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 Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition	)))))))))))	MB Docket No. 07-29

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

Linda Kinney
Bradley Gillen
ECHOSTAR SATELLITE L.L.C.
1233 20th Street N.W.
Washington, D.C. 20036
(202) 293-0981

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SUMMARY

The 1992 Cable Act recognized that vertically integrated cable conglomerates exploited their affiliated programming networks as a blunt tool to hamper the development of a competitive video market. Thus, Congress wanted to ensure that cable-owned programming – an essential prerequisite of a viable video service – is available to competitors on equitable terms. Rather than forbidding the ownership of both distribution networks and "must have" content outright or adopting prophylactic structural safeguards, Congress relied upon market negotiations backed up by strong enforcement mechanisms to check abusive behavior.

As a threshold matter, the Commission should extend the exclusivity prohibition on vertically integrated cable programming for five additional years. Indeed, the market needs the exclusivity prohibition now more than ever, because cable providers have demonstrated that they have the incentive, ability, and audacity to use exclusive content rights to discriminate against rival multichannel video distribution providers (MVPDs). Furthermore, the potential adverse effects of exclusive deals are even stronger today due to consolidation of power amongst the largest cable conglomerates. Absent an extension, the further growth of Direct Broadcast Service (DBS) services, delivery of service to rural areas by small cable providers, and the (still) future promise of video entry by traditional phone companies would be threatened.

Efficient and effective program access enforcement is equally critical: a toothless enforcement mechanism would gut the benefits of the extension. As a cost-conscious provider, EchoStar has availed itself of the program access complaint process eight times since its inception and, therefore, has unique experience with the Commission's

procedures. We have found that the process as currently configured does not provide an effective regulatory backstop to protect against cable excesses and market abuse. To satisfy its statutory obligation, therefore, the Commission needs to reform the broken program access process, thereby ensuring the speedy and just resolution of disputes.

The primary shortcomings of the current program access regime – failure to timely resolve complaints on their merits; failure to provide access to necessary documentation; and failure to protect consumers through standstill protections – have been well-documented. Tellingly, the only entities that defend the current system are the very same vertically integrated cable providers that compelled its creation: a striking indicator that this corrective measure must not work as intended.

Second, the Commission should adopt baseball-style arbitration as an alternative enforcement mechanism, which has already been tested and proven successful in resolving programming disputes. Incorporating the commercial arbitration provisions from the *News Corp/Hughes* and *Adelphia/Comcast/Time Warner* merger proceedings would address each of the three primary shortcomings of the current system in a manner clearly within the Commission's broad authority. Baseball arbitration offers a fair, speedy, and well-informed resolution of program access disputes, which is better matched to the time-sensitive nature of commercial negotiations than the lengthy, sometimes arduous decision-making process of a regulatory agency.

Our own experience is instructive. While the eight costly program access complaints we have filed remained pending with the Commission an average of over eight mouths each, the arbitration proceeding that we initiated under the Commission's *News/Hughes* merger conditions lasted less than three months once the arbitrator was appointed. The Commission is unlikely to be that punctual anytime soon. But, thankfully, the Commission has already discovered a dispute mechanism that works in the context of time-sensitive programming disputes, and has embraced it in the merger context to promote competition and protect consumers. Its time to extend those benefits more broadly by adopting that remedy here.

Third, the elements of arbitration that work so well should be carried over to the program access adjudicatory procedures so that some complaints that might not be well-suited for arbitration can still be resolved in an efficient manner. These targeted reforms to the program access regime and the development of two viable enforcement mechanisms would have distinct pro-consumer results: helping to control and limit further programming cost increases; reducing the forced bundling of wanted and unwanted programming; and strengthening the overall diversity and competitive viability of alternative MVPDs.

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COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") urges the Federal Communications Commission ("Commission") to update and revise its program access rules to "best fulfill[] the underlying purpose of the 1992 Cable Act – to foster competition to traditional cable systems."[1] The Commission should validate its previous findings and continue to encourage the development of competitive MVPDs by ensuring that cable conglomerates do not enter into anti-competitive exclusive arrangements with affiliated programmers. A targeted five-year extension of the current exclusivity prohibition is clearly warranted. The Commission should also ensure that its program access procedures comply with the statute, foster competitive video entry, and mirror commercial negotiations to the extent feasible.

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[1] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105, ¶ 33 (1994). *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* Notice of Proposed Rulemaking, FCC 07-7 (2007) ("*Notice*").

I. THE COMMISSION SHOULD EXTEND THE EXCLUSIVITY PROHIBITION TO PROTECT AGAINST THE MOST BLATANT FORM OF ANTI-COMPETITIVE CONDUCT AGAINST COMPETITIVE MVPDS.

The largest cable conglomerates attempted unsuccessfully five years ago to downplay their dominant market power and convince the Commission that the exclusivity prohibition for vertically integrated programming was no longer critical to fostering competition.[2] The Commission acknowledged the growth of DBS providers and independent programmers, but it found a clear-cut need to continue the prohibition.

The Commission's task in this proceeding is similarly straightforward, as the key threshold issues were resolved in 2002 and need not be revisited. Nor has the MVPD market or programming market evolved sufficiently to warrant a different result. Cable conglomerates "continue to have enough market power to have incentives to foreclose access to programming and harm competition and consumers."[3] Cable remains an owner of some of the most popular "must have" programming properties on television today, including CNN, HBO, Discovery, TNT, and E!. Given this prohibition's modest reach and its importance to competitive MVPDs, the Commission should extend the exclusivity prohibition for another five-year period as a baseline protection for the programming market and competitive MVPDs. *2002 Order,* ¶ 79.

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[2] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order, FCC 02-176, ¶ 45 (2002) ("*2002 Order*").

[3] Reply Comments of EchoStar Corporation, CS Docket No. 01-290, Exhibit "An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers" at 17 (Jan. 2002) ("*Economic Assessment*").

A The Exclusivity Prohibition is a Focused Remedy to an Identified Competitive Concern.

