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

REPLY COMMENTS OF ECHOSTAR SATELLITE L.L.C.

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SUMMARY

With the exception of vertically-integrated cable companies, the consensus of all other commenting parties – DBS, big telco, mid-sized and small telco, mid-sized and small cable, consumer groups, the Small Business Administration, and broadband service providers – is that market conditions have not changed significantly since the Commission's 2002 decision to extend the ban on program exclusivity, so the Commission should affirm its prior findings here. Based on concrete evidence, competitive video providers are unified in their belief that, if given the opportunity, cable conglomerates would withhold some portion of their 100+ valuable programming assets from competitors. A modest five-year extension would ensure that Commission policy helps foster diversity and consumer choice among a wide-variety of video platforms, including those serving rural, foreign-language, low-income, and other underserved populations.

Likewise, almost all commenters agree that the Commission's current program access procedures are not well-suited for resolving time-sensitive, commercial disputes. Nor should they be. The Commission is a large regulatory agency with many competing priorities. The Commission itself has already recognized that commercial arbitration is a much better forum for resolving programming disputes and, thus, it adopted extensive arbitration procedures in two recent, high-profile mergers. It's time to extend those benefits to the remaining categories of vertically-integrated programming. Congress believes that all vertically-integrated programming -- not just a subset of regional sports networks -- deserves equal protection, including the "expeditious" resolution of all programming disputes.

Even with arbitration, however, a parallel adjudicatory process at the Commission remains necessary. We agree with cable that a subset of programming disputes (*e.g.*, disagreements over the interpretation of statutory language) may not lend themselves to arbitration. The Commission should, therefore, use this opportunity to improve its existing program access procedures. Most commenters are in agreement that: (1) complaints should be resolved more expeditiously; (2) consumers should be insulated from the back-and-forth of commercial negotiations; and (3) standardized discovery rules need to be implemented to prevent manipulation of the process.

It bears highlighting that the vertically-integrated cable providers oppose any changes to the procedural rules, including the addition of an arbitration mechanism. This is not a surprise. A broken procedural regime that is cost-prohibitive deters competitive video providers from even filing complaints. Toothless discovery means that any discrimination that does exist is unlikely to be revealed. If no discrimination is taking place, however, then strong enforcement procedures should be of no concern. Clearly the benefits of shoring up the Commission's rules – including adding an enforcement mechanism based on arbitration – outweigh any potential harm.

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REPLY COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") supports the retention of the exclusivity prohibition on cable-affiliated programming, the creation of an arbitration enforcement mechanism within the program access regime, as well as concrete reforms to the Commission's program access procedural rules to facilitate video competition.

I. COMPETITIVE MVPDS NEED ACCESS TO PROGRAMMING CONTROLLED BY DOMINANT CABLE PROVIDERS.

In evaluating whether the exclusivity prohibition should be eliminated, a critical issue is whether the video competition and programming markets have changed so fundamentally as to preclude vertically integrated cable providers from abusing the programming market. The vast majority of commenters are correct that the Commission's "concerns are as valid today as they were in 2002," as market conditions in 2007 mirror closely those in 2002.[1] In making its determination, the Commission need not consider cable's attempts to re-argue legal issues addressed fully in the prior review.

A. Current Market Conditions Support Extension of the Exclusivity Prohibition.

Current market trends support fully the Commission's 2002 findings. In the words of the Small Business Administration, the "MVPD market has not changed significantly since that 2002 analysis." *SBA* at 5. In particular, neither the continued incremental gains of competitive MVPDs, nor the increase in total domestic and international unaffiliated programming materially alters the incentive or ability of vertically integrated cable providers – now even larger than in 2002 – to inhibit competitive MVPDs' access to the 100+ vertically integrated cable networks.

1. Cable Conglomerates Have Increased Their Market Power Since 2002.

The most relevant metric for this review is the size of the handful of vertically integrated cable companies. The Commission explained in 2002 that "the number of subscribers that a vertically integrated cable programmer serves is of particular importance in calculating the benefits of withholding programming."[2] Thus, any change in the relative size of these conglomerates is the appropriate starting point to evaluate whether vertically

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1 *Qwest* at 2; *AT*&T at 3 ("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."); *DIRECTV* at 5; *Verizon* at 8 (concluding that the "Commission's finding remain valid today"). In fact, based on the substantial consolidation amongst cable conglomerates since 2002, a number of commenters note that cable's ability to act abusively in the programming market has been enhanced in the past five years. *See ACA* at 2 (noting that the "risk of harm has increased since the Commission['s] last" review); *RICA* at 2 (same); *USTelecom* at 12 (finding that the Commission "should be at least as troubling as the MVPD Market of five years ago").

2 *Implementation of the Cable Television Consumer Protection And Competition Act of 1992*, Report and Order, FCC 02-176, ¶ 38 (2002) ("*2002 Order*").

integrated cable providers maintain the incentive and ability to act in an anti-competitive manner.

Verizon and other commenters note that the largest cable providers control a far greater portion of the MVPD market today than they did only five years ago. *Verizon* at 11-12; *USTelecom* at 9; *ACA* at 9-10. Specifically, the four largest vertically integrated cable providers (Comcast, Time Warner, Cox, and Cablevision) now serve over 56 percent of the MVPD market, compared to only 34 percent five years ago. USTelecom explains that "[i]ncreased consolidation leads to a heightened opportunity for destroying actual and incipient competitors." *USTelecom* at i.

This consolidation only continues: Comcast has entered into two additional agreements to enhance its market power since the start of this proceeding alone, acquiring 81,000 Patriot Cable subscribers and 684,000 Insight subscribers.[3] Commenters conclude correctly that the expanded access of vertically integrated cable companies – now able to reach over one-half the MVPD households – only strengthens their incentive and ability to profit from exclusionary tactics.

Cable sidesteps their impressive consolidation efforts altogether. Rather, in their view, an increase in the national MVPD market share of DBS providers should be dispositive. *Comcast* at 7-8; *Cablevision* at 11-12; *NCTA* at 4-5. As was the case in 2002, DBS providers remain a regulatory success story due to a number of commercial and regulatory factors, *e.g.*, local-into-local authority, low-cost service, high customer satisfaction, and program access protections. The incremental national growth of DBS providers since 2002 is certainly relevant to this inquiry. That said, the actual DBS market

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[3] Farrell, Mike, "Comcast Buys a Patriot," MULTICHANNEL NEWS (Apr. 9, 2007).

share within the footprints of the cable conglomerates is more probative as to the potential profitability of a foreclosure strategy, because national figures often obscure the realities of cable/DBS competition on a local or regional basis.[4]

Specifically, as a national service, DBS providers compete in each region of the country against a variety of different sized cable providers (large, mid-sized, and small cable providers). Across the nation, DBS providers now serve approximately 28 percent of all MVPD households. In contrast, the largest cable providers (Comcast, Time Warner, Cox, Cablevision, and Bright House) are regional and super-regional players with dominant market positions in the communities they choose to serve. For instance, Comcast has a dominant market share that reaches over 80 percent in many communities it serves.[5] Similarly, Cablevision reports that DBS providers control only a small subset of their market, less than 15 percent.[6] Thus, according to Cablevision's figures, each DBS provider serves less than 8 percent of that market, significantly shifting the debate as to the ability of vertically integrated cable providers to use exclusionary tactics. The national DBS penetration figures cannot be viewed in isolation.

