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

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APR - 2 2007
Federal Communications Commission
Office of the *secretary*

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:	)	MB Docket No. 07-29
	)	
Sunset of Exclusive Contract Prohibition	)	

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April 2, 2007

No. of Copies rec'd 0+4
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AT&T Inc. ("AT&T") respectfully submits these comments in responr to th Commission's Notice of Proposed Rulemaking released February 20, 2007, in the above-captioned proceeding.'

Introduction and Summary

The principal question raised by the Commission's Notice is the one posed by Section 628(c)(5) of the Communications Act: whether the limitation Congress imposed on exclusive contracts between cable operators and their affiliated programmers "continues to be necessary to preserve and pi-otcct competition and diversity in the distribution of video programming."' In 2002, the Commission concluded that the Section 628(c)(2)(D) limit on exclusivity – **a**

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[1] Notice of Proposed Rulemaking, *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, FCC 07-7 (rel. Feb. 20, 2007) ("NPRM").

[2] 47 U.S.C. § 548(c)(5).

straightforward limitation that imposes a duty to negotiate – remained necessary to prevent cable operators from withholding affiliated programming for anticompetitive reasons.[3]

That *is* all the more true today. Cable incumbents continue to control some of the most widely distributed programming channels, as we show below – including TBS, CNN, Discovery, TLC, TNT, HBO, and regional sports network programming that can be the key to a successful market penetration strategy. And ensuring that such programming remains competitively available is now of critical public policy significance. Today, five years after the Commission first looked at this question, the marketplace is on the verge of the type of dramatic competitive and technological developments that Congress had in mind when it first adopted the limit on exclusivity in 1992. With access to "must have" programming, DBS has continued to develop over the years. But a new chapter is beginning: telcos are now investing billions of dollars to build advanced broadband networks capable of providing consumers with facilities-based video programming services. These telco new entrants stand ready to offer direct, wireline-based competition to the incumbent cable MSOs, creating not only the price and service diversity Congress envisioned, but also – a companion goal of Section 628 – a long-awaited "development of [new video] communications technologies."[4]

These telco new entrants thus stand in the shoes of the DBS industry nearly two decades ago, when Congress first considered and adopted the exclusivity prohibition. In order to offer consumers a viable video option, new telco entrants like AT&T need continued access to "must

3 *See* Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 17 FCC Rcd 12124 (2002) ("2002 Order").

4 47 U.S.C. § 548(a) ("The purpose of this section is to . . . increase[] competition and diversity in the multichannel video programming market . . . and to spur the development of communications technologies.")

have" programming – the very programming that still is controlled, in many cases, by vertically integrated cable operators. Nothing has changed in this regard since 2002 or 1992. To the contrary, the cable incumbents continue to have powerful incentives to withhold such programming to impede the introduction of a significant new generation of video distribution technology and competition.

Indeed, they have even mol-e of an incentive to do so now than in those earlier years when they faced competition only from DBS providers. The Commission has found, the cable incumbents recognize, and early experience already has shown that telco video entry provides far mol-e price discipline to cable than does DBS. Moreover, that competition is not limited solely to video offerings, but extends to broadband Internet access services and packages of other services, such as voice, that include video and/or broadband Internet access offerings.[5] Given this competitive threat, cable MSOs have fought the initial deployment of telco video facilities and services using a variety oftactics: opposing the streamlining of franchising rules before Congress, the Commission, state legislatures, and the courts; seeking to enjoin deployment of new fiber facilities; threatening franchising authorities with litigation for permitting new entry; and pushing for application of level playing field requirements to new entrants (which the Commission recently found unreasonable) even as they seek to avoid any regulation of their

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5 For example, AT&T's Project Lightspeed contemplates a full suite of IP-enabled services that includes access to the Internet and stored files such as email, voicemail, or directory information, remote programming from wireless devices, and the aggregation of content and screening of calls. It pi-omises to enable subscribers to request additional content of particular interest to them, use enhanced "picture-in-picture" and "mosaic" features for simultaneous viewing of multiple video streams, and interact with triggers in those streams to enable them to vote in news polls and receive collated voting data in real time. *See, e.g.*, Letter from James C. Smith, SBC,,to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, at Att., p. 20 (filed Sept. 14,2005).

voice and data offerings.[6] Moreover, as with their DBS competitors, they have withheld from telco new entrants terrestrially-delivered programming that falls outside the Commission's current rules. In other words, there is ample evidence that cable incumbents have a substantial incentive to withhold critical programming from new telco entrants, and that they would exploit any relaxation or elimination of Section 628's limit on exclusive contracts to do precisely that in order to squelch competition in the video *and* broadband markets. As Comcast's Chairman and CEO has pointedly observed, "[D]on't underestimate the first mover advantage. . . . I think people are going to look back and say cable was able to run the table before there was any pushback [from phone companies]."[7]

It is therefore critical that the Commission maintain its limitation on the use of exclusive contracts as AT&T and others gear up to enter the market. NCTA has recently conceded that overbuilders and the wireline new entrants together have no more than 1.9% of all MVPD subscribers,[8] and the second largest cable MSO has recently sought to assure the investment community that "[over]builders only cover 3% of our footprint."[9] Although AT&T intends to

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6 *See, e.g.*, Report and Order; and Further Notice of Proposed Rulemaking, *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*, MB Docket No. 05-311, FCC 06-180 ¶¶ 24, 34, 47-48 (rel. Mar. 5, 2007) ("Franchise Reform Order"); AT&T Reply Comments, filed in MB Docket No. 05-311, Mar. 28, 2006, Appendix C, at 10-12, 20-31 (documenting instances of anticompetitive behavior by cable incumbents toward new entrants) ("AT&T Franchise Reform Reply Comments").

7 David B. Wilkerson, *Comcast Nixes Cash-only Compensation for TV Retransmission Rights*, Dow Jones Business News, March 6, 2007.

8 NCTA Comments, filed in MB Docket No. 06-189, Nov. 29, 2006, at 9.

9 Seeking Alpha, *Time Warner Q4 2006 Earnings Call Transcript*, Jan. 31, 2007, *available at* http://media.seekingalpha.com/article/25689 (remarks of President and COO of Time Warner Inc.); *see also* Charter at Bear Stearns 20th Annual Media Conference (Transcript), Mar. 7, 2007

reach over 19 million households with its initial U-Verse℠ fiber-based video service by the end of 2008,[10] it has just begun to penetrate the market, having so far signed up 10,000 video subscribers nationwide.[11] The short-term costs to cable incumbents of foregoing revenues from this current subscriber base are minimal. If access to critical programming is eliminated now, this nascent competition from AT&T and other wireline platforms could be severely thwarted — thereby denying consumers the benefits of promising new video technologies and the effective head-to-head competition that a wireline platform can offer. In short, Section 628's limitation continues to offer critical public interest benefits: it will help thwart the very real threat that cable incumbents will abuse their hold on critical video programming in order to thwart new competition in video, broadband Internet access and related markets. Thus, as it did in 2002, the Commission should retain the Section 628(c)(2)(D) exclusivity limitation for another five years.[12]

(Charter noting that Verizon's FiOS product is passing only "approximately 1% of our total homes passed.").

10 Press Release, "AT&T U-verse TV to Include ION Media Networks Content," Mar. 5, 2007, *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23461.

11 *AT&T Says U-Verse Sales Up "Dramatically," Total 10,000,* Reuters, Mar. 28, 2007, *available at* http://www.reuters.com/article/internetNews/idUSN2826839220070328.