Despite the attempts of cable conglomerates to portray the exclusivity prohibition as far-reaching, it is actually narrowly tailored by design. Congress did not require a strict separation of ownership of video distribution platforms and programming assets. Rather, Congress found that a subset of cable-owned programming – satellite-delivered vertically integrated programming – warranted a flat exclusivity prohibition.[4] This prohibition was in direct response to cable providers' use of affiliated popular national programming to block and hinder competitive MVPDs.[5] In the words of Rep. Tauzin, the statute "very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television program."[6]

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4 47 U.S.C. § 548(c)(2)(D); *see also* Olson, James and Lawrence Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?* 13 Cardozo Arts & Ent. L.J. 283, at *14 (1995) ("a narrowly-tailored regulatory approach [like program access] is perhaps the best way to keep pace with the dynamic nature of the telecommunications industry.").

5 *See* Cable Television Consumer Protection and Competition Act of 1992 § 2(5) (declaring Congress's finding that: "The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. 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.").

6 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (statement of Rep. Tauzin)("In effect, this bill says to the cable industry, 'You have to stop what you have been doing, and that is killing off your competition by denying it products.'. . . Programming is the key. . . . Without programming, competitors of cable are . . . stymied . . . What does it mean? It means that cable is jacking the price up on its competitors so high that they can never get off the ground. In some cases they deny programs completely to those competitors to make sure they cannot sell a full package of services….There are only five big cable integrated companies that control it all. My amendment says to those big five, 'You cannot refuse to deal anymore.'").

Nor is the exclusivity prohibition an intrusive remedy. The number of new vertically integrated programming networks since 2002 described herein undercuts any suggestion that this prohibition prevents or limits the ability or desire of cable conglomerates to create new programming assets. Moreover, Congress has even provided a separate means by which cable conglomerates can provide vertically integrated programming networks on an exclusive basis. 47 U.S.C. § 548(c)(4). Specifically, the Commission has a five-factor test to determine whether an exclusive contract is in the public interest. 47 C.F.R. § 76.1002(c)(4).[7]

As such, this narrowly tailored protection for competitive MVPDs does not alter cable conglomerates' incentives to enter the programming market, nor has it reduced the amount of diversity of programming available generally. In fact, given the clear anti-consumer effects of any exclusive contracts, the Commission should more broadly review its jurisdiction and authority to ban all exclusive programming agreements. In particular, the public interest would be served if the terrestrial loophole is closed.

B. The Amount of Cable Consolidation and Corresponding Market Power of Cable Conglomerates Has Increased Since the *2002 Order*.

The further consolidation of market power amongst the largest cable conglomerates in the past five years highlights that strong program access protections, including the exclusivity prohibition, are still necessary and critical to competitive MVPDs. In 2002, the Commission expressed concern that the largest four vertically integrated cable conglomerates (Comcast, Time Warner, Cox, and Cablevision) held over 34 percent of the

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[7] We note that not a single cable conglomerate to our knowledge has filed an exclusivity petition since 2002 seeking to offer a new or existing service on an exclusive basis. *2002 Order*, ¶¶ 5, 79. In total, ten exclusivity petitions have been filed since enactment of the 1992 Cable Act. *See Notice* at ¶ 3 n.19.

total MVPD market share. *2002 Order*, ¶ 20. Since that time, the market share of those big four conglomerates has increased significantly, ballooning from 34.44 percent of the total MVPD market to 56.75 percent of the total MVPD market today.

Table 1: Big Four Cable Conglomerates' Dominant Share of MVPD Market (2002-2006)[8]

Vertically Integrated Cable Conglomerate	2002	2006	Change
Comcast	9.53	28.90	+19.37
Time Warner	14.35	17.90	+3.55
Cox	6.98	6.73	-0.25
Cablevision	3.40	3.22	-0.18
Total	**34.44**	**56.75** [9]	**+22.31**

In fact, two of the three largest unaffiliated cable providers, TCI/MediaOne (AT&T) and Adelphia, have been acquired by vertically integrated conglomerates in this time frame.[10] From an economist's standpoint the "larger the size of the integrated cable firm's potential subscriber base, the larger the potential benefit from foreclosing access to

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8 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Eighth Annul Report, 17 FCC Rcd 1244, Table C-3 (2002) ("*2002 Report*"); *2006 Report*, Table B-3; *Application for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, et al,* Memorandum, Opinion and Order, 21 FCC Rcd 8203, ¶ 2 (2006) ("*Adelphia/Comcast/Time Warner*") (detailing the percentage of MVPD market Comcast and Time Warner would have Adelphia post-transaction).

9 This total does not include the 2.34 percent total MVPD market share of Bright House Networks, owned by Advance/Newhouse, which owns interest in 14 national cable networks. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 159, Table B-3 (2006) ("*2006 Report*").

10 *See e.g., Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 23246 (2002); *Adelphia/Comcast/Time Warner.*

programming." *Economic Assessment* at 19. Thus, this increase in total horizontal consolidation only strengthens the ability of these conglomerates to enter into anti-competitive foreclosure strategies against any competitive provider.

Cable conglomerates also maintain ownership in key programming properties any distributors must have to stay competitive as well as the most marquee networks, *e.g.,* HBO.[11]

Table 2: Top 10 Programming Services by Subscribership[12]

2002	2006
TBS (Time Warner)	**Discovery Channel (Cox/Advance Newhouse/Liberty Media)**
Discovery Channel (Liberty Media/Cox)	ESPN
TNT (Time Warner)	**CNN (Time Warner)**
ESPN	**TNT (Time Warner)**
USA Network (Liberty Media)	USA Network
Fox Family Channel	C-SPAN[13]
A&E	**TBS (Time Warner)**
TNN (Spike TV)	Spike TV
Lifetime Television	Nickelodeon
Nickelodeon	A&E

Moreover, cable conglomerates control a disproportionate share of regional networks, including regional sports networks. *2006 Report,* ¶ 166. Of the 96 identified regional networks, over 45 percent are owned by cable conglomerates. *Id.*

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11 *2006 Report,* Table C-5; *2002 Order*, ¶ 32.

12 *2006 Report,* Table C-5. Cable-owned vertically integrated programming is bolded in Table 2.

13 *2006 Report,* Table C-5 n ** (explaining that C-SPAN "derives 97 percent of its revenues from affiliate fees (*i.e.,* subscriber fees from MVPDs)").

