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

REPLY COMMENTS OF COMCAST CORPORATION

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April 16, 2007

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REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the comments submitted in response to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] Some parties, choosing to ignore evidence of fundamental pro-competitive changes in the multichannel video distribution marketplace over the past 15 years, urge the Commission to inject more regulation than ever before into the programming marketplace. However, credible evidence and analysis in the record should instead lead to a decisive reduction of regulatory burdens. It is also time for the Commission to address and end anomalies, such as the continued regulation of the terms of sale of any and all linear networks in which any cable operator has an attributable financial interest, at the same time that the Commission fails to ensure the availability of what is widely

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[1] *In re 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*, Notice of Proposed Rulemaking, 22 FCC Rcd. 4252 (2007) ("*Notice*").

regarded as "must-have" sports programming (regardless of rights ownership) to all MVPDs (e.g., NFL SUNDAY TICKET).

I. INTRODUCTION AND SUMMARY.

We are now in the 15th year of what Congress intended to be a ten-year transition to a competitive video marketplace in which the terms and conditions of the sale of programming are established by the marketplace, coupled with other statutory provisions intended to promote competitive distribution. The 1992 Cable Act achieved its purposes, stimulating a fiercely competitive video marketplace in which the two leading competitors to cable are now the second and fourth largest multichannel video programming distributors ("MVPDs") in the nation -- each twice as large as every cable company but Comcast and Time Warner. Now, the Bell Companies are finally responding to cable's competitive entry into the phone business by bringing more competition to the MVPD marketplace.

However, these facts are ignored by some who audaciously claim that the "MVPD market[place] has not changed significantly since . . . 2002," or who astonishingly argue that cable-affiliated programmers have "more of an incentive" to withhold programming from MVPDs competing with incumbent cable operators than they did in 1992. These arguments directly conflict with the Commission's own findings, and are also utterly disconnected from the realities of a marketplace in which virtually every American household has a choice among several MVPDs, while also accessing video content through over-the-air broadcasting, third-generation wireless, and video over the Internet. Moreover, the level of vertical integration between programming networks and cable operators has greatly diminished.

The levels of competition in today's video marketplace are dramatically greater than in 1992, or even as recently as 2002. So while the 2002 decision to retain the exclusivity prohibition may have been "a very close call," a decision now *to eliminate* the prohibition is, as

Comcast and NCTA pointed out in their comments, an "easy call," or as one reporter characterized it, "a no-brainer."

Now that the phone companies, after a decade of delay, have finally chosen to enter the video marketplace, the first thing they seek -- in marked contrast to cable's approach to competition -- is regulatory preferences. They seem to think that Congress intended the exclusivity prohibition to be some kind of "Welcome Wagon" of government assistance in program negotiations. But that was not Congress's intent. Congress temporarily, and radically, intruded into private contractual negotiations while taking complementary measures to stimulate MVPD competition. That competition is now mature, robust, and more than adequate to allow the Commission to restore free-market principles to programming negotiations. Accordingly, elimination of the exclusivity prohibition is overdue, and the Commission should allow it to expire on October 5, 2007. Maintaining the restriction in this competitive landscape is indefensible and would be highly vulnerable on appeal.

As Comcast demonstrated in its comments, the exclusivity prohibition is increasingly anomalous, and extending its life would be arbitrary and capricious. Even the most enthusiastic proponents of retaining the exclusivity prohibition recognize that the rule as it currently stands is seriously flawed. It is both too broad and too narrow. It is too broad in that it applies to any and all cable-affiliated programming networks, whether they are "must-have" or not. And it is too narrow in that it does not apply to a substantial portion of the programming that the Commission and many commenters have characterized as "must-have," most particularly, programming that is controlled by rights holders such as the NFL, Major League Baseball, the NCAA, NASCAR, and other sports organizations. If programming is "must-have" for one MVPD, then it necessarily is "must have" for all MVPDs, regardless of size, distribution technology, or ownership affiliation. Nevertheless, some parties seek to compound the deficiencies of the current regime by expanding the categories of programming that should be covered by the exclusivity prohibition. Consistent with its past findings and the limits of the statute, the Commission should again reject proposals that it expand the scope of the exclusivity prohibition to include content that Congress did not intend to have covered.

Several commenters ask the Commission to establish new rules and procedures for program access complaints that go beyond anything the Commission has previously found to be necessary during the fifteen years since program access requirements were first enacted. In so doing, they rely on demonstrably false factual claims and indefensible exaggerations of the Commission's statutory powers. None of these commenters provide any evidence that the Commission's program access complaint procedures are not working well. In fact, the evidence in the record shows that most program access issues are resolved in the marketplace rather than through resorting to Commission procedures. Those complaints that are filed usually are resolved by private settlement, as the Commission intended, and those that require a Commission decision have been resolved in a timely manner. Rather than further expedite the Commission's handling of these complaints, these proposals would make the program access complaint process more complicated, more costly, and more time-consuming. Adoption of any of these proposals is not likely to accelerate resolution of complaints and will enmesh the Commission further in resolving issues that are best left to the marketplace. Comcast would not, however, object to the Commission firming up its deadlines for action -- a procedural reform that would be beneficial in the Commission's handling of many requests for action, including petitions for effective competition and timely-filed petitions for waiver.

II. COMMENTERS WHO ADVOCATE FOR EXTENSION OF THE EXCLUSIVITY PROHIBITION IGNORE THE ASTOUNDING DEVELOPMENTS IN THE VIDEO MARKETPLACE SINCE 1992; BUT THE COMMISSION CANNOT.

Since 1994, the Commission each year has tracked the status of competition in the video marketplace, chronicling how the marketplace has shifted from one in which cable operators were the overwhelmingly dominant MVPD to one in which virtually every household in the nation can obtain its video programming from at least three different MVPDs, and in many cases (and increasingly as AT&T and Verizon continue their long-promised entry into the video marketplace) four or five MVPDs.[2] A number of commenters, however, try to insist that nothing has changed in the video marketplace since 2002, or even since 1992. These commenters ask the Commission to bury many years of findings and rely on conjecture about future harms to justify perpetuating a rule that should have expired five years ago.

The Commission should not, and cannot, do so. It can only extend the exclusivity prohibition if it finds that the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[3] The evidence in the record makes crystal clear that video competition has arrived and continues to expand.[4]

Certain exclusivity prohibition pleaders deserve to be singled out upfront for special mention as "special pleadings" that must be evaluated as such:

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[2] *Compare In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Annual Report, 9 FCC Rcd. 7442 (1994), *with In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 (2006) ("12th *Annual Report*").

[3] 47 U.S.C. § 548(c)(5).

[4] *See* Cablevision Comments at 2 ("Competition in video programming distribution is no longer in its infancy; it is mature, robust, and expanding."); Nat'l Cable & Telecomm. Ass'n ("NCTA") Comments at 3 ("[I]t is undeniable that competition in the video marketplace has fully taken hold."). For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 07-29.