12 Section 628(c)(2)(D) is not even a complete ban on exclusive contracts. Cable companies may enter into such contracts if the Commission finds them to be in the public interest, taking into account the effect on competition on the one hand, and the incumbent's need to attract capital investment to produce and distribute the programming on the other. 47 U.S.C. § 548(c)(4). *See also NPRM* ¶ 3 & nn.18-19; 2002 *Order* at 12135-36 ¶ 25. Under this provision, the Commission has granted petitions for exclusivity for new or recently-started networks. Memorandum Opinion and Order, *New England Cable News*, 9 FCC Rcd 3231, 3232, 3236 ¶¶ 1, 4, 33 (1994) ("fledgling service"); Memorandum Opinion and Order, *Newschannel*, 10 FCC Rcd 691, 694 ¶ 21 (1994) ("new service").

Rut in order for the rule to have its intended effect, the Commission should expedite the process for resolving program access complaints. Given the time frames typically involved in resolving such complaints, and the current incentives for delay as telcos begin to enter the market, the Commission should enforce a 90-day deadline for resolution of complaints. Such a deadline would also be more consistent with Congress' admonition that the Commission provide expedited review for program access complaints. There is no reason the Commission cannot resolve program access complaints within a 90-day timeframe; the Commission has experience deciding far broader and more complex common carrier disputes within similar timeframes. And the Commission can and should take steps to ensure that program access disputes can be resolved effectively and expeditiously, by drawing on its past experience. Specifically, it could delegate the resolution of such disputes to the Enforcement Bureau, and make them subject to the discovery and other procedures set forth in the Commission's formal complaint rules.

Argument

I. THE NEED FOR SECTION 628'S BAN Oh' EXCLUSIVE PROGRAMMING CONTRACTS IS EVEN MORE COMPELLING TODAY, AS FACILITIES-BASED COMPETITION BECOMES A REALITY, THAN IT WAS IN 2002.

In the Commission's 1990 report identifying competition problems in the cable industry, the Commission found that – in the absence of any program access obligations – "vertically integrated cable operators often have the ability to deny alternative multichannel video providers access to their vertically owned programming services."" The Commission also pointed to evidence that competing facilities-based pi-oviders (such as MMDS, SMATV, HSDs, and cable

[13] Report, *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5021 ¶ 1 13 (1990) ("1 990 Report").

overbuilders) had been "refused outright" access to cable programming.[14] In its report to Congress, the Commission concluded that "[e]nsuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable."[15]

Congress agreed. It found that vertically integrated cable programmers "may simply refuse to sell to potential competitors," given their "incentive and ability to favor cable operators over other video distribution technologies."[16] Tlic goal, in Congress's view, was to "increas[e] conipctition and diversity in the multichannel video programming market . . . and to spur the development of communications teclinologies."[17] **As** cahlc operators have recently agreed,[18] Congress specifically intended that Section 628 promote "new technologies providing *facilities-based* competition to cable." because alternative platform providers were seen as having the most realistic chance, in the long run, of creating programming diversity themselves, as well as price and service quality competition."

Given its hope that such facilities-bascd video competition would ultimately develop and create market-based disincentives *to* cable MSOs' anticompetitive withholding of programming.

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14 *See id.* at 5021-22 ¶ 114.

15 *Id.* at 5021 ¶ 112.

16 S. Rep. No. 102-92, at 26, 28 (1991).

17 47 U.S.C. § 548(a).

18 Turner Network Sales, Inc., et al.'s Motion to Dismiss and Answer, filed Feb. 8, 2007, at 13, *available at* http://blog.vdc.com/vdc/2007/02/turners_motion_.html, citing H. R. Conf. Rep. 102-862 at 93 (1992).

19 *See* H. R. Conf. Rep. 102-862 at 93 (1992) (emphasis added); ***see also*** 2002 Order at 12126-27, 12152 ¶¶ 6-7, 62; *NPRM* ¶ 2. This is in contrast to other provisions of the Act, such as leased access requirements, the horizontal cap and channel occupancy limits, and the program carriage provisions, which arc designed to promote diversity in cable *programming*. ***See*** 47 U.S.C. §§ 532, 533,536.

Congress provided that Section 628's limit on exclusive contracts (although not other components of that rule) could sunset. However, Congress *specifically provided that the* provision could be extended if the Commission found that it "continues *to* be necessary to preserve and protect competition and diversity in the distribution of video programming."[20] The Commission interpreted this to mean that the limit should be extended if, without it, "vertically integrated programmers would currently have the *incentive* and *ability* to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies" and, if that were indeed the case, "such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming."[21]

Based on that test, the Commission determined in 2002 that allowing the exclusivity prohibition to sunset would not be in the public interest.[22] The Commission specifically found that, given the limited number of consumers with a competitive alternative and the continued prevalence of popular, vertically integrated programming, cable incumbents continued to have both the *incentive* to thwart competition through exclusive contracts, and the *ability* to do so.[23]

Nothing has changed to alter these conclusions today. Cable incumbents continue to control programming that is critical to the success of competing video providers. And they have shown, not only that they retain the incentive to withhold such programming from their competitors, but also that they intend to do so — and in fact *do* so today where they can

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20 47 U.S.C. § 548(c)(5).

21 *2002 Order* at 12130-31 ¶ 16 (emphasis added); *see id.* at 12135 ¶ **24,**

22 *Id.* at 12125 ¶ 4.

23 *See id.* at 12138, 12143-44 ¶¶ 32, 45.

circumvent the rules by delivering programming terrestrially.[24] Indeed, if anything, the MSOs' incentive to use their control over programming to stifle competition is even stronger now than it was five years ago, since wireline telco entrants are entering the market with video services that stand to offer the most significant price pressure to the incumbents, and that will help pave the way for competition on all broadband fronts.

In short, every factor the Commission found relevant in 2002, and every policy rationale underlying the limitation, supports its extension. Indeed, the Commission's decision here should be even easier than the one it faced in 2002. Then, the issue was access to programming for DBS providers who were no longer new entrants and had already acquired millions of subscribers. Now, the issue is access to programming for *new* facilities-based entrants, from whom Congress encouraged competition in both the 1992 and 1996 Acts. The fact that these new entrants are also deploying new video distribution technologies (e.g., IP-enabled broadband distribution networks), which Congress sought to encourage when enacting the program access rules, makes it all the more imperative that the Commission retain the protection afforded by these rules. The limit on exclusive contracts played a critical role in facilitating the successful

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[24] Whether or not the Commission believes that it currently has authority over terrestrially-delivered programming, it is important that the Commission understand the impact this lack of programming has on providers seeking to provide consumers with video choice. In fact, as AT&T has previously shown, the Commission *has* ample authority to address the recognized problems posed by terrestrially delivered programming, whether migrated from satellite delivery or otherwise. *See* Comments of SBC Communications, filed in MB Docket No. 05-255, Sept. 19, 2005, at 24-27; Comments of AT&T, filed in MB Docket No. 06-189, Nov. 29, 2006, at 15-17. And nothing in the legislative history of section 628 indicates anything to the contrary. ***See*** 138 Cong. Rec. 19141, 26167 (statements of Rep. Tauzin and Sen. Inouye that House and Senate versions of the program access provisions were "similar"). In any event, the Commission should report the clear abuses that the incumbents have made of the "loophole," and should strongly recommend that Congress finally close it.

emergence of new DBS competitors." As shown below, it is no less critical now to the successful emergence of new telco competitors.