Thus, the Commission's observation in 2002 that "[d]espite the progress that has been made in the 10 years since enactment of the 1992 Act, a considerable amount of vertically integrated programming in the marketplace today remains 'must have' programming to most MVPD subscribers" remains accurate and prescient.[14] Indeed, the Commission "agree[d] with the competitive MVPDs' assertion that if they were to be deprived of only some of this 'must have' programming, their ability to retain subscribers would be jeopardized." *Id.* Withholding a single "must have" programming network from competitive MVPD platforms can hamper, if not foreclose, the development and preservation of viable competition.

Since 2002, the major cable conglomerates also have continued to develop and launch new vertically integrated cable networks, including the increasingly popular PBS Kids Sprout (Comcast).[15] It is equally clear that vertically integrated cable conglomerates will capitalize on their existing highly successful programming slate to launch new HD networks: HBO HD (Time Warner); Cinemax HD (Time Warner); TNT HD (Time Warner); InHD (in DEMAND); Golf Channel/Versus HD (Comcast); Discovery HD Theater (Cox, Advance Newhouse); and the Voom HD networks (Animania HD, Equator HD, Family Room HD, Film Fest HDM, Gallery HD, Gameplay HD, HD News, Kung Fu HD, Monsters HD, Rave HD, Treasure HD, Ultra HD, World Cinema HD, and Worldsport

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[14] *2002 Order,* ¶¶ 33, 64 (explaining that "vertically 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.").

[15] Cable conglomerates have also launched G4 (Comcast); TV One (Comcast); Exercise TV (Comcast); FEARnet (Comcast); FiT TV (Cox/Advanced Newhouse); and Sportskool (Cablevision).

HD) (Cablevision). Many more vertically integrated HD networks are also in development.[16]

Cable conglomerates also have continued their focus on regional networks, particularly regional sports networks (RSNs). A partial list of new and announced vertically integrated RSNs since 2002 includes: SportsNet New York (Time Warner and Comcast); The mtn. – MountainWest Sports Network (Comcast); Bravesvision (Comcast); Comcast SportsNet Chicago (Comcast); Comcast SportsNet West (Comcast); Cowboys TV (Comcast); Falconvision (Comcast); and MetroSports – Kansas City (Time Warner).

This is not to say that competition has stalled in the past five years. The market share of competitive MVPDs and unaffiliated domestic programmers also has grown incrementally since 2002, albeit at a slower rate than the large cable conglomerates. For instance, the total share of the DBS industry as a percentage of MVPD subscribers has increased by less than ten percentage points since 2002, or less than half the relative nationwide subscriber growth of dominant cable conglomerates in the same time period.[17] Phone companies also have begun their latest forays into video services, but have not achieved an appreciable subscribership base, or developed significant programming holdings at this time.[18] Many rural telephone companies and cable providers do not have

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16 *See* Bulik, Beth, "Discovery HD integrates marketers into programming that shows nothing but the first hour of daylight," ADVERTISING AGE (Feb. 26, 2007) (detailing planned launch of HD simulcasts of CNN, Cartoon Network, and TBS).

17 *2002 Report*, Table C-3; *2006 Report,* Table B-3 (noting that DBS served 18.19 percent of the MVPD market in 2001 compared to 27.99 percent in 2006).

18 *Notice*, ¶ 7 (noting that AT&T and Verizon have approximately 100,000 customers in total).

the scope or scale to develop content that could substitute for the "must have" content owned by large media companies.

Regardless, the continued gradual growth of competitive MVPDs has not altered the basic realities of the programming market. The key fact in this proceeding is that critical programming assets remain in the asset ledgers of a handful of media conglomerates, including the big four vertically integrated cable companies. As history has shown, access to programming will make or break new entrants' ability to compete.

Indeed, cable conglomerates have already demonstrated their willingness to abuse exclusive programming rights to gain market share and harm consumers. The well-worn example of Comcast's conduct in Philadelphia with its SportsNet asset is again instructive. The terrestrial loophole[19] has provided Comcast with the means to discriminate against DBS providers that seek to compete in Philadelphia. The Commission has recognized repeatedly that Comcast's exclusionary conduct has paid dividends in inhibiting competitive entry.[20] The Commission has concluded that by excluding "must have" content from DBS competitors, "the percentage of television households that subscribe to DBS service in Philadelphia is 40% below what would otherwise be expected." *Adelphia/Time Warner,* ¶ 149.

Emboldened Comcast has recently become more vocal in explaining which entities it will sell SportsNet to, and the economic rationale for refusing to sell to other providers.

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19 The terrestrial loophole provides a means by which cable conglomerates can (and do) provide exclusive programming even for affiliated programming content. *2002 Order,* ¶¶ 50-55, 71 (explaining the concern that cable conglomerates can "circumvent the exclusivity prohibition" by providing cable-affiliated regional sports and news programming through terrestrial modes of distribution).

20 *Adelphia/Comcast/Time Warner,* ¶¶ 147-150; *2002 Order*, fn. 107.

The *Philadelphia Inquirer* recently reported that Comcast "agreed to share [SportsNet with Verizon] in part because it did not think Verizon would compete with Comcast in the city of Philadelphia."[21] Comcast has again demonstrated that it has the incentive, ability, and audacity to use exclusive content rights to threaten the viability of competitive entrants and thwart the goals of the 1992 Cable Act.

C. The Commission's Prior Analysis Supports Further Extension of the Exclusivity Prohibition for Five Additional Years

Section 628(c)(5) of the Act requires the Commission to determine if the exclusivity prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548. The standard established by the Commission is that the "prohibition continues to be necessary if, in the absence of the prohibition, competition and diversity would not be preserved and protected." *Id.,* ¶ 14. It is clear that the incentive and ability of cable providers to use exclusivity as a competitive tool remains strong. The exclusivity prohibition continues to be necessary to ensure diversity among MVPDs, particularly to foster competitive delivery of video services to populations not typically sought after by the big cable companies, such as rural consumers and low-income households.

