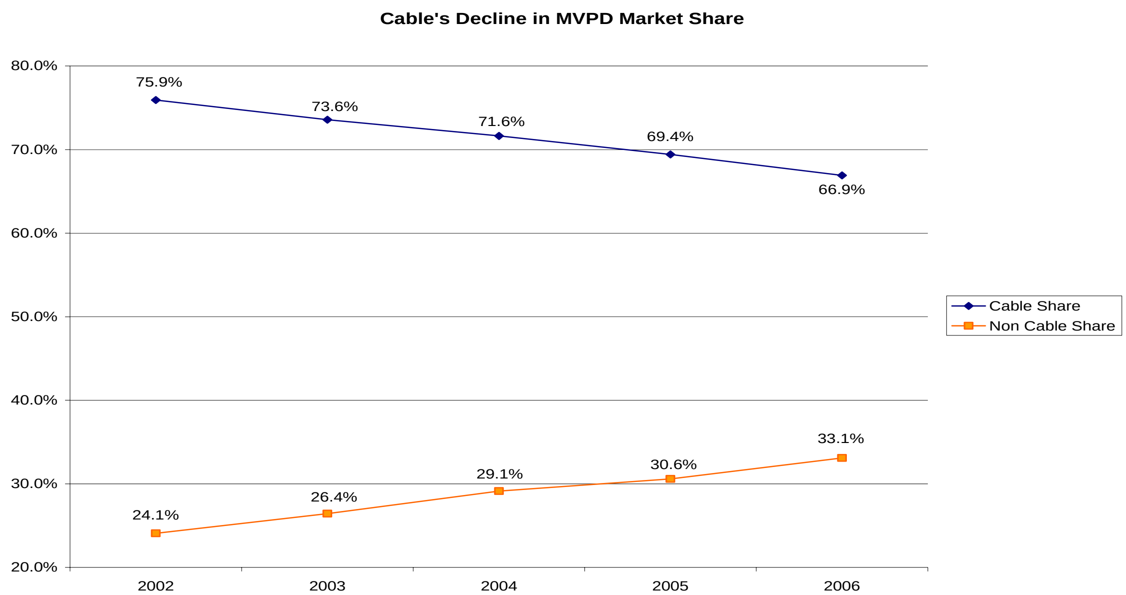
6 *Id.* at 12153-54.

7 Separate Statement of Commissioner Martin, approving in part, concurring in part, *id*. at 12181.

8 *Id.* at 12180 (emphasis in original). Commissioner Abernathy, dissenting, thought that the statutory standard for extending the prohibition had clearly *not* been met and that it was already the case, five years ago, that the ban was "overinclusive, inconsistent with today's marketplace, and no longer 'necessary' as defined by the statute." Dissenting Statement of Commissioner Abernathy, 17 FCC Rcd at 12175.

A. Competition Has Undeniably Taken Hold in the Video Marketplace.

The 78% share of MVPD customers that the Commission found still to be dominant in 2002 has, in just five years, diminished to less than 67%. *One out of three* customers now receives service from a competitor of their incumbent cable operator. And the other two have access and can switch to one of the DBS alternatives – or, increasingly, to a wireline alternative provided by the local telephone company or a competitive broadband provider.



In the five years since the Commission decided to extend the prohibition on exclusivity, the Commission's annual video competition reports have documented not only the increasing shares of DBS and other alternative MVPDs but also the evidence that competition has, indeed, taken hold in the video marketplace. By 2003, the Commission had already concluded that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[9] A year later, it further confirmed that "almost all consumers have the choice

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[9] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1608 (2003)("10th Annual Report").

between over-the-air broadcast television, a cable service, and at least two direct broadcast satellite (DBS) providers" and found that "in some areas, consumers may also choose" to receive service via one or more emerging technologies, including digital broadcast spectrum, fiber, and video over the Internet.[10] Last year, in its Twelfth Annual Report, the Commission echoed its previous findings, highlighting that "[c]ompetition in the delivery of video programming has provided consumers with increased choice, better picture quality, and greater technological innovation."[11]

B. Vertical Integration Between Cable Operators and Program Networks Has Diminished and Poses No Threat to Competition in the Video Marketplace.