A. Vertically Integrated Programmers Continue To Have the *Ability* To Favor Their Affiliated Cable Operators So As To Jeopardize the Viability of Competing MVPD Platforms — Particularly Newly Emerging Telco competitors.

In the *2002 Order*, the Commission concluded that nothing between 1992 and 2002 had "diminish[ed] the importance of vertically integrated programming or affect[ed] the ability of vertically integrated programmers to favor their affiliated cable operators over other MVPDs…."[26] While the cable industry argued that its programming was "akin to so many widgets,"[27] and could easily be reproduced or replaced by other programming, the Commission expressly disagreed, finding that an incumbent's refusal to provide a competitor access to vertically integrated pi-ogramming could have real, prohibitive effects on marketplace entry. The Commission noted that, despite the increase in the number of independent program networks, cable operators continued to own much of the "must have" programming that new entrants needed to provide subscribers with a meaningful competitive alternative. This included some of the most popular basic cable programming then available, such as TBS, Discovery, TNT, CNN,

[25] Indeed, the DBS providers have been able io acquire tlie millions ofcustomers they have today in part *due to* their right to access to "must have" programming. And their ability to attract new customers and retain their existing customer base depends largely on their continued access to such programming, which, in turn, will depend largely on whether the Commission extends the exclusivity limitation. The sad truth is that, absent that limitation, programmers affiliated with cable operators continue to have the incentive and ability to deny DBS providers (despite their relatively large subscriber bases) access to must have programming – as demonstrated by their refusal to provide DBS providers access to critical regional sports programming in, for example, Philadelphia. It remains important today that *all* MVPDs have this right so that competition continues to develop on all fronts.

[26] 2002 ***Order*** at 12136 ¶ 26.

[27] *Id.* at 12139 ¶ 33

and TLC; valuable premium networks such as HBO; and the (then) relatively new but increasingly attractive regional sports networks.[28]

This fact remains unchanged. If anything, subsequent developments have *increased* the ability of cable incumbents to threaten the viability of new entrants, and confirmed the bankruptcy of the cable industry's "let them eat cake" suggestions. MVPDs still remain highly dependent on key programming owned by the established cable MSOs, including TBS, Discovery, TNT, CNN, TLC, other popular basic cable networks, and also the regional sports network programming that the Commission found, in the *Adelphia Order*, could be used as a powerful weapon against potential competitors. Indeed, RCN has told investors that it now pays 37% of its revenues to Time Warner and Comcast for the programming it shows – stark evidence that the incumbents control the key input to their competitors' success.[29]

Cable's leverage over its competitors with respect to critical programming is specifically illustrated by the Commission's recent video competition reports, which show that cable networks owned by cable MSOs remain among those that have the very highest subscriber penetration.[30] Leaving aside C-SPAN,[31] the Commission's most recent video competition report

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28 *Id.* at 12131-32, 12138 ¶¶ 18, 32.

29 RCN Press Release, "RCN Urges Congress to Consider Views of Small Cable Operators, Conditions Needed to Protect Access to "Must Have" Programs," Sep. 22, 2005, *available at* http://investor.rcn.com/ReleaseDetail.cfm?ReleaseID=174589.

30 *See* Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2834 ¶ 150 (2005) ("Eleventh Report").

31 C-SPAN remains the fifth-ranked cable network by subscribership. *See* Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 (2006) at Table C-5 ("Twelfth Report"). Its Board of Directors includes senior executives from several major cable operators, including Comcast, Cox, Cablevision, Time Warner, and Charter. *See* C-SPAN Board of Directors, *available at*

notes that seven of the top 20 (and four of the top seven) programming services by subscribership – Discovery, CNN, TNT, TBS, QVC, TLC, and Headline News – remain vertically integrated.[32] More recent industry data posted by NCTA are to the same effect (although Cartoon Network has now replaced QVC).[33] Among national non-premium cable programming networks with at least 20 million subscribers – the threshold necessary to obtain even arguably reliable ratings data from Nielsen[34] – over 36% are vertically integrated.[35] In

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http://www.c-span.org/about/company/index.asp?code=BOARD. These executives therefore have an attributable interest in C-SPAN. *See* 47 C.F.R. §§ 76.1000(b); 76.501 note 2(g). ***See also*** Memorandum Opinion and Order, *Telemundo Communications Group Inc.*, 17 FCC Rcd 6958, 6970-73 ¶¶ 30-40 (2002) (attribution based upon "the ability to influence the entity's conduct by virtue of the director the party selects"); Memorandum Opinion and Order, *MediaOne Group, Inc.*, 15 FCC Rcd 9816, 9837 ¶ 42 (2000) (party that "appoints a director" is deemed attributable). The "economic reality", *id.*, is that C-SPAN "derives 97 percent of its revenues from affiliate fees (i.e., subscriber fees from MVPDs)." *See Eleventh Report* at Table C-6 n.**.

32 *See Twelfth Report* at Table C-5 (showing that the Discovery Channel, CNN, TNT, TBS, QVC, TLC, and Headline News, all of which are vertically integrated, hold positions 1, 3, 4, 7, 14, 15, and 16 on the list, respectively). QVC is wholly owned by Liberty Media, a cable operator, although the *Twelfth Report* does not so indicate. *See id.*; 2002 *Order* at 12132 n.42. In its application to acquire control of DIRECTV (*see NPRM* at n.33), Liberty Media has recently agreed to "continue to" comply with the program access rules – except to the extent the Commission changes them. *See* News Corp., The DirecTV Group, Inc. and Liberty Media Corp.'s Consolidated Application for Authority to Transfer Control in MB Docket No. 07-18, at 23, filed Jan. 29, 2007.

33 *See* NCTA, "Top 20 Cable Program Networks - as of December 2006," *available at* www.ncta.com/ContentView.aspx?contentId=74, *citing* Kagan Research, LLC, "Cable Program Investor," Jan. 31, 2007.

34 *See* Comments of Oxygen Media Corp., filed in MB Docket No. 04-207, July 15, 2004, at 4. In fact, at least for non-niche networks, it would appear that those with less than 40-60% of MVPD subscribers should be discounted as of questionable long-term viability. Further Notice of Proposed Rulemaking, *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* 16 FCC Rcd 17312, 17338-39 ¶¶ 53-54 (2001), *citing* Consent Order, *Time Warner, Inc.*, 123 F.T.C. 171, 207 (1997) (separate statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney).

contrast, many of the new networks have minimal subscriber bases and/or are targeted toward niche markets.[36] This gives cable-owned programmers powerful leverage to control the market for key programming. As Congress recognized when it enacted the Section 628 exclusivity limitation in 1992, it is still "difficult to believe a cable system would not carry" such key programming as CNN and remain competitive.[37]

Concerns about such leverage also continue *to* extend, as they did in 2002, beyond basic cable networks. Tlic key subscription premium networks, HBO and Cinemax, also remain vertically integrated. In its *2002 Order*, the Commission recognized that "[e]ven though they are not among the top programming services in subscribership," premium networks "make an important contribution to an MVPD's revenue and profits."[38] A TCI representative testified during the Commission field hearings prior *to* the 1990 report that "certain channels such as ... HBO are, for all practical purposes, 'must carries' for all cable systems."[39] That is only more true today than it was in 1990, 1992, or even 2002, given tlie introduction of more first run

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35 This calculation is based on network profile data from Kagan Research, LLC, *Economics of Basic Cable Networks - 13th Annual Edition* at 97-519 (2006) ("Kagan Report"). After adding Headline News and QVC, which are not separately profiled, 91 networks are shown to have at least 20 million subscribers. Of those, 33 are owned by cable operators.