- AT&T and Verizon, which deem it essential that the exclusivity prohibition be maintained, have each launched cable businesses successfully (if belatedly), with each offering hundreds of channels to their customers. Verizon admits that it has enjoyed "success in reaching programming providers" and only identifies a single instance in which (it claims) it found it necessary to file a program access complaint.[5] To the suggestion that they are beholden to cable companies for programming, it is worth noting their immense size and resources -- both AT&T and Verizon are larger than every established cable company (and the former is larger than the entire cable industry).

- AT&T, having sold one cable business and started another since this issue was last reviewed, now repudiates everything it put in the Commission record five years ago and argues precisely the opposite. AT&T, before it became a Bell Operating Company again, had it right five years ago, and its special pleading can be ignored this time around.[6]

- DIRECTV audaciously claims that exclusivity is a wonderful thing -- even when practiced by the country's second largest MVPD (and an affiliate of the largest, most powerful media conglomerate in the world) -- but it is unacceptable when practiced by a cable operator, whether large or small.[7]

- EchoStar, a sometime member of the "Coalition for Competitive Access to Content" ("CA2C"),[8] urges the Commission to engage itself even more deeply in the program licensing process, even as it berates the Commission for its past decisions and processes and urges the agency to abdicate its review authority to third parties.[9]

- CA2C, at least two members of which include parties named above, includes two appendices in its comments that it claims show that vertical integration has increased since 1992 and, therefore, the exclusivity prohibition should be extended.[10] CA2C,

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5 *See* Verizon Comments at 6.

6 *See* AT&T Corp. Comments, MB Dkt. No. 01-290 (Dec. 3, 2001).

7 *See* DIRECTV Comments at 1 ("[E]xclusivity helps competition . . . But in the hands of a cable operator with market power, exclusivity can be a decidedly anticompetitive tool."). DIRECTV is also a member of the Coalition for Competitive Access to Content ("CA2C").

8 *Compare* CA2C Letter, MB Dkt. No. 06-189 (Jan. 25, 2007) (indicating that EchoStar is a member), *and* SBA Comments at 2 & n.8 (same), *with* CA2C Comments at 1.

9 *See* EchoStar Comments at 13-16 (asserting that the Commission has failed in its duties), 24-30 (proposing additional requirements, including expanded discovery).

10 *See* CA2C Comments at 15 (claiming that the "absolute level of vertical integration today is similar in scale to the ownership in the early 1990s"), Attachment A, pts. 1 & 2.

however, refuses to vouch for either the accuracy or relevance of those documents.[11] As to the relevance of those documents, it should be made clear that more than half of the networks listed in its compendium of "vertically integrated" programming *have no ownership by any cable company*, and two of the longest lists of "affiliated" programming are networks associated with either the company that currently controls DIRECTV (a CA2C member)[12] or the company that is seeking Commission approval to buy a controlling interest in DIRECTV.[13]

A. The Evidence Presented in the Comments -- Including Submissions by Parties That Argue for Extension of the Exclusivity Prohibition -- Leaves No Doubt That Video Competition Is Robust and Increasing.

Comcast's comments in this proceeding, as well as its recent filings in the Commission's annual video competition inquiry (which have been placed in the record of the instant proceeding), underscore the dramatic increases in competition that have occurred in the past year alone.[14] NCTA's and Cablevision's comments also provide substantial evidence of the

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[11] CA2C Comments at 15 ("[W]e do not assert that all details in these reports are complete or fully current . . . ."), Attachment A, pt. 1, at 1 ("The CA2C does not present this data in the belief that all relevant data is either here or fully accurate."), Attachment A, pt. 2, at 1 (same). This is at least the third time that CA2C has submitted its incomplete and inaccurate attachments to the Commission (which were previously submitted by The America Channel in the Adelphia proceeding). *See* Letter from John Goodman, President, CA2C to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189 (Jan. 25, 2007); CA2C Ex Parte, MB Dkt. No. 07-29 (Mar. 30, 2007); CA2C Comments at Attachment A, pts. 1 & 2. The Comcast section alone contains numerous inaccuracies. Of the "MVPD Programming" holdings listed as affiliated with Comcast, four were shuttered or are no longer affiliated with Comcast (including Cowboys TV, Bravesvision, Falconvision, and INHD2). Furthermore, Music Choice is a music service, not a video programming network.

[12] *See* CA2C Comments Attachment A, pt. 1, at 5-6 (listing News Corp. holdings).

[13] *See id* Attachment A, pt. 1, at 9-10 (listing Liberty Media holdings).

[14] *See* Comments of Comcast Corp., MB Dkt. No. 06-189 (Nov. 29, 2006) ("*2006 Comcast Video Competition Comments*"); Reply Comments of Comcast Corp., MB Dkt. No. 06-189 (Dec. 29, 2006) ("*2006 Comcast Video Competition Reply*"); Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189 (Mar. 30, 2007) ("*Supplement*") (highlighting certain significant video competition developments from December 29, 2006 through March 30, 2007).

remarkable changes in the marketplace.[15] Proponents of retaining the exclusivity prohibition fail to provide a consistent or credible story in their arguments to the contrary.

While one claims that "the MVPD market[place] has not changed significantly since th[e] 2002 analysis,"[16] others admit that "the video marketplace has undoubtedly changed in recent years"[17] and that "[u]nquestionably, there have been major changes in the MVPD market over the last 5 years."[18] A fourth astutely notes that "[t]echnological developments and marketplace evolutions are occurring too frequently and rapidly for the Commission to accurately predict the consequences of allowing the rule to sunset"[19] -- a valid observation from which it tries to support an invalid recommendation, *i.e.*, that there is a continuing need to regulate the programming marketplace. None of these commenters provide any evidence of how competition in the video marketplace is failing or how consumers are being harmed, and all ignore or dismiss the immense growth of MVPD competition and the ongoing emergence of competitors. And, while several question the sufficiency of competition or plead for special help in establishing themselves as competitors, they neither provide any evidence of market power being exercised nor articulate a useful or logical standard for determining when rules that were designed for a monopoly era should be eliminated.[20]

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15 *See* NCTA Comments at 4-9; Cablevision Comments at 11-15, app. A; Declaration of Dr. Scott Wallsten at 6-23 (attached as Appendix B to Cablevision's Comments).

16 Office of Advocacy, U.S. Small Business Admin. ("SBA") Comments at 5.

17 DIRECTV Comments at 5.

18 Rural Independent Competitive Alliance ("RICA") Comments at 3.

19 Org. for the Promotion & Advancement of Small Telecomm. Cos. ("OPATSCO") Comments at 5.

20 *See*, *e.g.*, DIRECTV Comments at 10 ("It is possible that no single cable operator possesses sufficient nationwide market power to make an exclusive arrangement for, say, CNN profitable.").