Meanwhile, the decline in the amount and importance of cable-owned, vertically integrated programming on MVPD programming lineups has continued. In its 2002 Report and Order extending the exclusivity prohibition, the Commission noted that the percentage of satellite-delivered national programming services owned by cable operators had declined from 53% in 1993 to only 35%. By 2005, the Commission reported that the percentage had dramatically declined to 21.8%.[12]

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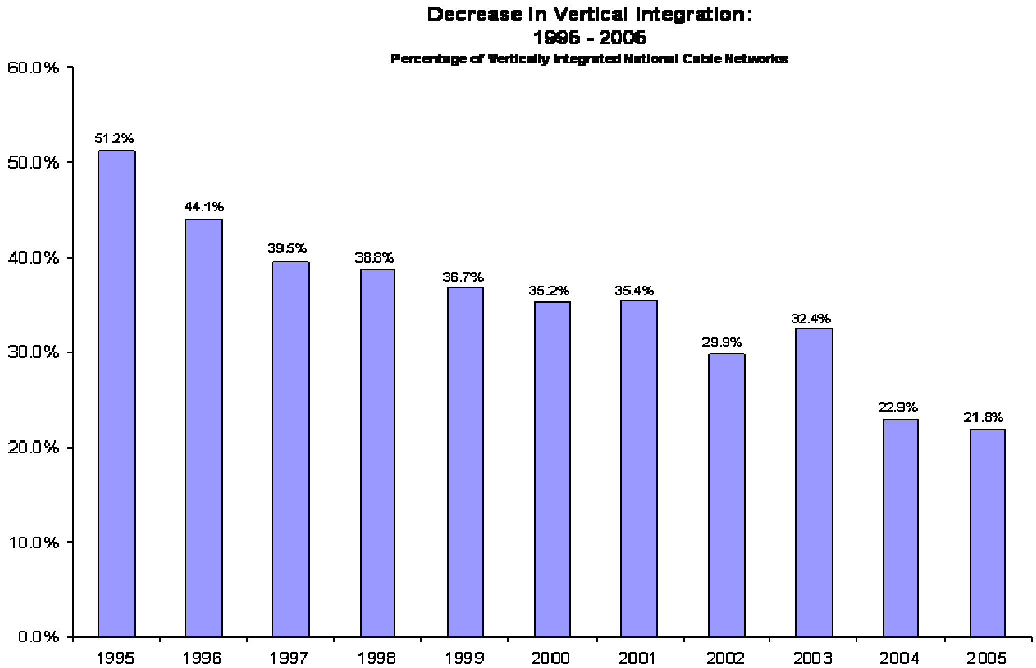
10 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2757 (2005)("11th Annual Report").

11 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506 (2006)("12th Annual Report").

12 This number actually overstates the extent of vertical integration, since it counts the inDemand pay-per-view service as if it were *60* separate programming services. *See* Ex parte letter of Michael S. Berman, Senior VP, inDemand Networks, MB Docket No. 06-189, Feb. 2, 2007.



Source: FCC, Annual Reports on the Status of Video Competition

Most importantly, there is no evidence to suggest that, as vertical integration has sharply declined and competition from DBS and other MVPDs has sharply increased, there is any significant likelihood that program networks that are vertically integrated with cable operators would or could seek to use exclusivity as a means of foreclosing competition. Among other things, the very success of DBS means that any decision to deal exclusively with cable operators would require a network to forgo viewership and revenues from more than 30% of MVPD households.

In any event, program networks that are vertically integrated with cable operators no longer constitute the essential core of MVPD programming lineups, as Congress thought they did in 1992 and as the Commission suggested they might still be in 2002. In its Report and Order extending the prohibition in 2002, the Commission noted that "seven out of the top 20 satellite-delivered video programming networks (ranked by prime time ratings) are vertically integrated with cable MSOs."[13] But in its most recent annual report on video competition, the Commission found that only *three* of the 15 top-rated prime time non-broadcast programming networks – TNT, TBS, and The Discovery Channel – were vertically integrated with a cable operator.

Many of the remaining 12 top-rated networks are vertically integrated with *non-cable* media entities. Those entities, as well as other independent programmers, have already created viable alternatives in virtually all the genres and niches of programming provided by cable-owned networks. As a result, it is unlikely, *first*, that highly rated operator-owned networks would refuse to deal with alternative MVPDs and thereby cede viewership and revenues to a competitive network. And it is unlikely, *second*, that any such exclusive dealing would have the effect of squelching competition from new or existing competitors were it to occur.