The other metric relied upon by cable is the total MVPD market share of all cable providers nationwide, 69 percent. *NCTA* at 4-5. It is true that the relative market share of cable has decreased since 2002, but as discussed above, that decline is not amongst the

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4 The Commission should also be careful not to view the DBS industry as single entity. A foreclosure strategy could be implemented against one or the other DBS provider. Cable providers need not use exclusionary tactics against EchoStar and DIRECTV at the same time or with the same strategy. *See 2002 Order,* ¶ 60.

5 *DMA Households Universe Estimates: Cable and/or ADS (Alternate Delivery System),* source Nielsen Media (Feb. 2007).

6 Cablevision Systems Q2 2006 Earnings Conference Call Transcript (Aug. 8, 2006) ("*Cablevision 2Q06 Earnings Call*").

large vertically integrated cable companies. A more granular review of cable market's share in a sample of DMAs served predominately by vertically integrated cable providers reveals the continued market power of the largest cable companies.

Table 1: Cable/Competitive MVPD Market Share by DMA (Feb. 2007)[7]

DMA (Main Cable Provider)	Cable	Competitive MVPDs
Philadelphia (Comcast)	83.3%	17.9%
New York (Cablevision)	84.5%	17.4%
San Diego (Cox)	89.3%	11.3%
Austin (Time Warner Cable)	80.5%	20.3%
Tampa/St. Pete (Bright House)	81.4%	19.2%

The reduction in market share of non-vertically integrated mid-sized and small cable providers – which happen to support the exclusivity prohibition – is not justification for eliminating the prohibition.

Similarly, cable's focus on telco video investment is exaggerated. *Comcast* at 8-9; *Cablevision* at 12-13. Both cable providers dedicate pages of their pleadings to the threat of telco video competition, based largely on proposed investment plans through 2010. *See e.g., Cablevision* at 2 (discussing "expected" telephone competition). Cablevision's posture to Wall Street is informative: "The Verizon product is a 'me too' product, it offers nothing new to subscribers. There's really no reason why anyone would want to switch from our service to theirs." *Cablevision 2Q06 Earnings Call.* Cable cannot have it both

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7 *DMA Households Universe Estimates: Cable and/or ADS (Alternate Delivery System)*, source Nielsen Media (Feb. 2007).

ways: bulletproof from video competitors when speaking to investors, while painting a picture of rapidly declining market share to regulators.[8]

2. Vertically Integrated Cable Providers Maintain Control Over Critical Programming Assets.

As the Commission set out in 2002, this review "is not related to the loss or lack of need for particular services but to the effect abolition of the limitation would have on competition in diversity in the distribution of video programming generally." *2002 Order*, ¶ 58. The central issue is whether vertically integrated cable providers retain the incentive "to withhold some important programming services." *Id.* With well over 100 programming networks, cable conglomerates clearly control important programming services, including many of the most subscribed to networks. Hence, they retain the ability to manipulate the video market. It is hard to envision a viable MVPD service offering that does not include many of these 100+ programming services.

Although withholding "must have" non-substitutable programming is the most dangerous from a competitive standpoint, the Commission has already refused to be placed in the "untenable position of designating certain programming as more essential than others." *2002 Order*, ¶ 69. Further, the Commission "recognize[d] the difficulty of

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[8] The repeated references to emerging forms of video services – mobile video, online video and Netflix (a "national phenomenon") – lack perspective. *Comcast* at 9-10; *Cablevision* at 14-5. Cable makes no effort to suggest that these developing video services are (or will be) substitutes to traditional MVPD services. Based on their logic, the exclusivity prohibition must remain in place given the demise of the Blockbuster home rental market. *See, e.g.*, Daniel McGinn and Ramin Setoodeh, "Rewinding A Video Giant Blockbuster is under attack from all sides," NEWSWEEK, 38 (June 27, 2005). Cablevision hyped the same competitive effects of online video in 2002 as well. Comments of Cablevision Systems Corp., MB Docket No. 07-29, 21, 25 (Apr. 2, 2007) ("*Cablevision 2002*").

developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition." *Id.*

Lost in cable's analysis in both 2002 and 2007 is that the determinative issue is not whether the video programming market is nominally more competitive than it was in 1992 or 2002. The inquiry is whether cable providers retain the market power to use their programming assets in an anti-competitive manner to undermine competitive inroads and act as a formidable barrier to competitive viability. The answer is yes: five companies control over 100 channels of video programming, and could withhold dozens of networks from competitive MVPDs if the exclusivity prohibition were lifted. *See RCN* at 8. AT&T notes accurately that "MVPDs still remain highly dependent on key programming owned by the established cable MSOs." *AT&T* at 11.

Nonetheless, Cablevision attempts to transform programming networks into interchangeable industrial widgets, going as far as to suggest that "no cable network can any longer be considered must have programming."[9] Yet again, cable's own words reveal the opposite. After trumpeting investments in the Golf Channel, E!, Sprout, and OLN (Versus), Comcast told investors that "[w]e believe these investments are critical to our objective of making our emerging portfolio of content assets must-have programming for distributors."[10] All cable networks seek to differentiate themselves with "must have" programming, and reap the benefits of corresponding profits and widespread carriage.

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[9] *Cablevision* at 2, 19-20. This same argument, with the same channel comparisons, was taken practically verbatim from Cablevision's 2002 comments. *Cablevision 2002* at 36.

[10] Comcast Corporation Q1 2006 Earnings Conference Call Transcript (Apr. 27, 2006).