The most important and relevant marketplace facts cannot be disputed. First, the percentage of programming that is vertically integrated with a cable operator has declined from 57% in 1992 to 35% in 2002 and to less than 20% today.[21] Second, video distribution is intensely (and increasingly) competitive, with virtually every American household having a choice of three -- and in more areas every day, four or five -- facilities-based MVPDs.[22] DBS has continued to prosper, adding almost 13 million customers over the past five years while cable operators have been largely flat or losing customers;[23] the giant telcos are finally investing billions to deliver the cable services that they have had the legal right to provide since February 8, 1996 (but failed to do so until cable began bringing competition to their telephone monopolies);[24] and Internet video and mobile devices are now successfully competing for

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[21] *See* Comcast Comments at 12, 20. As noted in Comcast's comments in this proceeding, in the *12th Annual Report*, based on data as of June 30, 2005, the FCC found that 21.8% of national programming networks were vertically integrated with cable operators, but this finding was based on a computation that counted iN DEMAND as if it were 60 separate networks. *See 12th Annual Report* ¶ 157 & n.568. The Commission noted that, "[i]f we count iN DEMAND as one network, 57 satellite-delivered national programming networks are vertically integrated with one or more . . . cable operators," *id.* ¶ 159, which would mean 57 out of the total 472 (or approximately 12.1%) national programming networks are vertically integrated with a cable operator. iN DEMAND recently reported that it now operates one HD network and eight multiplexed PPV channels. *See* Letter from Michael S. Berman, Senior Vice President, Business Affairs & General Counsel, iN DEMAND Networks, to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 2 (Feb. 2, 2007). Factored into the Commission's analysis, this would bring the total of national programming networks to 480 and the number of cable-affiliated national programming networks to 65, or 13.5%. *See* Comcast Comments at 12 & n.36.

[22] Last year, the Commission concluded that,

> almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber to the home, or video over the Internet.

12th Annual Report ¶ 72.

[23] *See* Comcast Comments at 7-8 & nn.12-13 (describing DBS growth over the past five years).

[24] As the American Cable Association ("ACA") explains,

> AT&T and Verizon are extremely well financed, have nationwide roll-out plans, and are making considerable investments in video. . . . AT&T had gross operating revenues in 2006 of over $63 billion, 2.5 times larger than Comcast's operating revenues. With the acquisition of BellSouth by AT&T those

(footnote continued…)

viewers' time and dollars.[25] In this environment, which is vibrantly competitive and growing more so each day, the free marketplace constrains competitors' ability to engage in anticompetitive conduct, and where it does not, the antitrust laws are adequate to address any concerns that might arise.[26]

B. The Commission Should Disregard the Attempt of Some Commenters to Belittle Existing Competition, Skew Marketplace Facts, and Seek Special Regulatory Concessions.

Not surprisingly, a handful of exclusivity prohibition proponents take this opportunity to attempt yet again to undervalue the competition provided by DBS and to assert that only wireline MVPD competition is effective.[27] Comcast has successfully disproved this claim each of the past three years in the context of the Commission's annual video competition inquiry.[28]

(…footnote continued)

> numbers will significantly increase. Verizon's operating revenues were in excess of $88 billion. In short, the phone companies are more formidable competitors than even the largest MSOs.

ACA Comments at 8-9.

25 *See* Comcast Comments at 9-11; Cablevision Comments at 14-15; app. A, at A-11 to A-18.

26 *See* Comcast Comments at 23-24. The Commission should not underestimate the harm it causes by intruding unnecessarily in the marketplace. One need only to consider how the cable industry reduced investment, and how facilities, customer service, and programming innovation all suffered, as a result of the Commission's implementation of the rate regulation provisions of the 1992 Cable Act. And compare what happened when Congress in 1996 told the Commission to get out of the way: cable invested $100 billion, expanded capacity, invented residential broadband, and added digital services, video-on-demand, HDTV, and VoIP. The Commission need only look to how the least regulated segment of the communications marketplace -- the Internet -- has been the most innovative. Should the Commission be reviewing the contract between Google and EchoStar for sales of commercial time, or should it let the marketplace work its magic? Should it intervene to ascertain whether there is anything untoward about Cingular's deal with Apple for the iPhone, or should it let progress march forward?

27 *See* AT&T Comments at 3; Broadband Service Provider Ass'n ("BSPA") Comments at 2-3; CA2C Comments at 7-8; Qwest Comments at 3 & n.6; United States Telecom Ass'n ("USTelecom") Comments at 4-5; Verizon Comments at 5.

28 *2006 Comcast Video Competition Reply* at 22-25; Comcast Reply Comments, MB Dkt. No. 05-255, at 37-41 (Oct. 11, 2005) ("*2005 Comcast Video Competition Reply*"); Comcast Reply Comments, MB Docket No. 04-227, at 12-17 (Aug. 25, 2004).

Exclusivity prohibition proponents point yet again to a GAO report that they characterize as demonstrating the effect of wireline overbuilders on the prices for cable services.[29] However, as GAO recognized, "because we used a case-study method, our results are not generalizable to all markets."[30] Moreover, as Comcast explained previously, the report's analysis suffers from significant deficiencies that deprived the conclusions of any evidentiary value.[31]

NCTA made similar conclusions about the GAO report and itself conducted a study of *all* of the communities with overbuilder competitors that showed that "overbuilders' prices are, in virtually all cases, the result of anomalous circumstances and are artificially low."[32] Significantly, a 2004 economic analysis of the effects of DBS competition done by Austan Goolsbee (a noted economist recently commissioned by this agency to conduct a media ownership study) and Amil Petrin concludes that DBS does provide price competition to cable:

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29 *See* Gen. Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004).

30 *Id.* at 4.

31 *See 2006 Video Competition Reply* at 25 & n.112. Key deficiencies include the following: (1) The report was based on an extremely small sample; it examined only six "matched pairs" of markets that were hypothesized to be comparable in every way except for the presence of an overbuilder in one of every two paired cities. (2) The study overweighted small markets, which tend to have larger estimated competitive differentials. (3) The report may have also overweighted markets with low DBS penetration since four of the six markets with an overbuilder had DBS penetration well below the national average. (4) The report failed to calculate quality-adjusted prices but merely compared the nominal prices for packages of services, ignoring potentially significant differences in the number or nature of channels in the package. (5) No effort was made to determine whether the service prices observed in overbuilt markets are sustainable. (6) There was no indication that GAO took into account, among other things: (a) whether the overbuilder competed in the entire franchise area or only in selected neighborhoods (meaning the "benefits" of price competition were limited to the most demographically attractive neighborhoods); (b) how long the overbuilder had been in business, and whether this price differential had persisted for a lengthy period of time; (c) whether the overbuilder was a private entity or one established by local government (leading to explicit or implicit government subsidies); or (d) whether the overbuilder, the cable operator, or both had rebuilt their systems (in fact, GAO seemed to find that the presence of an overbuilder does not affect overall quality improvements). *Id.*

32 NCTA Comments, MB Dkt. No. 04-227, at 7-10, Attachment A (Aug. 25, 2004) (attaching Steve Wildman, *Assessing the Policy Implications of Overbuild Competition* (Feb. 9, 2004)).