Parallel to its prior findings, while "it is evident that competition in the MVPD market has increased in some respects" since 2002, there remains a clear need for the exclusivity prohibition. *Id,* ¶ 45. As demonstrated above, market conditions have not "changed so fundamentally," and "competition in the distribution of video programming is [not] now so robust," as to eliminate cable conglomerates clear "incentive to favor

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21 Hill, Miriam, *Specter says NFL abuses cable viewers,* Philadelphia Inquirer (Dec. 8, 2006).

affiliated cable operators." *Id.* Similarly, through new and existing "must have" programming assets, cable conglomerates maintain the ability to foreclose competition through manipulation and denial of programming assets.[22]

The Commission found in 2002 that vertically integrated "programmers could reap a substantial portion of the gains from withholding programming from rivals" based on the fact that the cable conglomerates held only 34 percent of the MVPD market in 2002. *2002 Order,* ¶ 53. Given the substantial increase in the horizontal market share of the handful of vertically integrated cable conglomerates, the concern is greater today. By strengthening their control over a larger percentage of MVPD households, the cable conglomerates have enhanced their incentive to exert competitive harm through exclusionary tactics.[23]

It also is imperative to highlight that the exclusivity prohibition is needed for both new entrants as well as established competitive MVPDs to ensue diversity amongst MVPDs. The Act specifically protects both new and existing competitive MVPDs to foster and ensure the development of true video competition. With respect to existing competitors, the Commission found in 2002 that "vertically integrated programmers, given the opportunity, will foreclose strategic programming, either new or existing, to one or both DBS competitors to undermine their service offering and harm their competitive

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[22] The Commission should also consider the potential adverse effects to the program access regime more broadly if the exclusivity prohibition were to sunset. The other restrictions on cable conglomerates – *i.e.*, non-discriminatory treatment (47 U.S.C.§ 548(c)(2)(B) – do not sunset. As a result, cable conglomerates would have the perverse incentive to enter into exclusive arrangements to shield their conduct from scrutiny under the discriminatory provision of the program access rules.

[23] Specifically, enhanced by increased horizontal consolidation, large cable conglomerates can "limit or eliminate competition," by entering into "exclusive arrangement[s that] will result in increased profit through the subscribers that migrate from failing or defunct competitors to the programmer's cable affiliate, and through the ability to raise rates without fear of losing subscribers to competitive MVPDs." *Id.*

ability." *2002 Order*, ¶ 60. DBS providers' "ability to provide service that is competitive with an incumbent cable operator is significantly harmed if denied access to 'must have' vertically integrated programming for which there is no good substitutes." *2002 Orde*r, ¶ 4.

The analogous need to ensure that rural and low-income consumers also benefit from video competition further supports extension of the exclusivity prohibition. By enacting section 628(c)(2)(c), Congress understood the danger of exclusives and the harm they cause to consumers, particularly in areas that are not served by vertically integrated companies. 47 U.S.C. § 548(c)(2)(c). Indeed, each of the vertically integrated cable conglomerates serve discrete geographic areas and thus only a portion of the total population. Rural America is disproportionately served by small cable companies that are not content owners and DBS companies that rely on cable "must have" content in order to serve those subscribers. Because EchoStar and most small MVPDs are not content owners, limiting access to cable-owned exclusive content would be harmful to many subscribers in rural and low-income areas.

The Commission should extend the exclusivity prohibition for another targeted five year term consistent with the *2002 Order*. Given current market conditions, a period "shorter than five years likely would be insufficient for the market to develop to the point at which the sunset of the prohibition would be appropriate." *Id.,* ¶ 79. In 2012, the Commission should evaluate the continuing need for the restriction based on competitive conditions at that time.[24]

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[24] *2002 Order,* ¶ 72 ("Establishing a predetermined date on which the prohibition would automatically sunset without conducting a further proceeding to determine whether these objectives are met is not consistent with this congressional intent.").

II. THE CURRENT PROGRAM ACCESS PROCEDURES FAIL TO FOSTER VIDEO COMPETITION.

Congress entrusted the Commission with the development of a regulatory structure to foster the development and preservation of video competition, and protect against specific conduct of cable conglomerates. Program carriage disputes are market-based processes that are extremely time sensitive; protracted negotiations can result in loss of subscribers and significant financial uncertainty for competitive MVPDs. Congress required the Commission to develop enforcement mechanisms that ensure an expedited resolution on the merits of any allegations of misconduct vis-à-vis access to cable-owned programming. 47 U.S.C. § 548.

In 1993, the Commission "developed a streamlined complaint process that will enable [it] to settle uncomplicated complaints quickly while still resolving complex cases in a timely manner."[25] Persistent concerns have been raised by a wide cross-section of competitive MVPDs that these procedures do not satisfy the Commission's statutory mandate. Despite these concerns, the complaint procedures have not been substantially reformed, nor has the Commission provided competitive MVPDs with alternative enforcement mechanisms that better mirror market negotiations.[26]

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25 *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* First Report and Order, FCC 93-178, 3364 (1993) ("*Program Access Order*"). That process was modified subsequently in 1998. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, FCC 98-189 (1998) ("*1998 Order*").

26 *See* Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 of Ameritech New Media, L.P., RM-9097, CS Docket No. 97-248 (filed May 16, 1997); Comments of DIRECTV, Inc., CS Docket No. 97-248, RM-9097 (Feb. 2, 1998); Comments of RCN Telecom Services, Inc., CS Docket No. 97-248, RM-9097 (Feb. 2, 1998).

As a result, program access complaints are currently resolved through a complaint procedure that is broken. This onerous and ineffective process prevents the Commission's program access regime from deterring cable conglomerates from imposing discriminatory and unreasonable terms on unaffiliated MVPDs. Of particular concern, by failing to ensure a Commission resolution on the merits in a commercially reasonable time frame, the process provides no certainty to cable conglomerates or competitive MVPDs. Delay in resolving, or failure to resolve the merits of, program access disputes can have drastic financial consequences for competitive MVPDs seeking to compete directly against cable conglomerates. The process also fails to provide complainants and Commission staff with the necessary documentation to root out discrimination, and needlessly interjects consumers into commercial disputes. Each of these deficiencies undermines the Commission's stated objective of encouraging and preserving video competition.

A. The Commission Has Failed to Resolve Program Access Complaints On Their Merits In an Expedited Manner.

The recent history of program access complaints attests to the ineffectiveness of the current mechanism. Only three of the thirteen complaints disposed of since December 1998 have been resolved on their merits. On average, those three proceedings took over seven months to be resolved.[27]

[27] The other ten complaints were dismissed for a variety of reasons, including private settlement between the parties. It bears highlighting that these other ten complaint proceedings also were pending before the Commission for over seven months on average.