36 As Kagan Research reports, while major media-owned cable networks have posted strong returns, "independently owned networks struggle to *get* on tlie air." *Kagan* ***Report*** at **3.** *See also Twelfth* Report at 2575-76 ¶ 158 ("[W]e have identified many new networks since the last report, most notably new, non-English and multicultural programming services."); Kagan Report at 24 (among the new channels launched in tlie **past** five years are La Familia Cosmovision, GolTV, Sportsman Channel, ESPN Deportes, Si TV, History Channel en Espanol, Wealth TV, Aninie Network, Wine Network, Blackbelt TV, Military History, and Crime & Investigation).

37 S. Rep. 102-92 at 24.

38 2002 ***Order*** at 12138 ¶ **32.**

39 *1990 Report*, 5 FCC Rcd at 5027 ¶ 118 (quoting Robert Thompson of TCI).

programming on HBO like "The Sopranos" and other highly acclaimed, award-winning shows.[40] As cable MSOs have also noted, video on demand programming is now becoming increasingly popular:[41] and thus their Jointly owned iN DEMAND service will be of increasing importance.

As Commissioner Copps has noted,[42] a wide variety of other programming also qualifies as "must have" and can affect video competition. Another specific example emerged in the *Adelphia Order* proceeding, involving the PBS Kids on Demand service launched in 2003.[43] As RCN has noted, PBS Kids programming, "while appealing only *to* viewers with young children, is 'must have' programming for that demographic."[44] Originally, PBS Kids on Demand was

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40 *See, e.g.,* Miriam Hill, *HBO Move Riles Some Comcast Customers*, Philadelphia Inquirer, Mar. 21, 2007, *available at* http://www.philly.com/inquirer/home_top_stories/20070321_HBO_move_riles_some_Comcast_customers.html ("HBO has 29 million subscribers nationally, in part because of the popularity of *The Sopranos*. . . ."); Time Warner, *Home Box Office*, http://www.timewarner.com/corp/businesses/detail/hbo/index.html (last visited Mar. 29, 2007) ("HBO received 26 Primetime Emmy awards this year — the most of any network for the fourth year in a row....").

41 Dow Jones Business News, *supra* note 8; Broadcasting & Cable, *Roberts Touts Comcast's Triple Play*, Mar. 6, 2007, *available at* http://www.broadcastingcable.com/article/CA642 1943.html?display=Breaking+News.

42 Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable, Inc., et al.*, 21 FCC Rcd 8203, Dissenting Statement of Commissioner Copps at 8367 (2006) ("But is sports programming the only "must have" programming? . . . How about local news? Children's programming?') ("Adelphia Order").

43 **See** Press Release, "PBS in 2003," Dec. 17,2003, *available at* http://www.pbs.org/aboutpbs/1iews/20031217_PBSin2003.html (noting launch of PBS Kids in fall 2003); *see also* Karen Everhart, *Public TV Expands Fare Offered on Demand,* Current, April 12, 2004, *available ut* http://www.current.org/tech/tech0406vod.shtml.

44 *See* Comments of RCN Telecom Services, Inc., filed in MB Docket No. 05-192, July 21, 2005, at 13 ("RCN Comments"). The PBS Kids cable network has almost doubled in subscribership in the past two years. *See Kagan Report* at 422.

made available to competitive MVPDs such as RCN.[45] However, in 2005 a new commercial venture led by Conicast – PBS Kids Sprout – was formed as a successor to PBS Kids, Comcast took a 40% ownership interest in the new network.[46] RCN thereafter lost access to the programming based upon the imposition of new terms,[47] and suffered an 83% drop in VOD usage as a result.[48] While this matter was apparently resolved in the course of the Adelphia proceeding,[49] it demonstrates that there remains a wide variety of valuable programming that is available to cable operators as an anticompetitive weapon.

Pet-haps most important, Congress and the Commission have continued to recognize on multiple occasions the "must have" nature of cable incunibents' regional sports networks.[50] **As** the Commission observed in the *News Corp.-Hughes Order,* "[t]he basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: regional sports networks ("RSNs") typically purchase exclusive rights to show sporting events

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45 ***See*** *RCN Comments* at 13.

46 *See Adelphia Order at* 8210 n.35; *see also* Frank Ahrens, *Comcast, PBS Plan New Service,* Washington Post, Apr. 5, 2005, at E4.

47 ***See*** *RCN Comments* at 13.

48 *See id., Adelphia Order* at 8277-78 ¶ 166.

49 *See Adelphia Order,* Separate Statement of Commissioner Tate at 8375 ("this proceeding has also led to some resolution of the issue concerning access to PBS Kids Sprout"); Separate Statement of Commissioner Adelstein at 8373 ("I commend . . . Commissioner Tate for her efforts to help resolve concerns about the provisioning of PBS Sprout to a competing cable provider.").

50 *See Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?* Hearing before the S. Comm. on the Judiciary, 109th Cong. (Dec. 7, 2006); *see, e.g., Adelphia Order,* at 8258-59 ¶ 124 (2006) ("Adelphia 01-der"); Memorandum Opinion and Order, *General Motors Corp. and Hughes Electronics Corp., Transferors and **the** News Corp. Limited, Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473,496-97 ¶ 44 (2004) ("News Corp.-Hughes Order").

and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[51] As a result, "an MVPD's ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals."[52] As the Commission concluded in the *Adelphia Order,* this problem also remains an acute one today.[53] In Chairman Martin's words: "In North Carolina, there is no substitute for Tarheel basketball."[54]

These concerns are not merely theoretical. Cable MSOs have increasingly exploited their control of RSNs to deny competitors access to these packages, with palpable market impact. In Philadelphia, for example, where Comcast has refused to allow carriage by DBS operators of Comcast Sportsnet Philadelphia, which carries the games of Philadelphia's NHL, NBA, and Major League Baseball teams, the percentage of television households that subscribe to DBS service in Philadelphia is *40%* below what would otherwise be expected in that market.[55]

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51 *News Corp.-Hughes Order* at 535 ¶ 133; *Adelphiu Order* at 8258-59 ¶ 124 (citing *News Corp.-Hughes Order,* 19 FCC Rcd 496-97 ¶ 44).

52 *Adelphia Order* at 8258-59 ¶ 124.

53 There are currently 15 vertically integrated RSNs. *See Twelfth **Report*** at Table C-3.

54 *Adelphiu Order,* Separate Statement of Chairman Martin at 8365.

55 *Adelphia Order* at 8271 ¶ 149. According to DirecTV, DBS providers in Philadelphia serve only 12% of all households – compared to 21% nationwide. *See Competition in Sports Programming and Broudcasting: Are Consumers Winning?* Hearing Before the S. Comm. on the Judiciary, 109th Cong. 9-13 (2006) (statement of Daniel M. Fawcett, DirecTV, Inc.) ("Fawcett Statement"). *See also* Philadelphia Inquirer, *Consumer Watch – FCC's likely cable ruling would leave out Phil.,* July 12, 2006 at Bus. ("Philadelphia is Exhibit No. 1 for what happens when a cable company uses 'must-have content' to limit consumers' choice."). Comcast and Time Warner are now governed by a six-year ban on use of this terrestrial loophole, *except* in Philadelphia. However, that ban would be eliminated if the Commission sunsets 47 U.S.C. § 548(c)(2)(D) in this proceeding. *Adelphiu Order* at 8275 ¶ 157 & n.528.