"without DBS entry cable prices would be about 15 percent higher and cable quality would fall."[33] And even DIRECTV has agreed: "Even the [October 2003] GAO study acknowledges DBS competition has caused cable operators to lower rates . . . . More importantly, GAO failed to ask . . . the crucial question -- whether cable rates overall are lower because of DBS competition *than they otherwise would be*. DIRECTV is quite sure that the answer is yes[.]"[34]

Some proponents of extending the exclusivity prohibition try to show that cable's "market power" in video distribution has increased because the percentage of cable customers served by the largest cable companies has increased.[35] But these marketplace changes do not affect competition at the retail level; when one cable company is absorbed into another that it does not compete with, the number of competing MVPDs available to any given household does not decrease. Nor does it change the fact that the two ubiquitous competitors faced by each local cable operator -- DIRECTV and EchoStar -- are larger than every single cable operator but two, and these DBS providers have clearly demonstrated their abilities to protect their own interests without government assistance.[36] Moreover, the Commission has approved each of the cable

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33 Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV*, 72 Econometrica 351, 351 (2004). Goolsbee and Petrin find "that more competition from DBS correlated with lower cable prices and somewhat higher quality cable. . . . The aggregate gains to the 70 million cable users amount to between roughly $3-4 billion. In the end, our results suggest large gains from DBS entry, some of which are not captured if the price and characteristics response is ignored. The overall gains from this product introduction may be as large as $7 billion[.]" *Id.* at 377-78.

34 DIRECTV Comments, MB Dkt. No. 04-227, at 7-8 (July 23, 2004) (emphasis in original) (citing Gen. Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* (Oct. 2003)).

35 *See, e.g.* DIRECTV Comments at 9-11; EchoStar Comments at 4-6; Qwest Comments at 2-4; SBA Comments at 5-6; USTelecom Comments at 9-10; Verizon Comments at 11.

36 In fact, DIRECTV is twice as large as every cable operator except Comcast and Time Warner. *Compare* Press Release, DIRECTV Group, Inc., *DIRECTV Group Announces Fourth Quarter and Full Year 2006 Results*

(footnote continued…)

transactions cited by the proponents of regulation, expressly concluding in each case that they furthered the public interest.

It is especially strange for a Regional Bell Operating Company ("RBOC") such as Verizon or AT&T to suggest that, based on the market share of all cable operators combined, each cable operator has retail market power that justifies regulation. It is puzzling that Verizon claims the four largest cable companies have "market power" because they serve 53% of video subscribers,[37] but apparently fails to see "market power" where the *three* largest telephone companies control a vastly greater percentage of wireline phone subscribers.[38] And the Bells' market power is of course further magnified by their dominance in wireless services and for business lines.[39] The phone companies are attempting to build a regulatory moat around their market share while using the regulatory process to hold back their competitors. Such behavior is typical of the Bells, but it must not be rewarded.

Another assertion echoed by some proponents of the exclusivity prohibition is that regional clustering of cable systems is harmful to competition and provides an additional basis to

(…footnote continued)

(Feb. 7, 2007), *available at* http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q42006EarningsRelease1.pdf, *with* NCTA, *Statistics: Top 25 MSOs - As of December 2006, at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited Apr. 16, 2007).

37 *See* Verizon Comments at 11.

38 By the numbers in Verizon's calculation, the top four cable operators serve 50.2 million customers. *See id.* But the top three telcos serve 69.3 million households. *See* John C. Hodulik, et al., UBS Investment Research, *Wireline Postgame Analysis 17.0*, Global Equity Research, Mar. 20, 2007, at 34 (reporting that the new AT&T/BellSouth serves 36.147 million subscribers, Verizon serves 25.202 million, and Qwest serves 7.971 million), *available at* www.ubs.com/investmentresearch.

39 As of April 12, 2007, Verizon had a market capitalization of over $108 billion while AT&T/BellSouth has a market capitalization of over $241 billion -- well above that of any cable company.

extend the term of the prohibition.[40] The Commission, however, has explicitly acknowledged the benefits of clustering.[41] Agreeing that clustering can benefit competition and consumers, the FTC's Director of the Bureau of Economics recently testified that:

> Clustering enables cable firms to realize economies of scale associated with providing cable service in contiguous areas. By acquiring contiguous systems, [Time Warner Cable] and Comcast could lower several categories of costs, such as management, administrative and marketing costs, as well as the expense of providing system upgrades. *In addition, TWC and Comcast could use clustering to position themselves better to compete with local telephone companies and other providers in the delivery of video and telephone service*.[42]

Many of the proponents of extending the exclusivity prohibition are telephone companies. While they complain that they face disadvantages because of their sizes (the smaller telcos) or the areas they have chosen to serve, or the undeveloped state of their video businesses, they carefully avoid mentioning several key facts that the Commission must not overlook. First,

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40 *See, e.g.*, BSPA Comments at 17; CA2C Comments at 18; DIRECTV Comments at 9-10; Qwest Comments at 4; USTelecom Comments at 11-12.

41 *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd. 1244 ¶ 140 (2002) (noting commenters' recitation of benefits of clustering); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005 ¶ 166 (2001) (noting clustering "permits cable operators to . . . gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced deployment of new technologies, and encouraging the extension into previously unserved areas"); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978 ¶¶ 161-162 (2000) (noting that clustering "can create greater economies of scale and size," thereby enabling "cable operators to offer a wider variety of broadband services at lower prices to customers in geographic areas that are larger than single cable franchise areas," and thus, "make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area"); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284 ¶¶ 144-148 (1998); *see also* Gen. Accounting Office, *Telecommunications: The Changing Status of Competition to Cable Television* 20 (July 1999) (noting that, among other competitive advantages, clustering "enables firms to consolidate facilities for receiving and transmitting programming, reduce the number of repair crews, have regional customer service centers, reduce management, and compete more effectively for local advertising dollars").

42 *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?: Before the Senate Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Michael Salinger, Director, Bureau of economics, FTC) (emphasis added), *available at* http://judiciary.senate.gov/testimony.cfm?id=2454&wit_id=5929.

although some telephone companies have "nascent" video operations,[43] they have had the legal right to enter the video programming distribution business for over a decade. (Instead, they chose to spend their time crushing local exchange and long distance competitors through various means, investing in overseas businesses, and merging with one another. That was their choice -- it provides no excuse for protracting outdated regulation of program exclusivity to help them enter a business they chose to ignore for nearly a decade.) Second, every incumbent telephone company wields unique control of vital transport facilities,[44] local loops,[45] and building entrance facilities,[46] and many continue to benefit from statutory protections that insulate them against competition in their core phone business.[47] Third, in contrast to the cable companies that have

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[43] Verizon describes itself as a "new video entrant." Verizon Comments at 6. AT&T, which chose to shut down the cable businesses of several RBOCs that it purchased, describes itself as a "telco new entrant," AT&T Comments at 2, says it is "gear[ing] up to enter the market," *id.* at 4, describes competition as "nascent," *id.* at 5, and asserts it is "just beginning to launch its business," *id.* at 24.