Table 3: Program Access Complaints Decided on the Merits (1998-2007)

Complaint Proceeding	Complaint Date[28]	Commission Action Date	Months Pending Resolution
EchoStar v. Comcast	May 19, 1998	January 22, 1999	8+ months
RCN v. Madison Square Garden Network	May 25, 1999	October 6 ,1999	4+ months
Everest Midwest Licensee v. KS City Cable Partners	January 31, 2003	December 19, 2003	11+ months

In a related vein, program access disputes arise once commercial negotiations breakdown, or carriage contracts near their expiration. Thus, time is of the essence for competitive MVPDs to acquire or maintain carriage rights to critical programming assets. Congress understood the delicate commercial nature of these transactions, and the clear need for a speedy review process to protect against strong-arm tactics by cable conglomerates. Indeed, the 1992 Cable Act requires the Commission to "provide for an expedited review of any complaints made pursuant to this section."[29]

In 1998, the Commission found that its initial process was too open ended, and took the first step towards a fixed timetable with the adoption of specific goals in which to resolve program access complaints: five months for denial of service and nine months for all other complaints. *1998 Order,* ¶ 43. Subsequent program access complaint proceedings have demonstrated that those aspirational goals were too modest, and did not provide competitive MVPDs the necessary certainty that complaints will be resolved on an expedited basis. Program access proceedings remain pending far beyond a commercially

28 The actual filing date of the RCN and Everest Midwest complaints was not included in the Commission's relevant Public Notice, so the Public Notice date is used as a proxy. As a result, the chart underestimates the true length of time between filing of the complaint and Commission action.

29 47 U.S.C. § 548; *1998 Order,* ¶ 38 (finding that the "law impose the obligation to resolve complaints expeditiously").

reasonable time frame to resolve programming disputes, increasing the probably that complainants lose faith in the Commission's process and are compelled to capitulate to cable conglomerates' settlement demands to avoid consumer disruption and ensure continued access to programming.

B. Full Access to Critical Information is Denied in Program Access Complaint Proceedings.

Virtually all programming contracts are confidential and cable conglomerates closely protect against the disclosure of even the most basic details of carriage contracts with affiliated and unaffiliated providers. Against this backdrop, the program access process has devolved into a form of regulatory "gotcha" in which competitive MVPDs are forced to root out anti-competitive conduct and program access violations even though the cable conglomerates have sole custody of the majority of relevant documentation.[30]

The Commission's current procedures unintentionally assist cable conglomerates' ability to conceal and obfuscate discriminatory conduct by failing to provide a reliable means to ensure that all relevant documentation is available to Commission staff and the parties. The requirement that cable conglomerates include any documentation on which they rely on in their reply is grossly inadequate.[31] The Commission cannot objectively review whether a proposed carriage agreement is discriminatory or unreasonable based

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30 RCN concluded almost ten years ago that "[u]nder the current system, it is nearly impossible to gain access to the information necessary to establish whether an MVPD is being treated fairly vis-à-vis a programmer's affiliated cable operator." Reply Comments of RCN Telecom Services, Inc., CS Docket No. 97-248, at 10 (Feb. 23, 1998) ("RCN 1998 Reply Comments").

31 *1998 Order,* ¶ 167 ("We clarify our rules to provide that, to the extent that a defendant expressly references and relies upon a document or documents within its control in responding to a program access complaint, the defendant must attach that document or documents to its answer.").

upon documents self-selected by the alleged offending party. A cable conglomerate is unlikely to rely in its reply on a carriage agreement that would establish the alleged discriminatory or unreasonable conduct. Absent discovery, the Commission will never be aware of such an agreement.

The Commission's predictive judgment in 1993 that "we seek to dispose of as many complaint cases as possible on the basis of a complaint, answer, and reply" was misguided. *Program Access Order*, ¶ 75. Similarly, the Commission's finding that "Commission controlled discovery procedures currently provide complaints with the opportunity to obtain all relevant information to prove their claims" also has proven inaccurate. *1998 Order,* ¶ 49. As a practical matter, the Media Bureau has routinely rejected discovery requests.[32] The continued reluctance to grant discovery requests emboldens cable conglomerates to craft discriminatory tactics that cannot be easily revealed or discovered through basic pleadings.[33] As a result, only the crassest forms of discriminatory and unreasonable conduct can be addressed in the current program access regime.

C. Program Access Procedures Do Not Protect Competitive MVPD Customers

Program access complaints typically arise either directly prior to the initial launch of a network on a competitive MVPD platform, or upon the expiration of carriage agreement. In the latter subset of proceedings, there are established consumer expectations

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32 *See RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, et al.*, 16 FCC Rcd 12048, ¶ 19 (2001) (upholding Bureau's denial of RCN's discovery requests); *EchoStar Communications Corporation v. Comcast Corporation, et al.*, 14 FCC Rcd 2089, at ¶¶ 30-31 (1999).

33 RCN 1998 Reply Comments at 10 (suggesting that "[d]iscovery would discourage discriminatory acts in the first instance by creating an awareness by cable operators that their discriminatory behavior would be revealed.").

that programming will remain available on the competitive MVPD platform. The current program access rules allow consumer expectations and anxieties to be used as leverage by cable conglomerates in their negotiations. This risk provides yet another means for cable conglomerates to extract favorable concessions from competitive MVPDs seeking to ensure continuation of carriage and limit customer dissatisfaction and churn.

III. THE COMMISSION SHOULD ADOPT AN ARBITRATION-BASED ENFORCEMENT MECHANISM TO SUPPLEMENT THE COMPLAINT-BASED MECHANISM.

The Commission has repeatedly recognized that the current complaint-based enforcement mechanism is ill-equipped to address all programming disputes, and that arbitration is a more effective remedy.[34] We agree. Further, Congress provided clear authority for the Commission to adopt additional enforcement mechanisms to facilitate and encourage competitive MVPDs.

A. Commercial Arbitration Would Provide Competitive MVPDs an Expedited Market-Based Mechanism.

The Commission's recent experience with baseball arbitration remedies in the *News/Hughes* and *Adelphia/Comcast/Time Warner* proceedings provide an alternative means to address programming disputes. The Commission first adopted arbitration to govern carriage disputes between News Corp and unaffiliated MVPDs for Regional Sports Networks ("RSNs") and broadcast affiliates. *News/Hughes,* Appendix F. Satisfied with success of that experiment, the Commission extended the arbitration remedy in the

[34] *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee For Authority to Transfer Control,* Memorandum Opinion and Order, FCC 03-330 (2004) ("*News/Hughes*"); *Adelphia/Comcast/Time Warner.*

Adelphia/Comcast/Time Warner proceeding to cover RSNs as well as program carriage issues for unaffiliated RSN programmers. *Adelphia/Comcast/Time Warner,* ¶ 109.