NCTA's similar boast that affiliated cable programming "no longer constitute[s] the essential core of MVPD programming lineups" cannot withstand scrutiny. *NCTA* at 6. ACA directly refutes that statement finding that cable-owned networks continue to represent "a significant amount of the programming carried on ACA member systems."[11]

Similarly, cable's contention that they no longer have the ability to discriminate relies upon an intrinsically flawed statistical comparison. Just as they did in 2002,[12] cable draws great significance from the Commission's calculation of the percentage of national programming affiliated with cable providers. *NCTA* at 5-7; *Comcast* at 11-13; *Cablevision* at 3. A straight comparison of the percentage of affiliated cable programming in 2002 and 2006 – *i.e.*, 35 percent vertically integrated in 2002 compared to 21.8 percent in 2006 – is irrelevant because it is not a valid apples-to-apples comparison.

Specifically, in producing its *2006 Annual Video Report*, the Commission dedicated significant resources to providing a full picture of all video competition in recent years, "updat[ing] our prior estimates based on additional data sources."[13] In doing so, the Commission identified a number of international offerings for the first time, based on greater "research efforts … on international networks." *Id.*, fn 572. The Commission readily acknowledged that these international offerings may not be "new" offerings in their

11 *ACA* at 1; *CA2C* at 14 (finding that cable affiliated networks are critical to a competitive MVPD offering); *NRTC* at 7 (explaining "must have remains just that").

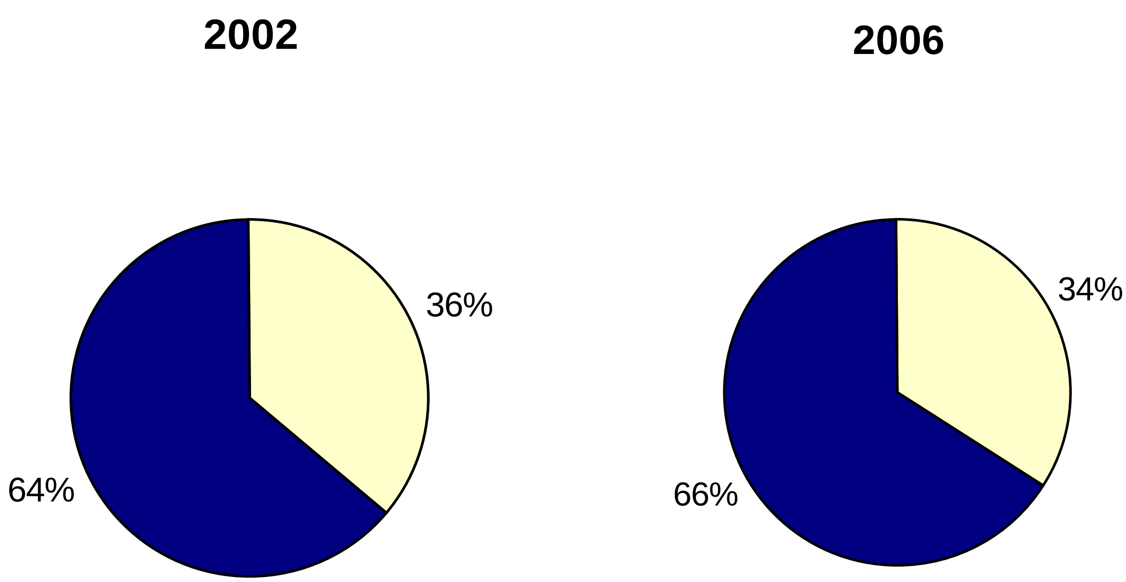
12 *Cablevision 2002* at 30-1; Comments of Comcast Corporation, CS Docket No. 01-290, 7-8 (Dec. 3, 2001) ("*Comcast 2002*").

13 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, FCC 06-11, ¶ 158 (2006) ("*2006 Annual Video Report*").

country of origin or even in the United States market.[14] EchoStar's own experience bears out that prediction. For instance, DISH Network has offered Antenna Satellite (Greek) for over ten years, and the Israeli Network (Hebrew) for over six years even though they appeared in the Commission's annual video competition report for the first time last year. Further, the potential availability of the Saigon Broadcasting Television Network does not inform the debate on whether TBS is important programming to rival MVPDs.

Controlling for international and non-English programming, the following graphs show the percentage of vertically integrated domestic programming in 2002 and 2006.

Table 2: Domestic Affiliated Programming[15]



[14] *2006 Annual Video Report*, fn 572 (explaining that "MVPDs may have carried some of those networks prior to the release of last year's report.").

[15] Appendix A provides full statistical breakdown of domestic and international/non-English programming in 2002 and 2006.

Contrary to cable's comparison, this more granular review reveals that the percentage of affiliated domestic programming has remained steady from 2002 to 2006, with cable providers maintaining control of over a third of all programming, 36 percent and 34 percent respectfully. The lack of any discernable shift in the domestic programming market since the *2002 Order* underscores the lack of need to revisit the Commission's prior findings.

We also agree with commenters that the large cable conglomerates continue to control many of the most subscribed to cable networks.[16] AT&T's analysis of the most carried 91 networks (those with at least 20 million subscribers) is compelling: 33 out of those 91 networks, or 36 percent, are vertically integrated. *AT&T* at 12-3. Similarly, Verizon notes that 32 percent of the networks on FiOS TV are vertically integrated with incumbent video providers. *Verizon* at 8. Again, in each of these metrics, approximately one-third of the programming is vertically integrated.[17]

[16] *Qwest* at 3 (three of the top four channels); *DIRECTV* at 7; *Verizon* at 8; *AT&T* at 8. ("cable incumbents continue to control programming that is critical to the success of competing video providers."); *CA2C* at 15.

[17] NCTA's selective use of prime time rankings is misleading. *NCTA* at ii. NCTA notes that "seven of the 15 top-rated networks were vertically integrated with cable operators in 2002, only three are cable-affiliated today." *Id.* Three cable-owned remain (TNT, Discovery, and TBS) in the top fifteen, and one remains among the most popular but is now affiliated with NBC (USA). While no longer in the top fifteen in prime time ratings, the last two cable networks remain among the most subscribed to national networks (TLC number 12 and Cartoon Network number 19). *See* NCTA Top 20 Cable Programming Networks – As of December 2006. The seventh network Sci-Fi, was not even in the top fifteen in 2002, it was number sixteen. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Video Report, FCC 01-389, Table D-7 (2002). This is in many ways a distinction without a difference, but the exclusion/inclusion of Sci-Fi underscores the arbitrariness of selecting a small set of the most popular or most subscribed to networks for this review. The broader review conducted by AT&T and Verizon provide a more valid result.