[44] *See In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 ¶ 126 (2005) (holding that competitive carriers generally cannot economically deploy DS1 transport facilities); *id.* ¶ 128 (holding that competitive carriers often cannot aggregate sufficient traffic to economically deploy DS3 transport facilities).

[45] *See* Gen. Accounting Office, *FCC Needs To Improve Its Ability To Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Nov. 2006) (explaining that, in nearly all of the 16 markets studied, the ILEC has a 95% share of loop facilities providing a single DS-1 of capacity or more); *United States v. Verizon Communications, Inc.*, Case No. 1:05CV02103, Complaint ¶ 15 (D.D.C. filed Oct. 27, 2005) (where the DOJ held that Verizon controlled the only last-mile access to the "vast majority of commercial buildings in its territory"); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, 18 FCC Rcd. 16978 n. 856 (2003) ("*TRO*") (stating that both "competitive LECs and incumbent LECs report that approximately 30,000, i.e., between 3% to 5%, of the nation's commercial office buildings are served by competitor-owned fiber loops").

[46] *See TRO* ¶ 348 (requiring ILECs to unbundle the "subloop" that permits access to multi-tenant buildings in light of the fact that "the record reflects that no third-party alternatives to these subloops are available").

[47] *See* 47 U.S.C. § 251(f)(1) (providing an exemption to rural telephone companies from the interconnection rules until "such company has received a bona fide request for interconnection, services, or network elements, and . . . the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of the title"); *id.* § 251(f)(2) (enabling local telephone companies with fewer than two percent of the nation's access lines to secure suspensions and modifications of various competition-enhancing statutory requirements upon petition to, and specified findings by, state commissions).

built their competitive video, data, and voice offerings using private risk capital, telephone companies in rural and high-cost areas take in literally billions of dollars a year in subsidies from federal and state universal service funds.[48]

Inexplicably, even as it advocates a "platform neutral" approach to the analysis, the United States Telecom Association ("USTelecom") seeks to devalue DBS competition and claims that the Commission must extend the rules to protect telcos, even if DBS is strong enough to stand on its own.[49] This argument is severely misguided. Congress's intent was to promote *competition*, not individual competitors. As Cablevision explains: "It is well established that

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[48] In fact, the high-cost component of the federal universal service program has soared from $1.5 billion when the Telecommunications Act of 1996 was implemented, *see* News Release, FCC, *Commission Implements Telecom Act's Universal Service Provisions* (May 7, 1997), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1997/nrcc7032.html, to $3 billion in 2002, *see* Universal Serv. Admin. Co., *About USAC*, *at* http://www.usac.org/about/universal-service/fund-facts/fund-facts-high-cost-program-data.aspx (last visited Apr. 12, 2007), to $4.27 billion in 2007, *see The Challenge of Adapting Universal Service to a Competitive Environment: Before the Communications Subcomm. of the Senate Commerce, Science & Transp. Comm.*, 110th Cong. 4 (Mar. 1, 2007) (statement of Billy Jack Gregg, Director, Consumer Advocate Div., Pub. Serv. Comm'n of W. Va.), *available at* http://commerce.senate.gov/public/_files/Testimony_BillJackGregg_WVPubServiceCommiss_BillyJackGreggTestimonySenateCommerce3107.pdf.

[49] *See* USTelecom Comments at 18-19 ("The effect of exclusivity on wireline MVPDs is relevant regardless of the competitive posture of DBS."). Both the Commission and the telcos have long-pushed for competitive and technological neutrality in a variety of different contexts. The telcos' inconsistent advocacy in this context is disingenuous and ought to carry an exceptionally high burden of proof for justifying disparate treatment for like services. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Order & NPRM, 20 FCC Rcd. 14853 ¶ 17 (2005) ("[B]y classifying both wireline broadband Internet access service and cable modem service as information services . . . we move closer to crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services."); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, FCC No. 07-30 ¶ 55 (Mar. 22, 2007) ("[O]ur interpretation of the definition supports . . . regulatory parity among all broadband Internet access services - regardless of whether they are offered through wireline, cable, or wireless technology."); *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television and Consumer Protection and Competition Act of 1992*, Order & FNPRM, 22 FCC Rcd. 5101 ¶ 139 n.479 (2007) (discussing NCTA's comment that "treating like services alike promotes competition" by allowing the marketplace to determine the better operator rather than providing one operator "artificial regulatory advantages"). The Commission should be working to eliminate regulations that are burdensome and unnecessary, especially ones that are not applied on an even-handed basis or those that unjustifiably and disproportionately impact a particular segment of the industry.

harm to competitors does not equal harm to competition."[50] And, as noted in Comcast's comments:

> In the *Notice*, the Commission overstates the relevant inquiry, describing it as "'preserving and protecting diversity in the distribution of video programming -- ensuring that as many MVPDs as possible remain viable distributors of video programming.'" The Commission's focus on maximizing the number of MVPDs, which is not the standard Congress established, mistakenly intrudes on market dynamics, and would seemingly justify perpetual retention of a prohibition that was intended to be temporary.[51]

The RBOCs have never suggested that they are unable to enter the video business unless the exclusivity prohibition remains on the books. In fact, as detailed more fully below, both AT&T and Verizon concede that they have successfully negotiated carriage contracts for all the programming they have sought, including cable-affiliated programming that they were not entitled to by law.[52] As Cablevision's comments describe, all signs indicate that these RBOC "new entrants" are in it for the long haul.[53]

C. MVPDs Are Demonstrably Obtaining Access to the Programming They Need To Compete.

While concurrently claiming that access to programming is problematic, several commenters concede their marketplace successes in obtaining the programming that they need to compete.

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[50] Cablevision Comments at 6 & n.17.

[51] Comcast Comments at 5 & n.5 (internal citations omitted).

[52] *See* AT&T Comments at 24; Verizon Comments at 6.

[53] Verizon and AT&T have invested billions of dollars in network upgrades necessary to deliver video, executed hundreds (and counting) of local franchise agreements, and entered into hundreds of long-term programming deals. *See* Cablevision Comments at 12 & n.42. "The billions of dollars in sunk costs incurred by DBS and the telcos represent a significant investment for them, and they will continue to offer video services irrespective of whether a handful of cable-owned programming services are unavailable to them." *Id.* at 15.