As an emerging video competitor, AT&T, too, has now experienced first hand the continued ability of vertically integrated cable operators to use RSN programming as a potent anticompetitive weapon. In San Diego, Cox has thus far refused to deal with AT&T – or other competitors[56] – about possible access to Cox's affiliated local sports network featuring San Diego Padres games. While Cox has made this channel available to other *incumbent cable operators* in the market (who do not compete in the same areas with Cox), it has refused to deal with any of its actual competitors in that market, notwithstanding the "outrage" expressed by San Diego viewers.[57] And the Commission need not wonder whether this has an effect on competition in the market. Cox has answered that question itself, using its exclusive access to Padres games as a prominent marketing tool:

> Cox values its partnership with the local community and will give you the best coverage of local sports with Channel 4 San Diego. Did you know that Channel 4 San Diego delivers 140+ Padres games, with over 110 games available in high definition? You won't find that on satellite.[58]

Here, too, the anticompetitive effects are measurable. DirecTV has recently testified that its market share in San Diego is approximately *half* its national average.[59] The Commission's own analysis found that in the San Diego DMA, lack of access to RSN programming is estimated to

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56 *See, e.g., Fawcett Statement* at 10

57 *See, e.g.,* Letter from Carol L. Carlson to Chairman Martin, FCC, filed in MB Docket No. 07-29, Mar. 20, 2007 ("As an additional outrage, in San Diego – the Padres broadcast is exclusively on cable and not carried by ANY satellite provider, including DirecTV. If I want to watch the Padres, I have to have cable.").

58 *See* Cox Website, Cox Standard Cable, *available* at http://www.cox.com/sandiego/cable/ (visited Mar. 15, 2007) ("Channel 4 San Diego – In addition, you will receive the local programming available ONLY on Channel 4 San Diego like 145 LIVE Padres games, San Diego State Aztecs basketball and football, San Diego Gulls Hockey, San Diego Spirit Women's Soccer, and more!").

59 *Fawcett Statement* at 46.

cause a 33% reduction in the households subscribing to DBS service.[60] As noted below, Verizon similarly has been the victim of what have amounted essentially to shell games by Cablevision about the availability of critical regional sports packages from its Rainbow affiliates — although, specifically *because* of the Section 628 exclusivity limit, Vel-iron was finally able to address this problem.

In short, there can be no doubt that in the absence of restrictions, cable incumbents have the ability to continue to use highly popular exclusive programming to their competitive advantage over the telcos, other new entrants, and DBS providers. A failure to extend the program access rules would allow incumbent cable companies to maintain exclusive access to their key programming assets that are "must have" components of video packages offered to consumers. Their refusal to deal would continue to have real world, pernicious effects on competition.

B. Today, Vertically Integrated Programmers Have a Particularly Keen *Incentive* to Favor Their Cable Operator Affiliates.

As the Commission concluded in the 2002 *Order,* a vertically integrated incumbent's exclusive distribution contract can be viewed as a kind of "investment:" the incumbent is willing to suffer an initial loss of profits from widely distributing the programming in order to achieve higher profits later from its own increased penetration with subscribers.[61] Such investment is most profitable when the incumbent faces minimal competition: it then foregoes little profit from lost distribution in-region, and can charge its own subscribers a premium rate for the

60 *Adelphia Order* at 8271 ¶ **149.**

61 2002 *Order* at 12140 ¶ 36; ***see also*** Jonathan M. Orszag, Peter R. Orszag and John M. Gale, "*An Economic Assessment of the Exclusive Contract Prohibition Between Veriically Integrated Cable Operators und Programmers*" (filed in conjunction with Reply Comments of EchoStar and DIRECTV in CS Docket No. 01-290), Jan. **7,** 2002.

programming.[62] As the Commission concluded, where competition is nascent but not yet broad-based, the incumbent's incentive to withhold programming is at its highest, because it then stands a chance of squelching or at least minimizing the competitor's penetration, while maximizing its own profit.[63]

The Commission's conclusions have been validated by subsequent events. One need look no further than the experience with respect to regional sports programming that is delivered terrestrially and is thus exempt from the scope of the Commission's existing program access protections.[64] If, as some have argued, the economic incentives for incumbents to *distribute* their programming were so powerful as to trump the incentive to *withhold* programming,[65] one would expect to see the incumbents widely sharing this programming – especially as DBS providers have begun increasing their subscriber base, and thus providing a substantial opportunity for increased revenues for RSN programmers. In fact, as noted above, Cox, Comcast, and others have continued to engage in an effort to tie up regional sports programming whenever possible — and to actively *advertise* their exclusive access to such programming in order to beat out DBS

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62 As the Commission further observed, a cable operator may gain by weakening a current or potential rival even in markets that the cable operator itself does not serve, since reducing the rival's customer base in other markets would raise the rival's average cost of serving customers in the cable operator's own market(s), and thereby reduce the rival's competitive strength. *2002 Order* at 12140 ¶ 37 & n.108. Clustering by incumbent cable systems also increases the incentives to deny programming to competitors over broad areas. *See 2002 Order* at 12141 ¶ 40. Such clustering has continued, as the recent *Adelphia Order* documents. *See, e.g.,* 21 FCC Rcd at 8255-56 ¶ 114.

63 *2002 Order* at 12140 ¶ 37.

64 As noted above, *see* note 24 *supra*, these abuses have a significant impact on video competition and should be addressed by the Commission.

65 *See 2002 Order*, Dissenting Statement of Commissioner Abernathy at 12176-77 ("Abernathy Statement").

competitors, among others.[66] Today's new video entrants like AT&T give cable incumbents even stronger incentives to limit competition. Refusing to deal with emerging competitors, with their still relatively small subscriber bases, poses relatively small short term costs in *lost* programming revenues compared to the long run benefits of suppressing entry — especially by those recognized to provide the greatest promise of competition in both video and broadband services.[61]

Indeed, such conduct is pervasive even where the current program access rules *do* apply, because of the powerful drive to withhold vertically integrated programming. For example, Verizon was forced to file a program access complaint against Rainbow Media – a Cablevision subsidiary – in March 2006 in order to force Rainbow to the table to negotiate a carriage agreement for Fox Sports Net New York, Madison Square Garden, and Fox Sports Net New England.[68] These networks carry games from as many as nine professional sports teams in two of the largest media markets in the country (in which Verizon has now begun to compete with

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[66] Comcast has recently noted the availability of *some* of these RSNs to *some* competitors. See Senate Hearing 109-758, *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?* Hearing before the S. Comm. on the Judiciary, 109th Cong. 5 (2006) (statement of David L. Cohen, Executive Vice President, Comcast Corp.) ("S. Hrg. 109-758"). But that is now required by the *Adelphia Order,* which applies only to Comcast and Time Warner, and sunsets that protection if the Commission elects to do so generally in this proceeding.

[67] And as the incumbents have shown, the benefit of capturing subscribers through exclusive programming arrangements apparently outweighs the revenues of selling programming to competitors even where, as in the case of DBS, the competitor has millions of subscribers.