Cable's broader argument that the wider availability of alternative programming assets prevents vertically integrated cable providers from harming competitors through withholding affiliated programming is an unviable proposition. *NCTA* at 7. This same argument was raised and rejected in 2002. *Cablevision 2002* at 35-6. Cable offers no basis to revisit the Commission's prior findings. Specifically, the Commission found that programming is "not akin to so many widgets … Even when there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channels." *2002 Order,* ¶ 33. The Commission continued that "even if an acceptable substitute is found, the competitive MVPD is still harmed because its competitors can likely offer to subscribers both the unavailable programming and its substitute." *Id.*

The Commission's findings remain accurate: if Time Warner withheld CNN from a rival MVPD, the availability of Fox News does not protect against customer dissatisfaction from Wolf Blitzer or Larry King's fans being denied CNN.[18] Comcast's own analysis concurs: "no programming network, whether or not affiliated with a cable operator, wants to produce programming that replicates the content of other programming networks." *Comcast* at 22.

Cablevision's similar attempt to underestimate the value of regional networks lacks credibility.[19] Verizon and others stress the critical importance of regional offerings.

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18 Cablevision's unconvincing rebuttal that the "prevalence of channel surfing supports the idea that such substitution is sufficiently common that the number of marginal consumers is large" is not grounded on a single qualitative study or economic principle. *Cablevision,* Wallsten Declaration at 18, fn 56.

19 *Cablevision* at 22-27. Cablevision focuses on the fact that regional networks are less vertically integrated today than in 2002. *Cablevision* at fn. 80. The key shift since 2002 was Cablevision's own decision to restructure the Fox Sports Networks with News

Verizon at 10; *CA2C* at 14. The Commission has found repeatedly that "[a]ccess to regional programming is an important component of competitive success, and the withdrawal of regional services by itself would threaten the preservation of competition and diversity in the distribution of video programming." *2002 Order*, ¶ 59. Regional programming continues to impact competitive viability as evidenced by the Commission's heightened protection for regional sports networks in *Adelphia/Comcast/Time Warner* last year.[20]

B. The Commission Should Dispose Quickly of Rehashed Legal and Policy Arguments Rejected in 2002.

Beyond their selective use of Commission statistics, cable repeats many of the same arguments unsuccessfully raised in 2002 to support the elimination of the exclusivity prohibition. In doing so, they fail to provide any additional evidence to support their previously rejected positions. The Commission should, therefore, extend the prohibition in full[21] for an additional five years consistent with its prior decision and the overwhelming

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Corp, and the resulting consolidation of its own stake in key RSNs, like Madison Square Garden Network. News Release, Cablevision and News Corporation to Restructure Ownership of Sports and Entertainment Assets (Feb. 22, 2005). There are sixteen RSNs vertically integrated with cable conglomerates today, seven of which are new since 2002. *2006 Annual Video Report,* Table C-3. More generally, there are 44 vertically integrated regional networks in total. *Id.,* ¶ 166.

[20] *Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc., Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee,* Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 181 (2006) ("*Adelphia/Comcast/Time Warner*").

[21] Cablevision and Comcast seek to limit the prohibition's reach based on a number of self-serving factors. *Comcast* at 26; *Cablevision* at 30-31. The Commission rejected similar partial sunset proposals in 2002. *2002 Order*, ¶¶ 56-60. Moreover, unlike the *2002*

record support in this proceeding.[22] In short, "every factor that the Commission found relevant in 2002, and every policy rationale underlying the limitation, supports its extension." *AT&T* at 9.

1. The limited exclusivity prohibition does not distort the programming market.

Cable suggests that lifting the prohibition is critical to eliminating a distortion in the programming market, yet the only "distortion" addressed in any detail is DIRECTV's exclusive sports franchises. *NCTA* at ii; *Comcast* at 24-26. Putting to one side the

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Notice, this *Notice* did not address a partial sunset, so procedurally such a request is beyond the scope of this proceeding. *Implementation of the Cable Television Consumer Protection And Competition Act of 1992,* Notice of Proposed Rulemaking, 16 FCC Rcd 19074, ¶ 14 (2001). Nevertheless, neither Comcast nor Cablevision provides a policy justification for reversing the Commission's prior finding or for drawing arbitrary lines in the types of providers or services subject to the exclusivity prohibition. In essence, cable seeks to re-write the statue to protect only the newest potential competitors. Remarkably, even Comcast's own citations contradict their view. Specifically, Comcast cites the following Commission statement to support the proposition that Congress "did not intend to bolster established and powerful distributors," like DBS. *Comcast* at 20. "The focus of Congress in enacting the program access provisions … was to encourage entry into the [MVPD] market by existing or potential competitor." *Id.* (citing *Notice*, ¶ 2) (emphasis added). It is clear that Congress sought to protect and preserve *both* existing and new competitive entrants. Cablevision's attempts for a partial sunset for low-ratings services, new services, or non-sports regional programming should be addressed on a case-by-case basis through the existing waiver process that has provided relief to similar programming ventures in the 1990s. *See New England Cable News*, 9 FCC Rcd 3231 (1994).

[22] *DIRECTV* at 12 ("five years is the minimum amount of time before market changes could be expected to significantly change the incentives of cable operators and affiliated programmers"); *AT&T* at 5 ("another five years"); *RCN* at 21 (same); *EATEL* at 5 (same); USTelecom at i (same); *OPASTCO and ITTA* at 3 (same); *SureWest* at 5 (same). Only Cablevision suggests a further extension would be legally problematic, and then only in a footnote. *Cablevision* at fn 13. The Commission has clear authority to extend the exclusivity prohibition for another term, as it found correctly in 2002 that an automatic sunset is not appropriate because the exclusivity prohibition should remain in place until the Commission finds a healthy MVPD market has developed. *2002 Order,* ¶¶ 77-80.

propriety of DIRECTV's own conduct,[23] the exclusivity prohibition does not limit cable's ability to compete for unaffiliated sports programming, including those out-of-market packages. *Cablevision* at 17. To date, they have simply chosen not to do so. Indeed, DIRECTV acquired the exclusive rights to NFL Sunday Ticket by outbidding cable.[24] Further, under the *News/Hughes* merger conditions, DIRECTV is now subject to the same program access regime as cable providers with respect to vertically integrated programming assets, correcting any perceived distortion in the market.[25]

Moreover, repeatedly lost in cable's arguments is that this prohibition is a congressionally imposed corrective action deemed necessary because vertically integrated cable providers used exclusive programming as a barrier to entry, not as a means to attract customers.[26] Verizon explains that this prohibition is "a limited remedial provision to address a problem unique to the cable industry." *Verizon* at 1. Cable should not be

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[23] EchoStar shares RCN's concern that DIRECTV's use of exclusive contracts has competitive implications warranting close scrutiny. *RCN* at 13. Likewise, SureWest's proposal to review the impact on competition and consumers of exclusive national sports programming packages has merit. *SureWest* at fn 17. Given the limited reach of Section 628, the more appropriate forum to address these concerns is the *Liberty/DIRECTV/News Corp* merger review docket.