In doing so, the Commission stressed that this "commercial arbitration condition [i]s an alternative for unaffiliated RSNs to our existing program carriage complaint procedures." *Adelphia/Comcast/Time Warner,* ¶ 191. EchoStar supports the same flexibility for competitive MVPDs under the program access rules: MVPDs should be permitted to either seek arbitration or file a traditional program access complaint.

To simplify the incorporation of an arbitration mechanism in its program access rules, the Commission should incorporate the same known and effective arbitration process adopted in *News/Hughes*.[35] The *News/Hughes* process offers a direct response to each of the three primary shortcomings of the current enforcement mechanism. First, the Commission has found arbitration to be beneficial because of its "specific time frames" and "timely resolution of carriage disputes," ensuring an expedited remedy for program access violations. *Id.* Second, the Commission provides the arbitrator with the power to "require the parties to submit such evidence to the extent it is in their possession," including carriage contracts. *News/Hughes,* Appendix F.III. Third, the Commission has stressed that its arbitration rules "ensure that programming an MVPD carries prior to arbitration is not temporarily disrupted during arbitration" through the inclusion of a standstill provision that can be invoked by the competitive MVPD. *See Adelphia/Comcast/Time Warner*, fn. 532.

[35] The Commission could simply adjust the arbitrator's instruction to reflect the requirements of Section 628. Under *News/Hughes,* the arbitrator is directed to "choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue." *News/Hughes,* Appendix F.III.

From a policy perspective, baseball arbitration is also preferable because it encourages private market-based resolutions: "arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'"[36] Use of an arbitrator also serves the public interest by conserving finite Commission resources.

The Commission should adopt arbitration as a second program access enforcement mechanism and send a clear signal to cable conglomerates that evading program access consequences will no longer be permissible: program access violations will be met with a zero tolerance policy in an expedited fashion.

B. The Commission Has Authority to Establish Arbitration Procedures for Enforcement of the Program Access Rules

Arbitration of program access complaints is consistent with all statutory requirements – including the 1992 Cable Act, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 – as well as with the subdelegation doctrine.

The 1992 Cable Act provides the Commission with wide latitude to adopt enforcement mechanisms to address the specific practices of cable conglomerates outlawed by Congress. *See* 47 U.S.C. § 548(b)-(c). Congress only required an expedited Commission adjudication as one potential remedy.[37] Section 628 does not, however, limit

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36 *News/Hughes,* ¶ 174 (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration,* Routledge, 2003 at 264).

37 *See id.* § 548(d)-(f); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* Notice of Proposed Rule Making, 8 FCC Rcd 194, ¶ 13 (1992); see id. at 202 ¶ 38 ("Section 628(d) of the 1992 Cable Act provides that any [MVPD] aggrieved by conduct that it alleges to violate Section 628(b) or (c) may commence an adjudicatory proceeding at the Commission.").

the Commission's general power to adopt whatever additional adjudicatory processes or enforcement mechanisms it deems necessary to make the program access rules effective.[38]

To the contrary, Congress specifically provided in Section 628(e)(2) that enforcement of the program access rules through administrative adjudication is "in addition to and not in lieu of the remedies available" in a forfeiture proceeding or under "*any other provision*" of the Communications Act. 47 U.S.C. § 548(e)(2). Accordingly, although the Commission must at a minimum provide complainants access to expedited administrative adjudication, it retains its full range of procedural options and enforcement powers, including the rulemaking powers vested in it under Sections 1, 4(i), 201(b), and 303(r) of the Communications Act.[39] Section 628 allows the Commission to give program access complainants the option of seeking enforcement through an arbitration process that complies with other provisions of law.

The APA likewise allows the Commission to adopt an arbitration remedy. The APA establishes procedures that the Commission generally must follow when it engages in "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a); *see id.* §§ 554-557. Those procedural requirements, which are reflected in Commission Rules 1.201-1.364, do not apply to program access

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38 Cf. *AT&T Corp. v. Iowa Utils. Bd.,* 529 U.S. 366, 385 (1999) (Congress's grant of authority to state commissions to approve interconnection agreements and grant exemptions to rural ILECs did not "displace[] the Commission's general rulemaking authority" over the same subjects); *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, Order*, FCC 06-180, ¶ 56 (Mar. 5, 2007) ("*Section 621 Order*") (Congress's establishment of a judicial remedy for violations of 47 U.S.C. § 541(a)(1) does not preclude creation of a Commission remedy for violations of same provision).

39 *See* 47 U.S.C. §§ 151, 154(i), 201(b), 303(r); *see also Section 621 Order* ¶¶ 54-55 (discussing the Commission's authority to administer Cable Act).

proceedings because Congress has not provided the triggering instruction. Section 628 permits an aggrieved MVPD to initiate an "adjudicatory proceeding" with the Commission, but it does not require a hearing on the record. *See* 47 U.S.C. § 548(d). Thus, the Commission permissibly reviews program access complaints under the complaint procedures set forth in 47 C.F.R. § 76.7, which give the Commission latitude to hold an evidentiary hearing "as it deems appropriate." 47 C.F.R. § 76.7(e); *see id.* § 76.1003(a) (specifying use of general procedures established in Rule 76.7). The Commission has the same flexibility to authorize arbitration, consistent with the APA.

The ADR Act authorizes agencies to employ *binding* arbitration as a "voluntary" alternative to "other available agency dispute resolution techniques." 5 U.S.C. §§ 572(c), 575(a)(1). Under the ADR Act's procedures, an agency may, with the parties' consent, refer an appropriate dispute to a government or private arbitrator for final resolution. *See id*. §§ 572(a), 573(a), 575(a); *but see id.* § 572(b) (requiring agencies to "consider not using a dispute resolution proceeding" if a case presents certain conditions such as special importance or a need for a precedential decision). The final arbitral award in such a proceeding is directly enforceable in court. *See id.* §§ 576, 580(c), 581(a); *see also* 9 U.S.C. § 9.