[68] *See* Program Access Complaint, *Verizon v. Rainbow Media arid Cablevision,* CSR-7010-P (filed Mar. 20,2006) ("Verizon Complaint").

Cablevision).[69] Verizon filed the complaint after more than a year of unsuccessfully trying to obtain carriage rights — a year during which Rainbow refused to provide Verizon with terms of carriage, refused to conduct negotiations of any kind concerning these sports networks, and often failed even to return phone calls.[70] **As** the incumbents' conduct demonstrates, the incentive remains strong – and, as Verizon's experience equally demonstrates, the need for the rule as a means of trumping that incentive remains even stronger.

The pi-esence of DBS competitors has done little to quell the cable incumbents' incentive to tie up programming. And that incentive is at its apex with respect to the even more nascent competition offered by telco new entrants. In 2002, the Commission found that the cable incumbents had incentives to withhold programming from DBS providers, which already had 18% of MVPD subscribers and thus arguably presented an attractive buyer's market for cable programming.[71] If that market share, and the grcatcr one DBS has amassed today, is an insufficient disincentive for cable incumbents to withhold programming, then new telco entrants — which today serve less than *two percent*[72] of all MVPD subscribers — can expect nothing

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69 The teams involved are the Boston Celtics, New England Revolution, New York Knicks, New York Rangers, New York Islanders, New Jersey Devils, Buffalo Sabres, New York Liberty, and MetroStars. *See Verizon Complaint* at 7.

70 *Verizon Complaint* at 2. Other MPVDs have had similar problems obtaining valuable sports pi-ogramming. For example, Cablcvision denied RCN access to the overflow pi-ogramming (games not featured on Cablevision's Madison Square Garden network) when more than one of the seven New York pi-ofessional sports teams on Cablevision's networks are playing simultaneously – although it granted RCN access to that programming in parts of New Jersey where Cablevision is not the dominant provider of cable service. ***See*** U.S. PIRG, ***The*** *Failure of Cable Deregulation: A Blueprint for Creating a Competitive, Pro-Consumer Cable Television Marketplace*, Aug. 12, 2003.

71 2002 *Order* at 12144-45 ¶ 46.

72 NCTA Comments, filed in MB Docket No. 06-189, Nov. 29, 2006, at 9.

better. Indeed, today telco video entrants stand in the place DBS stood, not in 2002, but in 1990, when the Commission and Congress first examined this problem. And cable incumbents' attitudes in the face of new entry have not changed since that time, making it just as (or even more) important that the Commission now keep in place the protection that Congress then adopted to ensure competitive video services.

In fact, the incentive of incumbents to block *telco* access *to* programming — and hence the video distribution market altogether — is even stronger than it was or is for DBS competitors, even apart from the low market share of telcos in the video market (and **thus** the minimal revenue loss associated with exclusivity). As the Commission just recently affirmed, the presence of a second wireline video provider in the market affects the price for cable service far more than does the presence of a DBS provider: "Specifically, the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition – about $5 per month."[73] As telcos have entered the market, this pattern has established itself: MSOs have dropped rates and offered new service packages rapidly.[74] The

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73 *Franchise Reform Order* ¶ 50. Other studies have confirmed the Commission's findings: A study from the American Consumer Institute found that when confronted by a new wireline competitor, incumbent cable providers have responded with lower prices, new high-speed data offerings, and better combination packages. *See* American Consumer Institute, *Does Cuble Competition Really Work? A Survey of Cable Subscribers in Texas*, March 2, 2006, *available at* http://www.theamericanconsumer.org/Consumers%20Saving%20from%20Competition.pdf.

14 *See, e.g.*, Sonia Arrison, *Reform Video Franchising Now*, TechNewsWorld, Feb. 17, 2006, *available at* http://www.technewsworld.com/story/48919.html ("Just weeks following passage of a bill last summer that authorized Texas to grant statewide video franchises, Verizon introduced its FiOS TV service in Keller, Texas, offering 180 video and music channels for US$43.95 a month, or a 35-channel plan for $12.95 a month. In response, the local cable company, Charier Communications dropped its prices, offering a package of 240 channels and fast Internet service for $50 a month. That's a big savings for the people of Keller, compared to the $68.99 Charter once charged for a TV package alone."); Andrew D. Smith, *AT&T Launching New Service in Bits*, Dallas Morning News, Mar. 6, 2007, *available ut* http://www.dallasnews.com/sharedcontent/dws/bus/stories/030607dnbusuverse.389efd2.html

competition spawned by telco entry is all the more critical given that cable prices have increased 93% overall since the adoption of the 1996 Telecommunications Act.[75]

The cable incumbents' incentive to resist telco entry is also reinforced by the competitive threat telcos offer outside of video, in the broadband market generally. As the Commission has found, broadband deployment and the provision of IP video are "inextricably linked," and thus telco video offerings "will likely speed deployment of advanced broadband services to consumers."[76] This will threaten the cable incumbents' lead in broadband services[77] and promote a competitive alternative to cable operators' broadband (and triple play) offerings.

In short, the incumbents have a substantial incentive to "run the table," as Comcast has put it. And they have already sought to do so: they are engaging in an all-out war to keep telco video entrants from entering the marketplace — opposing franchise relief pursuant to Section

("'We've seen rate cuts of anywhere from 25 percent to, in some cases, 50 percent off the price of cable from Time Warner and other cable companies,' said Verizon spokesman Bill Kula. 'Some of those reductions were in lower basic prices. Others were 'special offers' that got extended for a year or more at a time.'"); Comments of Verizon, filed in MB Docket No. 05-311, Feb. 1?, 2006, at 5, *quoting* Bank of America Equity Research, *Battle for the Bundle: Consumer Wireline Services Pricing*, at 10 (Jan. 23, 2006) (in areas where FiOS TV is now available, incumbents have offered price cuts of 28-42 percent, although they generally have "not actively advertised" these discounts or made them available in areas not served by FiOS TV); Aline van Duyn and Paul Taylor, *Battle of the Bundle is At the Doorstep*, Financial Times, Mar. 16, 2006 ("In Herndon [VA], ... Cox Communications has been providing bundled services for some time but was charging nearly $130 a month until ... Verizon Communications ... introduced a cheaper package of $109. In response, Cox customers who threaten to close their accounts are being offered a $90 monthly rate to stay.").

75 *See* Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Cable Programming Service and Equipment*, 21 FCC Rcd 15087, 15088 ¶ 2 (2006).

76 *Franchise Reform Order* at ¶ 51.

77 *See, e.g.,* Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14881-82 ¶ 51 (2005) (cable modem has 60% of the market); *id.* at 34884 ¶ 56 (cable modem and DSL will continue to compete head to head).

621, seeking to enjoin telco fiber deployments, impeding local franchise negotiations, and *threatening* and filing "level playing field" lawsuits.[78] There is no reasonable basis upon which the Commission could conclude, in the face of this campaign to stifle competitive entry, that now is the time to allow the exclusivity limit to sunset.

C. The Benefits of a Further Extension of the Obligation of Good Faith Negotiation Would Also Far Outweigh Any Minimal Costs of Such an Extension.