[24] *See* Steve Donohue and Mike Reynolds, "Cable Punts On Pricey NFL Slate," MULTICHANNEL NEWS (Nov. 15, 2004) (noting that "[it's no secret cable was interested in Sunday Ticket, but the price was too high.").

[25] *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004)("*News/Hughes*").

[26] *See* Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92, 102d Congress, 1st Sess. 28 (1991) (finding that "exclusive [contracts] may tend to establish a barrier to entry and inhibit the development of competition in the market."). *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, *6 (1995) ("*Olson/Spiwak*") (finding that "product differentiation on a sufficient scale can, in fact, impede or deter entry into the local distribution market.").

permitted to divorce themselves from their past conduct and the punitive nature of this prohibition with oblique references to the theoretical economic value of exclusive contracts or the use of such contracts by other media companies in other industries.[27]

2. The inadequacies of antitrust relief engendered the need for the program access regime.

In 2002, Cablevision and Comcast (then AT&T) suggested that antitrust relief is more than sufficient to serve as a backstop if the exclusivity prohibition were eliminated.[28] The Commission rejected that view outright: "Congress already determined that antitrust laws were not a viable alternative for achieving the government's goals in this instance." *2002 Order*, fn 138. Nonetheless, Comcast and Cablevision make the same arguments again here. *Comcast* at 23; *Cablevision* at 18.

The Cable Act was enacted because the antitrust process was found to be grossly inadequate to address competitive harms in the programming industry caused by anticompetitive behavior of cable conglomerates. Antitrust was deemed too slow and ineffective a remedy. In contrast, a "regulatory remedy is less costly, far faster, and more effective than if prospective plaintiffs sought similar relief under the antitrust laws."[29] Of particular concern, there is no means to check abusive behavior prospectively in antitrust law, and absent a stay, the competitive harm of using exclusive programming as a barrier

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27 *See Comcast* 14-8; *Cablevision* at 29. These same arguments were raised by cable commenters almost verbatim in the 2002 review to no avail. *Cablevision 2002* at 2, 18; *Comcast 2002* at 13.

28 *See* Comments of AT&T, MB Docket No. 07-29, 24 (Apr. 2, 2007); *Cablevision 2002* at 37-40.

29 *Olson/Spiwak* at *14.

to entry – loss of subscribers – is irreparable. In addition, antitrust litigation itself "is an expensive, time-consuming process with often uncertain results." *Id.*

In attempting to elude the exclusivity prohibition, cable continues to mischaracterize its scope. *Comcast* at 24. Congress did not reflexively outlaw all exclusive contracts. The statute provides a built-in means for cable companies to enter into exclusive contracts based on a public interest test. 47 U.S.C. § 548(c)(4). For whatever reason, cable providers have rarely taken advantage of this process. Their apparent reluctance to use this mechanism does not, however, will away its existence or its relevance to this inquiry.[30]

3. Cable providers withhold programming for competitive reasons today, demonstrating the profitability of such tactics.

The most illustrative and well-documented anti-competitive conduct remains Comcast's use of its SportsNet property to forestall competitive entry of satellite providers in Philadelphia.[31] Commenters have now offered a number of additional examples of ongoing cable misconduct. Remarkably, each of these incidents occurred while the exclusivity prohibition is in place. NRTC reports that it has failed to gain distribution

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[30] Cablevision's additional claim of burdening constitutional protected speech was also raised and rejected by the Commission in 2002. *Compare Cablevision* at 10 *to Cablevision 2002* at 40-42. The Commission found that "[t]he exclusivity prohibition was previously upheld in the face of a First Amendment challenge. *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996). Moreover, we do not find persuasive [cable's] contention that commenters favoring retention fail to provide 'substantial evidence' that sunset of the prohibition would significantly hamper competition and/or diversity, as required under the intermediate scrutiny test. *Id.*, citing *Time Warner Entertainment Co. L.P.*, 93 F.3d at 979 (upholding section 628's prohibition on exclusive contracts using intermediate scrutiny test)." *2002 Order*, fn 138. Cablevision does not provide a basis to modify this finding.

[31] Exclusive programming provided pursuant to the terrestrial loophole remains a critical competitive issue that needs to be addressed. *See SureWest* at 4; *BSPA* at 16; *AT&T* at fn. 24; *USTelecom* at 44.

rights for all requested programming except "two [networks] (both vertically integrated with cable system operators)." *NRTC* at 5. RICA highlights AT&T's struggles gaining access to San Diego Padres games due to Cox's unwillingness to provide access. *RICA* at 4. EATEL reports that it "was prohibited from carrying KZUP, originally carried on EATEL Channel 13, and LPB Kids & You, originally carried on EATEL Channel 11, due to what EATEL believes are exclusive arrangements between the content providers and Cox." *EATEL* at 3. RCN notes its past struggles to gain access to Comcast's New England Cable News (NECN). *CA2C* at 16. Finally, Verizon notes a more recent trend in which cable providers attempt to evade the program access rules by stripping out HD feeds of programming and delivering those feeds under the terrestrial loophole. *Verizon* at 7, 13.

Despite this checkered history, cable maintains that the "elimination of the ban is unlikely to precipitate the withdrawal of a substantial amount of cable-owned programming from rival MVPDs." *Cablevision* at 4; *NCTA* at 6-7 (same). Just as they did in 2002, cable suggests that they would be "unable to recoup the significant license fees and advertising revenues lost when not distributed over competing platforms." *Compare Cablevision* at 16 to *Cablevision 2002* at 29. Cable ignores the Commission's findings in 2002 on this same issue, and fails to account for their greater market power and larger footprints today.

In 2002, the Commission found that "there will likely also be many instances in which the economic incentive will be to offer programming on an exclusive basis to a subset of MVPDs." *2002 Order*, ¶ 53. The expanded reach of vertically integrated cable companies only multiplies the number of instances in which this incentive will exist. The Commission continued: "if the long-term result is to limit or eliminate competition, the exclusive arrangement will result in increase profit through the subscriber that migrate from failing or defunct competitors … and through the ability to raise rates without fear of losing subscribes."[32] AT&T concludes correctly that the facts and circumstances in the market today show that vertically integrated cable providers 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." *AT&T* at 4.

Finally, cable's participation in this proceeding at all demonstrates they believe that a business case exists for using – or threatening to use – exclusionary tactics to isolate rival MVPDs. If eliminating this prohibition would not be to their distinct commercial advantage, why the hard the push from Cablevision, Comcast, and NCTA in this proceeding?