> **AT&T**: "AT&T and other new telco entrants have been able to negotiate programming agreements that allow assembly of an attractive competitive offering."[54]
>
> **Verizon**: "Verizon has had some success in reaching agreements with programming providers, including most vertically integrated programming providers, for the programming that it needs to compete."[55]
>
> **NRTC**: "NRTC is pleased to advise the Commission that it has recently completed buying group distribution agreements for over 250 video and audio channels, including *nearly* every major programming service, on terms that appear to be generally non-discriminatory vis-à-vis cable rate cards. Additional rights are being pursued and NRTC expects to ultimately offer its members over 300 video and audio channels in IPTV / MPEG-4."[56]
>
> **DIRECTV**: "All of the 'marquee' cable-affiliated programming cited by the Commission in 2002 -- RSNs, HBO, and the like -- is still carried by virtually every MVPD[.]"[57]

The channel lineups of all MVPDs provide additional evidence that competitors are obtaining access to the programming they want.[58] Although some programming negotiations may have

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54 AT&T Comments at 24.

55 Verizon Comments at 6.

56 NRTC Comments at 4-5. NRTC claims that "[a]mong the major programmers only two (both vertically integrated with cable MSOs) have failed or refused to provide distribution rights to NRTC," *id.* at 5, but in a footnote acknowledges that it has not been "refused" distribution rights but "is continuing efforts to reach a negotiated settlement with these programmers," *id.* at 5 n.8. NRTC, like many other commenters, essentially is complaining that complex business negotiations for carriage agreements are not as easy as it would like and the government should make them so. That, however, is not the role of the Commission or the program access rules. *See In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corp. to Time Warner Cable Inc. and Comcast Corporation*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 (2006) ("*Adelphia Order*") (Statement of Commissioner Tate) ("The FCC should not be in the business of writing contracts between private companies . . . .").

57 DIRECTV Comments at 7.

58 *See* Verizon Inc., *National Channel Lineup*, *at* http://www22.verizon.com/content/fiostv/channel+lineup/channel+lineup.htm (last visited Apr. 12, 2007); EchoStar Satellite, L.L.C., *What's Playing on DISH Network Tonight?*, *at* http://www.dishnetwork.com/content/whats_on_dish/index.shtml (last visited Apr. 12, 2007); RCN Corp., *RCN Channel Lineups*, *at* http://www.rcn.com/cabletv/lineupMain.php (last visited Apr. 12, 2007); AT&T Knowledge Ventures, L.P., *AT&T U-Verse* (providing links to the channel line-ups in various U.S. cities) https://uverse1.att.com/launchAMSS.do (last visited Apr. 12, 2007); Qwest, *Welcome to QWEST* (same), *at*

(footnote continued…)

presented some challenges, that is the nature of *all* program carriage negotiations, regardless of whether the programmer is affiliated with a cable operator, a broadcaster, a DBS provider, or is independent. Even well established cable operators face challenges in negotiating for the programming they want to carry, regardless of ownership.[59] Simply put, programming carriage agreements are extremely complex with numerous terms and conditions besides the simple issue of a price, involve months of negotiation even when renewing an agreement, and can take a year or more to finalize. Rather than provide concrete evidence that there is a problem in the marketplace, commenters regurgitate a handful of tired stories and cite to irrelevant harms,[60] falling far short of the proof of market failure that requires government intervention.[61]

Proponents of the exclusivity ban seem to be trying to create an echo chamber in which the mere repetition of their own and each others' allegations gives substance to claims that have

(…footnote continued)

http://pcat.qwest.com/pcat/profile.do?lastUri=http://www.qwest.com/residential/products/tv/ (last visited Apr. 12, 2007).

59 *See* Mike Reynolds, *Charter Reaches Deals for Golf, Versus*, Multichannel News, Apr. 3, 2007 ("With threats of pulling the networks looming, Charter Communications reached new carriage commitments with Comcast-owned The Golf Channel and Versus."), *available at* http://www.multichannel.com/article/CA6430580.html; Linda Moss, *Cable One Drops Court TV*, Multichannel News, Apr. 3, 2007 (reporting that Cable One could not reach an agreement with Time Warner-owned Court TV).

60 *See, e.g.*, Eatel Video Comments at 2 (alleging that "it is EATEL's belief that an exclusive agreement was signed [between a local broadcaster and] the incumbent cable TV provider" and that "EATEL was prohibited from carrying KZUP . . . due to what EATEL believes are exclusive agreements between the content providers and Cox"). These claims appear to pertain to retransmission consent agreements with broadcasters, not to negotiations for cable affiliated programming.

61 *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("In addition, in 'demonstrat[ing] that the recited harms are real, not merely conjectural,' the FCC must show a record that validates the *regulations*, not just the abstract statutory authority." (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)); *id.* at 1134 ("Having failed to identify a nonconjectural harm, the Commission could not possibly have addressed the connection between the harm and market power.").

been thoroughly discredited.[62] For example, commenters repeat for the 10th year in a row their demonstrably false claims that cable programmers are "migrating" their networks to terrestrial delivery to take advantage of the terrestrial exemption, and they once again claim that MVPDs' access to other video programming, *e.g.*, Comcast SportsNet Mid-Atlantic, and content, *e.g.*, PBS KIDS Sprout, has been impeded. These commenters once again fail to provide a single example of programming that has been migrated and Comcast has refuted these allegations year-after-year.

No fewer than five parties join RCN is asserting that RCN has experienced difficulties in securing rights to carry Comcast SportsNet Philadelphia,[63] but the plain truth is that *RCN has carried that network every single day since it was launched in 1997* -- and no one has adduced a shred of evidence to the contrary.[64]

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[62] Adding to the racket of the echo chamber, several CA2C members participated in multiple comments. For example, SureWest filed its own individual comment, it filed as a member of the BSPA, and it filed as a member of CA2C. *See generally* SureWest Comments; BSPA Comments; CA2C Comments. It is also significant to note that other CA2C members, namely Media Access Project and the National Hispanic Media Coalition ("NHMC"), are also members of the StopBigMedia.com Coalition, whose advocacy elsewhere is decidedly inconsistent with what CA2C claims in this proceeding. The following claim appears at the stopbigmedia.com website:

> Five media conglomerates -- Viacom, Disney, Time Warner, News Corp. and NBC/GE -- control the big four networks (70 percent of the primetime television market share), most cable channels, as well as vast holdings in radio, publishing, movie studios, music, Internet and other sectors.

See StopBigMedia.Com, *Learn More*, *at* http://stopbigmedia.com/=learn (last visited Apr. 9, 2007). Another page on the website maps out "the control the eight most concentrated giants exert over all forms of news, entertainment and information." This is comprised of the same five companies mentioned in the quote above, plus Vivendi/Universal, Bertelsmann, and CBS. *See* StopBigMedia.com, *Who Owns the Media?*, *at* http://stopbigmedia.com/chart.php (last visited Apr. 9, 2007). Thus, the same groups who claim *here* that cable operators are the problem only mention a single cable operator when they *elsewhere* describe the companies that concern them the most. It should also be noted that DIRECTV, which is aligned in this proceeding with members of StopBigMedia.com, is in fact a subsidiary of one of the "Top 5" problem companies.