Because Section 628 prohibits cable incumbents from refusing to negotiate, AT&T and other new telco enti-ants have been able to negotiate programming agreements that allow assembly of an attractive competitive offering. As a result, AT&T has been able to sign up 10,000 U-Verse video subscribers.[79] Nevertheless, **AT&T** is just beginning to launch its video business. It is imperative that **AT&T** have the same opportunity to negotiate programming agreements when the existing contracts expire, not only so that it can attract new customers, but also in order to retain existing ones. **As** noted above, sunsetting this protection now would pull the rug *out* from undcr tclco new entrants just as the promise of real price and service competition – and broadband deployment – is most promising, and at a time when cable incumbents' ability and incentive to thwart it is even greater than it was in 2002. Moreover, sunset would be inconsistent with the other key goal of Section 628, which is to "spur the

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78 *See, e.g.*, *AT&T Franchise Reform Reply Comments*, *supra* note 6, Appendix C, at 10-12, 20-31.

79 Jn addition to its U-verse video product, **AT&T** is offering consumers the choice of an integrated DSL and satellite video service to subscribers across tlie lrgacy AT&T service area in 13 states. AT&T also has marketing arrangements with both DIRECTV and EchoStar to offer satellite television service to its customers. **As** noted above, it is important for these offerings that DBS providers also continue to have access to "must-have" programming. Indeed, Section 628 is intended "to spur tlie development of communications technologies" of all kinds. 47 U.S.C. § 548(a).

development of communications technologies,"[80] such as AT&T's upgraded technological platform.

In 2002, incumbent cable operators argued that extending this mandate would come at the cost of incentives to develop new cable programming networks. As a threshold matter, the Commission made clear in its 2002 order that any such effect should not be the "primary focus" of the inquiry, because of the emphasis in the statute on diversity "in the *distribution* of video programming" – i.e., "ensuring that as many MVPDs as possible remain viable distributors of video programming."[81] But the Commission rejected the suggestion in any event, noting that the number of national programming services had increased since the enactment of the limit on exclusivity from 87 to 294, and that the number of vertically integrated services had nearly doubled since 1994 (from 56 to 104).[82] Since that time, the number of vertically-integrated networks has further increased to 116.[83] Indeed, Time Warner's increasing investment in Oxygen starting in the late 1990s[84] established the network in the marketplace to such a degree

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80 ***Id.***

81 2002 *Order*, 17 FCC Rcd at 12152 ¶ 62, quoting 47 U.S.C. § 548(c)(5) (emphasis added by Commission).

82 *Id.* ¶ 64. These included the Golf Channel, the Outdoor Life Network, several Discovery Channel offshoots, the Independent Film Channel, Boomerang, and Oxygen.

83 *Compare* Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1309-10 ¶ 157 (2002) ("Eighth Report") (104 networks) *with Twelfth Report*, 21 FCC Rcd 2503 at 2575 ¶ 157 (116 networks). In any event, as noted above, the Act permits exclusivity in the limited situation where it can be demonstrated, *inter cilia,* to be essential for investment in new programming -- which is much different from the "must have" programming that is key to new entrants. *See* note 12 *supra.*

84 *See* Linda Moss, Cable World, *AOL Pressuring Time Warner Cable,* **Apr.** 9, 2001, *available ut* http://findarticles.com/p/articles/mi_m0DIZ/is_15_13/ai_73709971 ("With its Oxygen distribution deal, AOL Time Warner is making good on its promise to aggressively roll

that, in 2005, the network doubled its license fee per subscriber – the largest such increase that year among the 60-plus networks charging at least ten cents per month per subscriber.[85]

Finally, it is worth noting what the rule at issue does. Section 628(c)(2)(D) is limited in scope; it requires the cable incunibents to come to the table and negotiate. It does not set the terms of the contract or regulate rates,[86] and it certainly does not dictate the relationship between the cable incumbent and an affiliated programming network. Nor, for that matter, is it even a complete prohibition on any exclusive arrangements — if the incumbent can make a public intercsi showing in support of the arrangement, it may be approved." In light of this and Congress' and the Connnission's understanding of the clear harnis exclusive programming arrangements have in this market – and in light of concrete evidence to that effect – the Commission should retain the exclusivity limitation for another five years.

II. THE COMMISSION SHOULD ESTABLISH A FIRM 90-DAY DEADLJNE FOR RESOLUTION OF PROGRAM ACCESS COMPLAINTS AND MAKE SUCH COMPLAINTS SUBJECT TO THE COMMISSION'S FORMAL COMPLAINT PROCEDURES.

The Connnission's Notice also seeks comment on possible modifications to its program access complaint procedures.[88] There are two such modifications that are necessary in order to

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out channels it has a stake in."): Shirley Brady, Cable World, *Oxygen Goes Basic in N.Y.*, Nov. 19, 2001, *available at* http://findarticles.com/p/articles/mi_m0DIZ/is_47_13/ai_80487476 ("Time Warner Cable parent AOL Time Warner increased its minority stake in Oxygen Media earlier this year, and the two companies formed a strategic relationship."); *see also Kagan Report*, *supra* note 35, at 418 (listing Time Warner among the ownership of Oxygen).

85 ***See** Kagan **Report*** at 59.

86 *Compare* 47 U.S.C. § 548(c)(2)(D) (limiting exclusive contracts) with ***id.*** § 548(c)(2)(B) (prohibiting discrimination in prices, terms, and conditions).

87 S*ee* note 12 ***supra.***

88 *NPRM* ¶ 13.

make these procedures more effective, at a time when their protections have assumed even greater importance to promoting new video entry. First, the Commission should revisit its rules to "provide for an expedited review" of any Section 625 complaints, as the **Act** requires.[89] New entrants are particularly vulnerable to the delays from incumbents' refusals to negotiate for critical "must have" programming. Second, the Commission should expedite resolution of these cases by making program access complaints subject to the regime the Commission already has in place for adjudicating formal complaints, and further could expedite such cases by delegating program access complaints to the Enforcement Bureau.

A. The Commission Should Establish a 90-Day Deadline for Program Access Complaints.

Notwithstanding Section 628's admonition that the Commission should resolve program access complaints expeditiously, the track record for these cases, at least until 1998, was a year on average, with the longest taking 32 months to resolve.[90] In 1998, the Commission reacted to this problem by adopting a non-binding goal of resolving exclusivity complaints within five months, and all other program access cases within nine months.[91] But the one exclusivity complaint that appears to have been decided since that time took over eleven months to resolve – six months longer than the Commission's stated timeframe — even though the resolution of that

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89 47 U.S.C. § 548(f)(1).

90 *See* Petition for Rulemaking of Ameritech New Media, Inc. (filed May 16, 1997) at 12, citing Memorandum Opinion and Order, *American Cable v. Telecable of Columbus*, 11 FCC Rcd 10090 (1996) (December 1993 complaint addressed in August 1996 order).

91 Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 ¶ 41 (1998) ("Ameritech New Media Order").

case turned on the straightforward issue that the rules did not even apply.[92] The remainder of these complaints appear to have settled, but only after a lengthy period of time — often exceeding nine months.[93]

That is too long. Time – as the CEO of Comcast Iias made clear in touting his industry's first mover advantage[94] – is on the incumbents' side. A new entrant seeking to roll out service in various markets cannot wait five months or more for the Comniission to force a cable incumbent to come to the table in the first place. Waiting nine months for valuable RSN programming means that a new entrant, and its potential customers, will have missed an entire baseball, football, basketball, or hockey season. Mini-series and other "must see" shows on must-have cable networks can likewise come and go as a complainant waits to have its claim resolved. These delays can not only cripple the ability of a new entrant to attract new subscribers; they also can also seriously tarnish public perception of a new entrant's video offering during the critical period in which consumers are forming initial impressions of that offering. The damage to

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92 *See* Memorandum Opinion and Order, *Everest Midwest Licensee, LLC v. Kansas City Cable Partners and Metro Sports*, CSR-6094-P, DA 03-4077 (2003). Ultimately, the *Everest* complaint was dismissed on the basis that the network in question was not vertically integrated and was terrestrially delivered (despite the complainant's arguments to the contrary).