4. The exclusivity prohibition promotes diversity in MVPDs without discouraging investment in content.

Cable's attempt to characterize competitive MVPDs' access to cable-owned programming as a free ride cannot withstand scrutiny. *Cablevision* at 27-29. Cable providers are only required to provide affiliated programming to all competitive MVPDs at reasonable and non-discriminatory rates. 47 U.S.C. § 548(c)(2). Those rates, however, are not regulated by the government: there is no wholesale access to programming, nor are there TELRIC or FLEC-based rates available to competitive video providers. The only governmental check is that affiliated networks must charge unaffiliated providers non-

[32] *Id.* Given that Comcast recently paid over $6,000 per subscriber in the Patriot Cable transaction, it is apparent that cable providers have substantial incentive to risk the temporary loss of licensing fees and advertising revenues to re-acquire a rival MVPD's subscriber, or protect its own customer base. To this end, the Commission in 2002 explained that "[p]rotection of this investment provides an extraordinary degree of motivation in terms of programming sales as well as other competitive considerations." *2002 Order,* ¶ 58.

discriminatory rates. As a result, cable providers benefit by repeatedly increasing the license fees for their affiliated networks, which contribute significantly to the continued upward spiral of cable rates.[33] Comcast reports that its "programming division revenue increased 15 percent to 1.1 billion" last year, highlighting the profitability of cable network ownership for cable companies.[34] As to the impact on competitive MVPDs, AT&T notes that RCN pays 37 percent of its revenues to Comcast and Time Warner alone. *AT&T* at 11.

Cable similarly contends that the exclusivity prohibition reduces the incentive to invest in programming and limits diversity in programming. They are wrong on both counts. Cablevision offers the blanket statement that "the relative level of cable investment in programming has declined precipitously since the ban was adopted." *Cablevision* at 28. Yet they offer no evidentiary support for this position, and NCTA's own statistics demonstrate the opposite trend.

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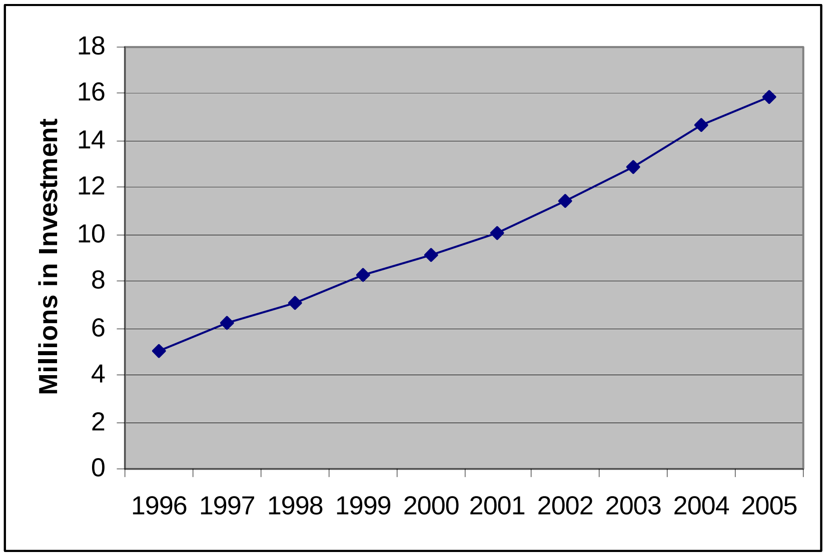
[33] The Commission should monitor the competitive impact on inter-company transfers of wealth from cable systems to cable networks. This form of stealth discrimination is widespread in the industry. The program access rules prohibit unreasonable conduct, and any unjustified across-the-board license fee hike clearly fits within that prohibition.

[34] Comcast Q4 2006 Earnings Call Transcript (Feb. 1, 2007).

Table 3: Cable Conglomerate Programming Investment (1996-2005)[35]



Since 2002 alone, cable's programming investment has increased from $11.4 million annually to $15.88 million in 2005. *Id.* The total number of cable-affiliated networks has also increased, as has the number of unaffiliated networks. *See 2006 Annual Video Report.*

With respect to the diversity of programming, the primary focus here is on diversity in distribution networks, not diversity in content. The Commission carefully framed this debate in the February *Notice* as "whether retention of the exclusivity prohibition in the current climate helps to ensure that as many MVPDs as possible remain viable distributors of video programming." *Notice,* ¶ 10. The objective is to facilitate diversity and consumer choice among a wide-variety of video platforms, including those serving rural, foreign-language, low-income, and other underserved populations. Cable's continued refusal to accept the validity of this objective will not make it go away. *See e.g., Cablevision 2002* at 15-19.

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[35] NCTA 2006 Industry Overview, at 4, available at Hhttp://i.ncta.com/ncta_com/PDFs/NCTAAnnual%20Report4-06FINAL.pdfH.

Amongst a diverse set of MVPDs, there is value in an independent program distributor, like DISH Network, that is not beholden to affiliated programming networks and offers the opportunity for unaffiliated or new programming networks to gain national exposure and carriage. Nevertheless, in singling out EchoStar for criticism as a free rider, Comcast fails to recognize the inherent benefits of independent distributors. *Comcast* at 21.

II. THE COMMISSION SHOULD ADDRESS CRITICAL DEFICIENCIES IN THE CURRENT PROGRAM ACCESS PROCEDURAL RULES.

Almost all parties – other than the vertically integrated cable companies – express serious concern and frustration over the design and effectiveness of the Commission's current program access procedures. A broken mechanism favors cable conglomerates, because the more delay there is, the less likely there will be a negative decision (and, therefore, negative precedent) against cable. A lengthy decision-making process virtually assures that the complainant will eventually be forced to settle – even for egregious terms – in order to gain, or retain, access to content needed to survive. Targeted reforms including adoption of an arbitration remedy to the program access regime will bolster the Commission's policy goals of fostering diversity of MVPDs and controlling the cost of video services.

A. The Current Program Access Rules Fail to Provide an Effective Check on Cable Market Power.

Cable conglomerates contend that the low number of total program access complaints filed is clear proof that the program access system works. *NCTA* at ii, 9; *Comcast* at 27. In self-congratulatory terms, cable suggests that the lack of complaints also demonstrates that cable conglomerates treat all MVPDs in a reasonable and non-discriminatory fashion. *Comcast* at 28. Our cable emperors have no clothes: one has nothing to do with the other.