[63] *See* AT&T Comments at 10 n.25; CA2C Comments at 16; DIRECTV Comments at 9-10; EchoStar Comments at 9; USTelecom Comments at 15-16.

[64] *2005 Comcast Video Competition Reply* at 25 n.96; Comcast Reply Comments, MB Dkt. No. 03-172, at 15.

As for Comcast SportsNet Mid-Atlantic, *Comcast has made that network available to all MVPDs since acquiring it in 2001* -- and no one has adduced a shred of evidence to the contrary.

And the video programming and video-on-demand content that PBS KIDS Sprout creates and aggregates has always been available to every MVPD in America -- and no one has adduced a shred of evidence to the contrary.[65]

The simple fact is that what many of these pleaders want is not "access" to programming -- they want access at *government-set prices*. Although there have been far fewer program access complaints than the Commission expected when the regime was first implemented in 1993,[66] the majority of the complaints that have been filed were filed not because a network refused to sell its programming to a distributor but because the network and the distributor could not agree on the price, and other terms and conditions, for carriage. Some distributors think they will have more leverage in negotiating for the prices, terms, and conditions that they want if they can bring regulatory pressure.[67] But the empirical evidence brought forth to justify continued government intervention in this marketplace is scant or nonexistent, while evidence of a well-functioning marketplace (with lots of competition, innovation, and diversity at the network and

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65 *See* Letter from Sandy Wax, President, PBS KIDS Sprout, to Marlene Dortch, Secretary, FCC, MB Dkt. No. 05-192, at 2 (June 5, 2006) (noting that Sprout has, "from the beginning," made its VOD programming available to all distributors wishing to carry the service, including RCN); Letter from Paul Greco, Vice President & Deputy General Counsel, PBS, to Commissioners Adelstein and Tate, FCC, MB Dkt. No. 05-192, at 2 (July 5, 2006) ("From its inception, Sprout has made clear that its mission includes making its programming services available as broadly as possible to cable and satellite operators nationwide.").

66 *See* Comcast Comments at 27.

67 This appears to be a common tactic for EchoStar and DIRECTV, which have filed over half of the program access complaints since 1998. The overwhelming majority were settled or dismissed.

distribution levels) is abundant. The Commission would do well to remember Fred Kahn's famous dictum that markets do not need to work all that well to work better than regulation.[68]

The Commission should also bear in mind that, to the extent that anyone with market power seeks to use that power in anticompetitive ways, the antitrust laws remain available. *Tellingly, not one of the parties that favors extension of the exclusivity prohibition even acknowledges the existence of the antitrust laws*. The reason for that is simple -- they prefer the advantages of a process that is far less analytically rigorous.

The truth of the matter is that cable operators face fierce competition in every individual market that they serve. Programming services that are vertically integrated with cable operators cannot afford to forego the revenue opportunities created by these MVPD competitors. In the words of AT&T, which *opposed* the extension of the exclusivity provisions five years ago,

> [A] wealth of empirical evidence, including the Commission's own findings, make plain that Congress' 1992 assumptions regarding the future development of MVPD competition were well-founded: The 2001 MVPD marketplace is characterized by robust competition in which no class of competitors should be handicapped by a presumption against exclusive programming contracts. Past concerns that cable companies might enter into exclusive contracts to forestall competitive entry are not relevant to today's economic reality. It would be economically irrational for any MSO to overpay programmers for exclusives as a means of excluding competing MVPDs because these rivals are established, are highly unlikely to exit the market, and are in some cases national distributors. This holds equally true where the programmer and the MSO are commonly owned, since the profit to the overall enterprise must account for the opportunity cost of not having the programming more widely distributed.[69]

AT&T was as right then as it is wrong now.

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68 *See* Alfred E. Kahn, *The Economics of Regulations: Principles and Institutions* 327-29 (The MIT Press 1988) (1970); *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 24 (1984) ("The entire corpus of antitrust doctrine is based on the belief that markets do better than judges or regulators in rewarding practices that create economic benefit and penalizing others. The common belief that if markets are imperfect then something else must be better is a logical fallacy.").

69 AT&T Corp. Comments, MB Dkt. No. 01-290, at 2.

III. THE EXCLUSIVITY PROHIBITION IS ARBITRARY AND CAPRICIOUS, AND EXPANDING ITS SCOPE WILL MAKE IT ONLY MORE SO.

Even the most enthusiastic proponents of retaining the program access exclusivity prohibition recognize that the rule as it currently stands is seriously flawed. It is both too broad and too narrow. It is too broad in that it applies to any cable-affiliated programming, whether it is "must-have" or not.[70] And it is too narrow in that it does not apply to a lot of programming that the Commission and many commenters consider to be "must-have."

Perpetuation of such a rule cannot be rationally justified. Even if some form of exclusivity prohibition would serve strong governmental interests in promoting MVPD competition and programming diversity, a rule that is so ill-tailored to advancing those interests cannot be defended. Proposals to *expand* the exclusivity prohibition for cable-affiliated programming alone not only would be unlawful, but also would further compound the irrationally disparate treatment to which cable operators are already subjected.

A. The Commission Cannot Rationally Justify A Rule That Prohibits Exclusive Contracts for Programming That Is Not "Must-Have" But Does Not Prohibit Exclusive Contracts for All "Must-Have" Programming.

If there is a legitimate concern that some programming is so important that it must be made available to all competitors, the current exclusivity prohibition does not fix the problem. Absent evidence that any particular MVPD has market power -- and none has been provided in

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[70] Some parties take an extremely broad view of what constitutes "must-have" programming. *See* EchoStar Comments at 2 ("Cable remains an owner of some of the most popular 'must have' programming properties on television today, including CNN, HBO, Discovery, TNT, and E."), AT&T Comments at 11 (naming TBS, Discovery, TNT, CNN, TLC, and others). *But see 12th Annual Report* app. C, tbl. C-6 (listing the "Top 15 Programming Services by Prime Time Rating"; neither TLC nor E! are among the top 15 networks as measured by primetime ratings). BSPA seems to take the broadest view, alleging that competition will be skewed if a cable operator has "exclusive access to only one 'must have' programming service in each of the major buying segments (sports, news, family, children, youth, etc.)." BSPA Comments at 4. BSPA fails to identify which are the additional categories that are relevant and, within any given category, which are the networks that are "must have."

this proceeding -- there can be no basis for preventing cable operators alone from enjoying exclusivity. Nor is there any basis for conflating the notion of "must-have" with that of "vertically integrated with a cable operator." They are not congruent sets.