93 *See, e.g.*, Memorandum Opinion and Order, *Knology Holdings v. Time Warner et al*, 16 FCC Rcd 7093 (2001) (March 2001 settlement of November 1999 complaint); Order, *City of Ashland, Oregon v. WB Television, Charter Communications, et al.*, 16 FCC Rcd 1 1944 (2001) (June 2001 settlement of September 2000 complaint); Order, *DirecTV Inc.* v. *InDemand L.L.C.*, 21 FCC Rcd 3878 (2006) (April 2006 settlement of June 2005 complaint); Order, *Echostar Satellite L.L.C. v. InDemand L.L.C.*, 21 FCC Rcd 10085 (2006) (September 2006 settlement of July 2005 complaint); Order, *Verizon Telephone Cos., et al., v. Cablevision Systems Corp. & Rainbow Media Holdings, Inc.*, 21 FCC Rcd 13387 (November 2006 resolution of March 2006 complaint).

94 *See* Dow Jones Business News, *supra* note 7 and accompanying **text.**

competition can thus last well beyond the period in which the programming at issue is unavailable.

A 30-day binding deadline for resolution of these complaints would thus better reflect the Act's admonition that the Commission "pi-ovide for an expedited review" of program access complaints; particularly today in light of the anticompetitive incentives for delaying impending tclco entry. Such a deadline also would be consistent with the 30-day deadline established by Congress for section 271 complaints.[95] Indeed, section 271 complaints typically would be far more complex than the average program access coniplaint. While a program access coniplaint might allege nothing more than the existence of a prohibited exclusive contract or specific discriminatory terms on a limited number of issues, section 271 complaints can involve a host of service quality, price, and other conditions, relating to a broad array of facilities and services. There is no reason that program access complaints – especially those concerning exclusive contracts – cannot be resolved within the same 90-day time frame accorded section 271 complaints.

And the parallels arc clear: Congress saw the need for a short turnaround for section 271 coniplaints because it perceived a risk that the BOCs' entry into long distance could adversely affect competition from new entrants if the market were not fully open. The Commission needed to be able to act swiftly if market foreclosure appeared likely. By the same token, if **a** new entrant were foreclosed from obtaining must-have programming when it *is* ready to roll out, its entry could be deterred altogether, or it might enter without the attractive programming, and fail

[95] 47 U.S.C. § 271(d)(6)(B); *see* Report and Order, *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing* ***Procedures*** *to* ***be*** *Followed When Formal Complaints are Filed Against Common Curriers,* 12 FCC Rcd 22497, 22504 ¶ 12 (1997). As a BOC itself, AT&T must defend against such complaints.

to attract subscribers, advertisers, and ultimately, investment. Based on these concerns and the *Act's express admonition to act quickly, the Commission should* adopt a binding 90-day deadline for resolving program access complaints.

B. The Commission Should Apply to Program Access Disputes Its Established Procedures lor Adjudicating Formal Complaints.

Unlike complaints about violations of many other provisions of the Communications Act, complaints alleging violations of Section 628 historically have not been the province of the Enfool-cement Bureau. Instead, they have been the province of the Media Bureau, which lacks the Enforcement Bureau's resources in adjudicating enforcement matters. This no doubt contributes to tlie length of program access complaint adjudications, and makes the process more cumbersome for all involved. The Commission could remedy this by delegating tlie authority over these coniplaints (and enforcement of the program access rules more generally) to the Enforcement Bureau.

Relatedly, the Commission should apply the formal complaint regime to Section 628 coniplaints. That regime includes established and practical rules governing pleading, discovery, and motions applicable to common carrier complaints.[96] Applying this regime to Section 628 complaints would create clearer expectations on the part of complainants and defendants, and eliminate the unproductive disputes and ambiguity that now lard down program access complaint proceedings and delay their resolution. Like tlie 90-day deadline, application of tlie formal complaint procedures would help the Commission better discharge its statutory obligation to expedite resolution of program access complaints.

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[96] 47 C.F.R. §§ 1.720 *et seq.*

Application of those rules will also help ensure that complainants have access to the self-propounded discovery that is often critical to their enforcing their rights under Section 628. While nothing precludes discovery under the existing regime for Section 628 complaints, as a practical matter, it has been largely unavailable in such proceedings, rendering complainants largely helpless to prove their allegations in many cases. The Commission's formal complaint procedures, conversely, require defendants to identify all documents in their possession that are relevant to any facts alleged in the answer and to automatically produce all documents on which their defense will rely.[97] The Commission should make clear that these rules will be strictly applied. In addition, to remedy the clear limitations that have plagued enforcement of the program access rules to date, it should further clarify that – where relevant based on the allegations of the complaint – the defendant will be required to produce, either with its answer or upon service of appropriate discovery under the formal complaint rules, copies of other contracts entered into for the programming at issue. Section 628 expressly provides the Commission with explicit statutory authority to "obtain copies of all contracts and documents" reflecting arrangements alleged to violate the program access rules.[98]

AT&T recognizes that contracts between vertically-integrated programmers and third parties include highly sensitive and proprietary information that deserves protection. Thus, these materials should be automatically protected. The Commission's formal complaint rules already codify confidentiality procedures that should apply to program access complaints as well.[99] But to further ensure that defendants are amply protected, the Commission should apply its

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97 *See id.* § 1.724(f)(2), (g).

98 47 U.S.C. § 548(f)(2).

99 *See* 47 C.F.R. § 1.731.

standardized protective order for program access complaints, that all parties may utilize.[100] For greater clarity, this order can and should be codified in the rules applicable to program access complaints. Such a measure will eliminate individualized disputes and speed the process of discovery and ultimately resolution of complaints.

Finally, given the anticompetitive incentives that Section 628 was designed to forestall, the Commission should also make clear that the Enforcement Bureau will make appropriate use of Section 503 of the Act so as to deter willful or repeated violations of incumbent cable operators' obligations under the Act.[101] Those obligations should be enforced no less rigorously than the obligations of broadcasters or common carriers.

Conclusion

For the reasons set forth above, the Commission should extend the limitation of Section 628(c)(2)(D) for an additional five years, subject to review proceedings to be initiated within the one year period prior to the expiration of the additional five year period. The Commission should also provide for its resolution of program access complaints within 90 days and revise its rules to adopt for such complaints the established formal complaint procedures adopted to enforce other provisions of the Communications Act. As it has done in the past, the Commission should seek to increase customer choice by ensuring consumers will have the ability to subscribe to "must have" programming no matter whom they select as their video provider.

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[100] *Ameritech New Media Order* ¶ 61 & app. B. This standard order restricts access to confidential information to counsel (including in-house counsel) to the extent reasonably necessary to render professional services, and to technical or other experts (including employees of a party), except to persons "in a position to use this information for competitive commercial or business purposes." *Id.* It imposes limits on copying and use of documents, and contains procedures designed to enforce its confidentiality requirements. *Id.*

[101] 47 U.S.C. § 503.

Respectfully submitted,

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April 2, 2007