Adjudicating a program access complaint is not cheap: indeed, the legal costs to file a complaint can be prohibitive for new entrants. *OPASTCO/ITTA* at 8; *CA2C* at 21. The cost of filing a complaint has to be balanced against the probability of success, the swiftness of Commission action, and the Commission's likelihood to reach the merits with a fully-informed decision. Given the substantial procedural deficiencies in the current program access structure, it is not surprising that competitive MVPDs decide to dedicate their finite resources elsewhere. It makes no sense to continue to put money in a broken parking meter.

Cable also points to the number of settlements that occur prior to the resolution of program access disputes as further confirmation of the effectiveness of the current regime. *NCTA* at ii, 9; *Comcast* at 28. Program access complaints are often filed after many months of unfruitful carriage negotiations; competitive MVPDs file program access complaints seeking Commission adjudication, not more one-sided negotiations. The Commission's open-ended process often dictates that a bad deal has to be signed by rival MVPDs to ensure that subscribers – and potential subscribers – are not denied a full slate of programming they have come to expect.[36] And, if a deal is reached, the competitive MVPD is often required to withdraw the complaint "with prejudice" in order to get access to the content. The Commission should, therefore, not be under any illusion that private settlement of program access disputes is desirable, or a win for either complainants or consumers.

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[36] *SBA* at 7 (explaining that the Commission "needs to address the disproportionate bargaining power among providers.").

Cable conglomerates also heap scorn on those entities that choose to use the enforcement process, noting that two DBS providers have filed the lion's share of such complaints. But that is exactly the result that Congress envisioned. As new entrants, the two DBS providers have had to struggle against cable monopolists from their inception. In contrast, vertically integrated cable providers, like Comcast and Time Warner Cable, do not actually compete against each other and have little incentive to file a program access complaint against a peer program owner.

One of the biggest challenges facing the Commission in this proceeding is the lack of transparency in the programming carriage market. The vast majority of cable carriage contracts are subject to strict confidentiality protections. *RICA* at 2. Even the most contentious of negotiations results in confidential agreements that forbid publicly disclosing the terms of carriage, or the disputes between the parties. Thus, shielded from objective review or scrutiny, cable conglomerates are free to dictate terms to rival MVPDs of any size, and impose discriminatory and unreasonable terms. Rival MVPDs have little, if any, information in which to determine the fairness of an offer from a cable conglomerate, and the Commission has no systemic means to monitor or evaluate these negotiations.

B. The Benefits of Targeted Reforms to the Program Access Regime Far Outweigh Any Harm.

1. An Arbitration-Based Enforcement Mechanism Should Be Established to Better Mirror Commercial Negotiations.

The most important thing the Commission could do to reduce barriers to entry in the video marketplace is to adopt arbitration as an enforcement mechanism available to competitive MVPDs to resolve program access disputes. Arbitration received support from a number of commenters[37] and has emerged as a central theme in this proceeding. RCN supports the inclusion of such an enforcement mechanism because it offers the prospect of a "cost-effective, timely mechanism for resolving program access disputes." *RCN* at 18. The Small Business Administration concurs that arbitration could "help to reduce problems associated with timing and expenses." *SBA* at 8. A number of other parties call the Commission's attention to the potential value of an arbitration remedy. *OPASTCO/ITTA* at 8.

Although no enforcement mechanism is a panacea, arbitration comes close. The Commission recognized as much in two recent merger proceedings involving vertically-integrated content providers.[38] In the *Adelphia/Comcast/Time Warner* proceeding, one Commissioner observed that arbitration promised "a private-sector solution to the [programming] dispute" that could be "concluded swiftly and at a minimal cost."[39] Further, by relying on arbitration instead of its own program access rules, the Commission has already implicitly recognized that the existing rules are not sufficient to counter potential harm to the market by powerful conglomerates. Why else would the Commission have gone to the trouble of creating such extensive arbitration procedures if the program access rules are adequate to address programming disputes?

Now that arbitration procedures have been agreed upon and the heavy-lifting is done, it makes sense to have those procedures apply more broadly to all programming

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37 *RCN* at 18; *SBA* at 8; *BSPA* at 7-9.

38 *See generally News/Hughes*; *Adelphia/Comcast/Time Warner*.

39 *Adelphia/Comcast/Time Warner*, Separate Statement of Commissioner Robert M. McDowell.

disputes by incorporating them here. The public interest would not be served if the Commission were to back away from the one enforcement mechanism that works.

Moreover, when conducting a cost-benefit analysis, the benefits of adopting arbitration clearly outweigh the harms: Disputes are resolved quickly and efficiently by an impartial arbitrator. No consumers are harmed. Protections are in place to ensure confidentiality. Commission resources are conserved. As for potential harms, the large cable providers argue against arbitration, but fail to identify how they would be harmed if such procedures were implemented.[40] Perhaps that is because the two largest vertically-integrated cable companies, Comcast and Time Warner, have already agreed to be subject to arbitration procedures pursuant to their merger conditions. *See, e.g., Adelphia/Comcast/Time Warner*. The problem is that those merger conditions only apply to regional sports networks, yet Congress concluded that competitive MVPDs need access to *all* programming assets because of the potential harms associated with vertical integration. 47 U.S.C. § 548(a-c). Failure to extend an arbitration remedy that has proven effective would leave in place a more efficient remedy only for certain types of content and providers -- a dangerous precedent that appears in conflict with the plain language of the statute. The Commission has proper notice and the legal authority to extend the benefits of arbitration, and should meet its statutory obligation to provide "expedited" resolution of disputes by doing so now.

[40] Cable offers only a very high-level legal critique of arbitration that amounts to issue spotting: delegation of Commission authority; effects of mandatory arbitration under ADR; and statutory authority to adopt additional enforcement mechanisms. *Comcast* at 4, 28-30; *NCTA* at 12, fn. 29. EchoStar fully addressed and refuted each of these concerns in its opening comments.

2. The Current Complaint-Based Enforcement Mechanism Should Be Bolstered.

The Commission should not replace the complaint-based mechanism with an arbitration mechanism; rather, the addition of an alternative vehicle for competitive MVPDs to address program access concerns would improve greatly the workability of the system. As NCTA notes, there may be a number of individual complaints that lend themselves to expert agency review and expertise. *NCTA* at 12-13. Competitive MVPDs should have the flexibility to determine the most appropriate enforcement mechanism on a case-by-case basis upon filing a complaint. There is, therefore, no need to limit artificially the types of disputes subject to the complaint process or the arbitration process.[41]

In order to ensure the workability of both mechanisms, EchoStar laid out three areas of necessary reform in its opening comments: accelerating the Commission's deliberative process; providing a standardized discovery mechanism; and protecting consumers during the pendency of complaint proceedings. Encouragingly, a number of commenters offered reform proposals addressing all three areas of concern.