C. The Program Access Rules Are Not Meant To Address All Public Policy Issues Related To Exclusive Programming Contracts.

There may, of course, be other public policy issues – wholly apart from the concerns underlying the program access rules – regarding exclusive contracts for certain types of programming. For example, DirecTV for several years had exclusive rights to provide to its customers a "Sunday Ticket" package of all out-of-market National Football League games and has announced a similar potentially exclusive deal to carry Major League Baseball's "Extra Innings" package of all out-of-market baseball games.

Some policymakers have expressed concern over such exclusive arrangements, but not because of any vertical integration between the NFL or Major League Baseball, and not because of a fear that such exclusivity will foreclose competition among MVPDs. Their concern, as expressed by Senator John Kerry, is that certain programming – specifically, in this case, out-of-

[13] *Sunset Report & Order* at 12132.

market major league sports packages – should be available for purchase by *all* MVPD *customers*, regardless of where they obtain their subscription service.[14] Congress barred exclusive retransmission consent deals because it similarly was concerned that over-the-air broadcast stations should be accessible by all MVPD households.[15]

These issues may warrant further consideration by policymakers. But the program access provisions of Section 628, which focus solely on satellite-delivered programming vertically integrated with a *cable operator*, are not meant to address them.[16] And retaining the statutory bar on exclusive contracts would do nothing to solve them.

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Proponents of further extending the sunset of the exclusivity prohibition have a heavy burden of proof, which simply cannot be met. The Commission expected that, in light of the trends that were already evident in 2002, a five-year extension would "provide[] a sufficient time period in which the video distribution marketplace may have the opportunity to achieve the level of competition and diversity envisioned by Congress."[17] Those trends have continued on course, and have been enhanced and accelerated by the entry of a sturdy new competitor – the local telephone companies.

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14 "[I]f this exclusive deal is approved, only 15 million DirectTV subscribers will be able to purchase Extra Innings, leaving 50 million Americans without access to out-of-market games that they currently enjoy and a viable alternative to view them." "Kerry Wants Martin To Investigate Sports Exclusivity," *Broadcasting & Cable*, Feb. 2, 2007, http://www.broadcastingcable.com/article/CA6413042.html.

15 *See* 47 U.S.C. § 325(b)(3)(C)(ii).

16 The Commission recognized as much when it declined, five years ago, to link the sunset of the bar on exclusive contracts under the program access rules with the statutory sunset of the prohibition on exclusive retransmission consent agreements: "Although both provisions involve prohibition of exclusive contracts, they are not so intertwined that consolidating the termination dates is appropriate." *Sunset Report and Order*, 17 FCC Rcd at 12161.

17 *Id.* at 12160.

In an abundance of caution, the Commission kept the constraints of regulation in place for half a decade longer than Congress expected to be necessary. Competition in the video marketplace is here to stay, and it's time for the prohibition to go.

II. MODIFIED PROCEDURES FOR RESOLVING PROGRAM ACCESS COMPLAINTS ARE UNNECESSARY.

The FCC also asks whether to modify the rules and procedures regarding its program access complaint process.[18] Section 628(f)(1) requires the FCC to adopt regulations that "provide for an expedited review of any complaints made pursuant to this section." There is every reason to believe that the Commission's existing procedures satisfy this dictate. Program access complaints have been few and far between over the last 15 years. Those that have been filed have been disposed of relatively quickly or settled by the parties. The Notice provides no reason to believe that regulations governing the complaint process are in need of an overhaul.

A. The Commission Already Has Procedures in Place Designed to Expedite Consideration of Program Access Complaints.

Existing complaint procedures work, and the Notice states nothing to the contrary. These procedures were established after a comprehensive review in which the FCC in 1998 modified its program access complaint process to further expedite the pleading cycle.[19] As a result, program access complaints already are put on a fast track: cable operators have only 20 days to answer a program access complaint, and replies are due 15 days thereafter – among the shortest

[18] Notice at ¶13.

[19] 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 on Video Programming Distribution and Carriage, 13 FCC Rcd 15822 (1998) ("Ameritech Order"). The *Ameritech Order* also addressed issues relating to discovery, strengthening its procedures to require additional documents from respondents. *Id.* at 15849-50.

timeframes anywhere in FCC regulation. Given this short pleading cycle, it is hard to see how reducing it further would materially affect the timing for resolving these disputes. Any shortening of the time period for a cable operator's response to a complaint would merely impose additional hardships on the respondents with no guarantee of a more expeditious agency resolution.