The ADR Act does not govern use of *News/Hughes* procedures because, under those procedures, the Commission retains final decision-making authority. Once the arbitrator has selected the offer "that most closely approximates the fair market value of the programming carriage rights at issue" and "permit[s the programmer] to recover a reasonable share of the costs of acquiring the programming at issue," that arbitral decision is subject to *de novo* review by the Commission. *See News Corp. Order*, 19 FCC Rcd 473, App. F, § III. The Commission "examine[s] the same evidence that was presented to the arbitrator and . . . choose[s] the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue." *Id.* Unlike the procedures described in the ADR Act, in which the arbitrator is the only available forum before judicial review, the *News/Hughes* arbitration procedures make the Commission available to resolve the dispute.

The ADR Act's provisions governing binding arbitration therefore leave the Commission free to use arbitration to assist *its own* resolution of program access disputes. As noted, the ADR Act specifically states that its binding arbitration procedures "supplement rather than limit other available agency dispute resolution techniques."[40]

The judicial rules that constrain so-called "subdelegation" by administrative agencies likewise allow the Commission to adopt arbitration procedures for enforcement of the program access rules. *See generally United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004). Consistent with subdelegation principles, agencies possess broad authority to refer matters outside the agency for fact-finding and the issuance of preliminary decisions, subject to final agency review. An agency runs afoul of the subdelegation doctrine only if it abdicates its final decision-making authority. Thus, in *National Park & Conservation Association v. Stanton*, on which the D.C. Circuit relied in *USTA II* (*see id.* at 568), the court rejected as unlawful a procedure by which the agency "completely shift[ed] its responsibility" to an outside council and "retain[ed] virtually no final authority over the

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[40] 5 U.S.C. § 572(c); see id. § 580(c) ("A final award [under the ADR Act] is binding on the parties"); *see also Dep't of the Air Force v. FLRA*, 316 F.3d 280, 286 n.1 (D.C. Cir. 2003) ("The ADR Act by its terms is voluntary and merely supplements, rather than limits, other available ADR techniques.").

actions – or inaction – of the Council." *See* 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999). At the same time, the *Stanton* court made clear that "[d]elegations by federal agencies to private parties are . . . valid so long as the federal agency or official retains final reviewing authority."[41] The arbitration procedures established in *News/Hughes* and *Adelphia/Comcast/Time Warner* satisfy the requirement of ultimate Commission decision-making. Because the Commission may examine the evidence that was presented to the arbitrator and choose the appropriate final offer, it "retains final reviewing authority."[42]

IV. THE COMMISSION SHOULD PROVIDE TARGETED REFORMS TO THE COMPLAINT-BASED PROCESS TO BETTER REFLECT MARKET NEGOTIATIONS.

Providing access to a more effective enforcement mechanism does not eliminate the need for the Commission to adjust its complaint-based mechanism to ensure competitors' efforts are not thwarted. Competitive MVPDs should have the opportunity to seek Commission review directly of programming disputes, or to seek an arbitrator's review. Again, the *News/Hughes* and *Adelphia/Comcast/Time Warner* model is instructive, and the value to competing MVPDs to have alternative forms of relief based on the particular violation in question has proven beneficial. There may be specific issues that are not as time sensitive or address novel issues meriting Commission review to address

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41 Id. at 19; s*ee also United Black Fund, Inc. v. Hampton,* 352 F. Supp. 898, 904 (D.D.C. 1972) ("[T]here is authority for the proposition that subdelegations by federal agencies to private parties are not invalid when the federal agency or official retains final reviewing authority.").

42 *Stanton*, 54 F. Supp. 2d. at 19; *see Verizon New Eng., Inc. v. Maine Pub. Utils. Comm'n,* 403 F. Supp. 2d 96, 100 (D. Me. 2005) (state commission's review of a tariff under 47 U.S.C. § 271 did not present a subdelegation issue because, inter alia, the FCC would "retain the final decision-making authority over any rate set by the PUC").

concerns like stealth discrimination or other complicated non-price forms of misconduct by cable conglomerates.

The Commission should focus its complaint process reform efforts on accelerating its deliberative process; providing a workable discovery mechanism; and protecting consumers during the pendency of complaint proceedings.

A. Complaint Procedures Should Provide a Fixed Timetable for Resolution.

Section 628(f)(1) of the Communications Act provides that: "The Commission shall . . . provide for an expedited review of any complaints made pursuant to this subsection." 47 U.S.C. § 548(f)(1). Building upon its initial step in 1998 to adopt a set timetable, the Commission should take a second step towards providing the statutorily required expedited review process by adopting a fixed shot clock deadline of no more than 45 days from the filing of the complaint to resolution, with a one-time extension of 45 days in cases that present, in the Commission's view, exceptional complexity.[43] To make a 45-day turn-around possible, discovery requests should be served by the complainant simultaneously to filing the complaint, and any document requests and discovery disputes should be resolved by the Commission within 10 days. The respondent's answer should be due 10 days after filing of the complaint, and the reply should be due five days thereafter. All service should be electronic. A concise 45-day process would oblige cable

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[43] Comments of GTE, CS Docket No. 97-248, at 8 (Feb. 2, 1998) ("…[T]he Commission must impose upon itself a 45-day time limit within which to resolve program access complaints once submitted"); Comments of Home Box Office, CS Docket No. 97-248, at 4 (Feb 2, 1998) (explaining that "programmers, as well as MVPD complainants, would benefit from the certainty that would result from expeditious resolution of complaints."); *cf. Section 621 Order*, ¶ 67 ("We establish a maximum time frame of 90 days for entities with existing authority to access public rights-of-way.").

conglomerates to negotiate in good faith or face the consequences of immediate Commission action.

To further facilitate and encourage prompt private resolution of complaints the Media Bureau should insist on weekly status conferences beginning with the filing of the complaint to encourage and facilitate a mutually agreeable solution.

B. Clear Discovery Rights Should be Provided in the Complaint Process.

The Commission's procedures should ensure that both parties and Media Bureau staff have sufficient access to critical documentation to demonstrate the veracity of program access complaints. Discovery should be the rule, not the exception, and a presumption that certain documentation is critical to any Commission review is long overdue. If prohibited discrimination and unfair practices are to be rooted out, cable-affiliated programmers should no longer be given the latitude to self-select which, if any, contracts to produce in response to a program access complaint.