First, commenters agree that the Commission's current guidelines of five and nine months for resolving disputes are too open-ended and fail to provide competitive MVPDs with certainty that their complaints will be addressed in an expedited fashion. AT&T highlights the competitive implications of delay: "[t]ime … is on the incumbent's side." *AT&T* at 28.

In lieu of guidelines, we agree with Verizon that all complaints should be "resolved promptly by a date certain." *Verizon* at 16. A number of commenters concur and offer their own fixed timetables for final Commission action on program access complaints. *See*

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[41] *BSPA* at 7 (supporting arbitration for pricing disputes).

e.g., CA2C, SBA, USTelecom, AT&T. We support 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 exceptional complexity. AT&T proposes a 90-day process based on deadlines under Title II (section 271 complaints). AT&*T* at 29. We agree with AT&T that 90 days should represent the upper limit for resolution of a complaint, but we maintain that there is merit in seeking to provide the Commission with a more streamlined 45-day expedited resolution path as well to ensure expedited and prompt decision-making.[42] Further, to address NCTA's concern that "[voluntary resolution] would be less feasible if the Commission were to impose an unrealistically aggressive time frame," the Commission could incorporate CA2C's suggestion that parties could jointly petition to stop the clock to negotiate at any time. *NCTA* at 11; *CA2C* at 22. The Commission should also require weekly status conferences to ensure an expedited resolution.

Second, the Commission should ensure that the discovery process cannot be manipulated by cable providers; standardizing minimum discovery requirements in this proceeding will improve the decision-making process. Recognizing the lack of transparency in this process, commenters have come independently to the same conclusion: cable conglomerates should be required to provide relevant programming carriage agreements automatically. AT&T,[43] USTelecom,[44] CA2C,[45] RCN[46] and the Small

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[42] Proposals to transform the guidelines into a deadline to act would improve upon the current system, but would not ensure expedited resolution as required by the statute in a time frame respectful of commercially sensitive negotiations. *SBA* at n. 34 (advocating four month deadline); *CA2C* at 21-22 (same); *Verizon* at 16 (five months).

[43] *AT&T* at 31 (arguing that "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.").

Business Administration[47] all focus on the critical need for the production of documentation in the sole custody of cable conglomerates, particularly program carriage contracts between the affiliated network and other MVPDs. At a minimum, the Commission should require at least six carriage contracts for the cable network in question with cable's answer. The production of representative contracts from a wide range of distributors, including affiliated MVPDs, sister cable providers, comparable MVPD platforms (*i.e.,* satellite or telco), and similarly sized providers is essential to provide the Commission staff with a full view of the true nature of the dispute. The Commission can require adequate safeguards – *i.e.,* a standard protective order – to ensure confidentiality of market sensitive information. Thus, the benefits of establishing routine discovery outweigh any speculative harms. Further, given their expertise in discovery and complaint processes and protecting confidential information, we also support AT&T's proposal to transition the adjudication process to the Enforcement Bureau. *AT&T* at 30.

Third, it is encouraging that a number of commenters also advocated the adoption of a standstill provision to provide competitive MVPDs with the opportunity to insulate subscribers from the ill effects of any carriage dispute upon the filing of a program access

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44 *USTelecom* at ii (advocating for the "automatic disclosure of certain information at the beginning of the complaint process.").

45 *CA2C* at 23 (proposing that cable conglomerates be forced "to produce contracts pertaining to the programming at issue").

46 *RCN* at 20 (explaining that process should "require[] programmer's carriage contracts to be made available").

47 *SBA* at 8 (noting that the current process "fails to provide the aggrieved party with access to necessary paperwork.").

complaint.[48] Verizon highlights the clear benefits of adopting rules to ensure continued access to programming, which would "help deter misconduct" of cable conglomerates. *Verizon* at 16. RCN concurs that a standstill would limit "a programmer vendors' ability to use temporary foreclosure to affect negotiations." *RCN* at 19. Verizon also notes that the lack of any discernable harm from the cable conglomerate's perspective: they "only have to abide by the terms of an agreement it voluntarily negotiated and would only have to do so for a limited time." *Id.* A standstill provision modeled on *News/Hughes* merger condition's analogous procedure has support from commenters, and should be a non-controversial, pro-consumer correction to the program access process.

III. CONCLUSION

The Commission should extend the exclusivity sunset for five more years to protect and preserve video competition. Now is not the time to risk reversals in video competition and consumer choice. The Commission should also adopt an arbitration enforcement mechanism, and address the fundamental deficiencies of the current program access enforcement mechanism.

Respectfully submitted,

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48 *See also BSPA* at 14-16; *USTelecom* at 21.

Appendix A: Vertical Consolidation of Domestic Cable Networks (2002-2007)[1]

	2002	Percentage of National Networks	2006	Percentage of National Networks
Total Networks	294		531	
Affiliated Networks	104	35.37	116	22
Non-Affiliated Networks	190	64.63	415	78
International/non-English Language Networks	40		207	
Int'l Affiliated Networks	12[2]	30	5[3]	2.4
Int'l Non-Affiliated Networks	28[4]	70	202[5]	98.6
Domestic Networks	254		314	
Domestic Affiliated Networks	92	36.22	111	35.3
Domestic Non-Affiliated Networks	162	63.78	213	67.8

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1 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389 (2002)(" *2002 Annual Video Report*"); *2006 Annual Video Report.*

2 A review of the 104 affiliated networks in 2002 shows that 92 were domestic networks and 12 were international or non-English networks. *See 2002 Annual Video Report,* Table D-1. The 12 non-domestic channels were Canales ñ (6 digital channels), CNN International, CNN Español, Discovery en Español, HBO Latino, International Channel, and Telemundo.

3 This calculation includes CNN International, CNN en Espanol, Discovery en Espanol, AZN Television, and HBO Latino as affiliated international or non-English networks. This calculation relies upon the Commission's 2006 data, and, therefore, does not include Time Warner's acquisition of seven Latin American networks, including Fashion TV, HTV, Infinito, I. SAT, MuchMusic, Retro and Space, in December 2006.

4 To determine the number of non-affiliated international and non-English language networks in 2002, the 190 non-affiliated networks in 2002 were compared to the list of international or Spanish-language networks in the *2006 Annual Video Report*. *See* n.5. There could, therefore, be omissions if international/non-English networks changed names or ceased to operate in the United States since 2002.

5 The division between domestic and international/non-English non-affiliated programming is reliant upon the Commission's division in Table C-2 of the *2006 Annual Video Report*, in which domestic networks were addressed separate from international and Spanish-language programming.