In that regard, the Notice asks whether "specific time limits on the Commission, the parties, or others would promote a speedy and just resolution of these disputes."[20] The FCC already pledged to resolve program access complaints for denial of programming within 5 months of a complaint being filed, and within 9 months for all other program access disputes.[21] When it adopted these goals, the Commission acknowledged that "these dates reflect not what the Commission would select if afforded unlimited resources, but rather what we believe to be realistic goals that are achievable given the Commission's limited resources and overall statutory duties."[22] The Notice provides no evidence that the FCC has ignored these self-imposed deadlines. But neither does it show that the legitimate considerations on which these timelines were based have changed.

In any event, since the last program access review, only a handful of complaints have even been filed. So far as we are aware, in the nearly nine years since the FCC adopted its August 1998 decision expediting its program access procedures, only 14 program access complaints have been lodged. This amounts to, on average, a little more than one program

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[20] Notice at 14.

[21] *Ameritech Order*, 13 FCC Rcd at 15842-43.

[22] *Id.* at 15843.

access complaint annually. And of those complaints filed, *the FCC has found not a single program access violation*.

The FCC resolved many of these complaints in a matter of months.[23] In other cases which may have taken longer to deny or dismiss, as far as can be determined from a review of the FCC decisions, it appears that negotiations between the parties may have prolonged the time between complaint filing and complaint dismissal.[24] The FCC has encouraged voluntary resolution of these disputes,[25] an outcome that would be less feasible if the Commission were to impose an unrealistically aggressive timeframe.

B. The Commission Should Not Require Arbitration.

The Notice also asks whether to impose alternative procedures or remedies in the form of "mandatory standstill agreements and/or arbitration."[26] Establishing a mandatory commercial arbitration provision similar to those imposed in the News Corp./DirecTV[27] and the Comcast/Time Warner/Adelphia[28] transactions, would be neither lawful nor advisable here.

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[23] *See, e.g.*, *EchoStar Communications Corp.*, CSR-5364-P (Public Notice Jan. 1999; denied June 1999); *Dakota Telecom Inc.*, CSR-5381-P (Public Notice April 1999; denied July 1999); *RCN Telecom Services of NY Inc.*, CSR – 5404-P (Public Notice May 1999; denied October 1999); *Microwave Satellite Technologies*, CSR-5415-P (Public Notice July 1999; denied October 1999); *EchoStar Satellite Corp.*, CSR-5412-P (Public Notice July 1999; dismissed December 1999).

[24] *See, e.g.*, *City of Ashland*, CSR-5597-P (Public Notice September 2000; dismissed after settlement June 2001); *DirecTV Inc.*, CSR-6901-P (Public Notice June 2005; dismissed after complaint withdrawn, April 2006).

[25] *Ameritech Order*, 13 FCC Rcd. at 15843 (encouraging resolution of program access complaints through negotiated settlements).

[26] Notice at ¶ 15.

[27] *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 at ¶ 177 (2004).

[28] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corp., Assignors to Time Warner Cable Inc. and Comcast Corporation, Assignees and Transferees*, 21 FCC Rcd. 8203 (2006) at ¶ 156 ("Adelphia Order") (applying commercial arbitration remedy similar to that adopted in News Corp. – DirecTV Order).

Whatever the merits of the FCC's merger-specific arbitration conditions, the Act provides no rationale for the Commission to import this concept into the program access regulations. Section 628 instructs the Commission to establish remedies and procedures and provides the FCC no authority to outsource its responsibilities for program access complaint resolution or fact gathering to a third party arbitrator.[29] Absent express authority, the Commission has no power to delegate its statutory responsibilities to third parties. As the United States Court of Appeals for the D.C. Circuit has noted, "the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of Congressional authorization."[30] This is, according to the Court, because: "[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making . . . . Also, delegation to outside entities increases the risk that these parties will not share the agency's national vision and perspective . . . and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme."[31]

Even if the Act were ambiguous as to the FCC's duty to itself decide these cases, compulsory arbitration would be ill-advised. Virtually all the program access complaints that have been filed since 1998 revolve around legal interpretations of the scope of the program

[29] This contrasts with other provisions of the Act, where Congress expressly prescribed arbitration to resolve disputes. *See*, *e.g.*, 47 U.S.C. Sec. 252(b) (compulsory arbitration before State PUC).