Such limited disclosure requirements are wholly inadequate for detecting discrimination.[44] The Commission cannot determine whether particular terms and conditions are discriminatory without knowing the terms and conditions offered to other MVPDs. When the respondent selectively unveils information that presumably helps its

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[44] *See* 47 C.F.R. § 76.1003(e). The importance of adequate disclosure to prevent prohibited discrimination has been recognized by other federal agencies. The Federal Energy Regulatory Commission recently issued a final rule to increase the transparency of its open access transmission scheme in order to detect and prevent undue discrimination. *See Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12266 (2007 (Final Rule) (concluding that: "inadequate transparency requirements, combined with inadequate compliance with existing OASIS regulations, increases the opportunities for undue discrimination under the *pro forma* OATT and makes instances of undue discrimination more difficult to detect. We find that the reforms we adopt in this Final Rule will improve transparency in the OATT, reduce opportunities for undue discrimination, and increase our ability to detect undue discrimination.").

case, this limited disclosure also makes it next to impossible to detect discriminatory practices that are hidden behind ostensibly uniform terms. For the Commission to be able to detect and eliminate such anti-competitive practices, it must require cable-affiliated programmers to provide more complete discovery, including its contracts with other MVPDs.

At a minimum, the Commission should require cable conglomerates to provide at least six carriage contracts for the cable network in question from both affiliated and non-affiliated MVPDs with their answer. These agreements should offer a broad representation of carriage terms across platforms, and different sized providers. The current default practice of providing a single carriage agreement deprives competitive MVPDs and Commission staff with a holistic view of the true nature of the dispute and how a class of similarly situated providers is treated. A single contract viewed in isolation is a poor substitute. In this regard, the discovery measures provided for under the arbitration provisions are instructive and have led to more informed decisions about discrimination and market pricing, features which may be lacking in current complaint-based proceedings.

In addition, the Commission should adopt the discovery mechanisms available in complaint proceedings against common carriers. *See* 47 C.F.R. § 1.729. Under those rules, complainants may file and serve up to ten written interrogatories at the same time as the complaint, and up to five more interrogatories after the defendant's answer.[45] Such discovery is an essential tool for investigating unreasonable rate and unjust discrimination complaints against common carriers, and is just as critical for uncovering unfair and discriminatory practices by cable-affiliated programmers. Any additional discovery

[45] *See* 47 C.F.R. § 1.729(a). Under that section, defendants are also entitled to request up to ten written interrogatories between complaint and answer. *Id.*

requests, including additional document production, depositions and/or further interrogatories, would be at the Commission's discretion, as is the current practice for common carrier complaints. *See* 47 C.F.R. § 1.729(g) and (h).

C. Competitive MVPDs Should Have Tools to Insulate Their Customers from Any Adverse Effects of Pending Program Access Disputes.

The process for resolving program access disputes, no matter how expedited, would be to no avail if the cable-affiliated programmer is able to withdraw programming upon expiration of an existing programming agreement while a program access complaint or arbitration is still pending. As the Commission correctly concluded in *News/Hughes*, a vertically integrated programmer and distributor has anticompetitive incentives to temporarily foreclose (or threaten to foreclose) access to "must have" programming in order to extract higher prices from unaffiliated MVPDs and to induce subscribers to switch to the affiliated MVPD. *See News/Hughes*, ¶¶ 153-162. For the unaffiliated MVPD, such withholding of critical programming (even temporarily) can have a devastating effect on its ability to attract and retain customers, and, for that reason, the mere threat of such withholding will often lead to a capitulation to the terms demanded by the programmer, regardless of whether such terms comport with the Commission's program access rules.

To address these problems, the Commission in *News/Hughes* and *Adelphia/Comcast/Time Warner* imposed mandatory arbitration of certain program access disputes and required the vertically integrated programmers to "immediately allow continued carriage of the network under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in this condition,"[46] pending arbitration. To date, this "standstill" mechanism has worked well to take away the threat of temporary foreclosure and enable better programming agreements to be reached, whether through negotiation or arbitration, that are more reflective of market prices.

The program access rules are designed to address the same problem as the Commission's arbitration conditions in the *News/Hughes* and *Adelphia* proceeding – namely, to prevent abuse of market power by vertically integrated programmers. Indeed, a complaint or arbitration procedure that did not allow continued carriage under the terms of the expiring agreement would be largely ineffective, as most disputes would be "resolved" through the superior bargaining power of the vertically integrated programmer.

The Commission should provide competitive MVPDs with the option to insulate their customers from the program access dispute altogether through a standstill provision modeled on the *News/Hughes* conditions. Competitive MVPDs should be able to ensure that any program access dispute is invisible to their consumers, and prevent consumers from becoming negotiating pawns during the Commission's review.

There can be no doubt that the Commission has the authority to promulgate a standstill requirement. The Commission may order the respondent to enter into a non-discriminatory agreement at the conclusion of its review, and therefore may *a fortiori* order

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[46] *News/Hughes* at Appendix F, Part III. *See also Adelphia/Comcast/Time Warner* at Appendix B.2.c (requiring covered regional sports networks to "allow[] continued carriage under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in this condition").

the lesser remedy of an interim standstill, especially where interruption of carriage threatens to cause irreparable injury to the public.[47]

These three targeted reforms – a fixed timetable, clear discovery rights and a standstill – would ensure the Commission's adjudicatory process for program access disputes results in well-informed decisions in an expedited manner.

V. CONCLUSION

The Commission should extend the exclusivity prohibition for five more years to protect and preserve video competition. The Commission should also adopt an arbitration remedy to address the fundamental deficiencies of the current program access enforcement mechanism. Similar modifications to the complaint-based process are also critical to provide competitive MVPDs with two effective enforcement mechanisms. An effective program access regime would oblige cable conglomerates to bargain in good faith and ensure the non-discriminatory and reasonable treatment of all competitive MVPDs.

Respectfully submitted,

/s/ *Linda Kinney*_______
Linda Kinney
Bradley Gillen
ECHOSTAR SATELLITE L.L.C.
1233 20th Street N.W.
Washington, D.C. 20036
(202) 293-0981

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47 *Cf. Virginia Petroleum Jobbers Assn. v. Federal Power Commission*, 368 U.S. 940 (1961).