[30] *USTA v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *see also Michigan Bell v. Lark*, 373 F. Supp. 2d 694 (E. D. Mich. 2005).

[31] *Id.* (citations omitted).

access provision.[32] The Commission is uniquely qualified to make determinations that involve such questions.

Where a program access complaint were to contain issues that required a weighing of the facts in a particular case, FCC rules and procedures already in place will help speed resolution of these types of disputes. The general cable complaint rules provide for referral to an administrative law judge for an adjudicatory hearing if warranted.[33] The rules also contemplate alternative dispute resolution ("ADR") under certain circumstances; Section 76.7(g)(2) allows parties to choose *voluntarily* to resolve certain factual disputes in that manner.[34]

The more specific program access rules also already provide for this type of alternative procedure, permitting issues regarding the amount of damages for a program access violation, upon *agreement* of the parties, to be "submitted for mediation…."[35] Thus, the Commission already has procedures in place that will enable both parties to agree to resolution by ADR. Under these circumstances, imposing *mandatory* commercial arbitration as a remedy would simply represent an abdication of FCC responsibility to resolve a dispute that arises under the

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32 *See, e.g., World Satellite Network, Inc. v. TCI*, 14 FCC Rcd. 13242 (1999) (denying complaint due to lack of standing); *Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, 14 FCC Rcd. 10500 (1999) (denying program access complaint brought against exclusive contract between cable operator and non-vertically-integrated program network); *RCN Telecom Services of NY v. Cablevision Systems Corp.*, 14 FCC Rcd 17093 (1999) (denying program access complaint brought against non-satellite delivered service); *Everest Midwest Licensee v. Kansas City Cable Partners*, 18 FCC Rcd. 26679 (2003) (denying complaint filed against terrestrially delivered and unaffiliated program network).

33 47 C.F.R. Sec. 76.7(g).

34 *See generally TCR Sports Broadcasting Holding v. Comcast Corp.*, 21 FCC Rcd 8989 (2006) (directing Administrative Law Judge to resolve factual dispute within 45 days or allowing parties to voluntarily resolve the dispute through alternative dispute resolution.)

35 47 C.F.R. Sec. 76.1003(h)(iii)(C)(2). *See also First Report and Order*, 8 FCC Rcd. 3359, 3416 (1993) ("If… the staff determines that a case is particularly complex and will require extensive discovery, the parties will be so advised, and will be given the opportunity to resolve the dispute through ADR. If ADR is not selected or is unsuccessful, the case will be designated for an evidentiary hearing before an administrative law judge (ALJ).")

Commission's rules. And it would deny parties the right to elect mediation as a permitted, not mandated, solution.

Moreover, including an additional layer of dispute resolution through mandatory commercial arbitration will only serve to delay, not expedite, resolution of any program access complaint. Using the model of recent merger conditions shows why this is the case. Under the merger conditions, any party aggrieved by an arbitrator's decision can seek a *de novo* review by the Commission.[36] This can take up to an additional four months from the date of the petition, which itself can be filed up to a month after the arbitrator's award. Thus, the time for resolution of a program access complaint could be doubled – from the existing FCC goal of five months to up to ten months – to accommodate this additional layer of review.

In sum, the program access process is working as the Commission intended. If the FCC wants to adopt a more expedited timeframe for its *own* resolution of complaints, we have no objection, so long as cable operators and programmers are provided with sufficient time to respond to complaints. But a further shortening of the already expedited pleading cycle is unwarranted. And forcing cable operators and programmers to submit to mandatory arbitration is a wholly inappropriate approach to implementing the Commission's responsibilities.

[36] Adelphia Order, 21 FCC Rcd. 8203 at App. B.

CONCLUSION

In an abundance of caution, the Commission extended the ban on exclusive contracts for five more years than were probably necessary at the time. Today, it's no longer even arguably a "very close call" whether to allow the prohibition finally to sunset. Vibrant competition is the hallmark of today's video marketplace, and the prohibition is in no way essential to preserving this irreversible development. There is also no reason to adjust the procedures for dealing with program access complaints. There is no evidence that the current rules are in any way deficient, and adopting unduly stringent timetables or providing for mandatory binding arbitration would likely only serve to impair the process for resolving the few disputes that arise.

Respectfully submitted,

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