The Commission itself has recognized that "must-have" is something separate and apart from "affiliated with a cable operator." Specifically, it has found "that certain programming services, such as sports programming, or marquee programming, such as HBO, may be essential and for all practical purposes, 'must haves' for program distributors and their subscribers."[71] In addition to sports and marquee programming, the Commission has found that local broadcast programming is "must-have."[72] Similarly, many of the commenters here recognize that affiliation with a cable operator is not the determinant of whether programming is "must-have," and they urge the Commission to expand the rule to all "must-have" programming whether or not it is affiliated with a cable operator, a DBS provider, or any other entity.[73] For example,

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[71] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report & Order, 17 FCC Rcd. 12124 ¶ 69 (2002) ("*Sunset Order*") (citing *In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Serv.*, 5 FCC Rcd. 4962, 5027 (1990)); *see In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority To Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd. 473 ¶ 148 (2004) ("*News Corp.-DIRECTV Order*") ("At the outset, we agree with commenters that there are no reasonably available substitutes for News Corp.'s RSN programming and that News Corp. thus currently possesses significant market power in the geographic markets in which its RSNs are distributed.").

[72] *News Corp.-DIRECTV Order* ¶ 202 ("At the outset, we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings. Congress has repeatedly recognized the importance of carriage of local television broadcast signals to MVPDs -- most recently when it enacted the SHVIA, which permitted DBS operators to carry local television broadcast signals so that they could better compete with cable operators.").

[73] Cablevision notes that it is by no means clear that the programming that some commenters' claim is "must-have" is truly "must-have" in order for an MVPD to compete. For example, EchoStar does not carry either the Mid-Atlantic Sports Network in Baltimore/Washington, DC or the YES Network in New York, despite its insistence that such regional sports programming is "must-have." *See* Cablevision Comments at 26. Cablevision itself had to deal with a situation where it could not come to terms with the YES Network for carriage and was unable to provide the

(footnote continued…)

- **EchoStar:** The Commission should "more broadly review its jurisdiction and authority to ban all exclusive programming agreements."[74]
- **RCN:** The Commission should prohibit exclusive arrangements by MVPDs with third-party providers of "must have" programming because "there is no requirement that a cable operator be affiliated with a programming vendor in order to be prohibited from engaging in unfair methods of competition."[75]
- **BSPA:** "[T]he same principles regarding assured access to RSNs that are terrestrially delivered enacted by the Commission as it adopted these merger conditions should ultimately be applied on an equal basis to all MVPDs in all markets."[76]
- **National Telecommunications Cooperative Association ("NTCA"):** "Rural MVPDs need access to all sports programming."[77]
- **ACA:** "The FCC must adopt safeguards like those contained in § 628(c)(2)(D) -- either in this proceeding or in another -- to cover vertically integrated DBS programming."[78]
- **SureWest:** "Just as exclusive programming contracts between cable operators and vertically integrated cable programmers can harm competition and limit diversity . . ., the same is true regarding certain exclusive programming contracts between MVPDs and non-vertically-integrated programmers."[79]

In fact, the "must-have" programming about which most commenters expressed their concern about their ability to access is that *controlled by the sports leagues, not by cable operators*:

(…footnote continued)

network to its subscribers for an entire year. During that year, however, Cablevision only lost 2.1% of its subscribers. As Cablevision notes, "[e]ven if that figure were wholly attributable to Cablevision's failure to carry YES (which is highly unlikely), the impact on an MVPD would not be sufficient to jeopardize competition in video distribution." *Id.* at 24.

[74] EchoStar Comments at 4.

[75] RCN Comments at 16.

[76] BSPA Comments at 17.

[77] Nat'l Telecomm. Coop. Ass'n ("NTCA") Comments at 4-5.

[78] ACA Comments at 11-13.

[79] SureWest Comments at 9 n.17 (stating that the "greatest concern" applies to national sports programming involving Major League Baseball, the National Football League, the National Basketball Association, and NASCAR).

- **RCN:** "RCN urges the Commission to carry forward its finding that 'must have' programming is essential to competition to address the growing use of exclusive arrangements with third party vendors as a competitive weapon."[80]
- **NTCA: "**The Commission should . . . continue to allow MVPDs access to sports programming by disallowing exclusive sports contracts."[81]
- **ACA:** "The recent MLB-DirecTV deal serves as an acute example of the disadvantages ACA members face."[82]

Of particular concern was DIRECTV's exclusive deals with sports leagues such as the NFL, the NCAA, and Major League Baseball (which originally entered into an exclusive agreement with DIRECTV but, after significant Congressional pressure, relented and offered the programming to cable operators and others).

These comments clearly reflect concerns about the power wielded by programming *rights holders*, a power that is entirely independent of the distribution medium and that can be abused without an ownership link to a distributor. There is no conceivable justification for a rule that would *allow* DIRECTV to have an exclusive contract to provide its 16 million customers with highly valued exclusive access to "must-have" programming but would *disallow* similar exclusive contractual arrangements if they were entered into by Buckeye Cable System, with its 145,500 customers, Cablevision, with its 3.1 million customers, Time Warner, with its 13.4 million customers, or even Comcast with its 24.2 million customers.[83] If programming is

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80 RCN Comments at 17 (citing DIRECTV's attempt to get MLB's Extra Innings on an exclusive basis).

81 NTCA Comments at 5 (citing the MLB/DIRECTV deal).

82 ACA Comments at 12.

83 *See* NCTA, *Top 25 MSOs - As of December 2006, at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited Apr. 10, 2007).

"must-have" for one MVPD, then it necessarily is "must-have" for all MVPDs, regardless of size, distribution technology, or ownership affiliation.

Commenters' concerns underscore the serious flaws with the current exclusivity prohibition. As Comcast noted in its initial comments,

> [T]he current application of the exclusivity prohibition is fraught with inconsistencies. For example, the exclusivity prohibition's focus on whether programming is affiliated with a cable operator misses an important point: to the extent that MVPDs cannot survive without access to certain programming, it is irrelevant whether that programming is "affiliated"; what matters is whether that programming is "must-have" in order to compete. In the current regime, cable-affiliated programming that is of no competitive consequence is covered by the exclusivity prohibition, but other programming that has powerful competitive implications is not.[84]

These inconsistencies present serious constitutional issues.[85] Application of the exclusivity prohibition only to programming affiliated with a cable operator imposes regulations on particular speech based on who the speaker is. In effect, the Commission has determined that a particular type of speech, *e.g.*, sports programming, is "must-have," but instead of applying regulations on that speech uniformly, it regulates that speech only when the speaker is affiliated with a cable operator, leaving all other factors aside.

In addressing the issue of whether it is "necessary" to further extend the exclusivity prohibition for another five years beyond the time that Congress originally planned for it to sunset, it would be arbitrary and capricious for the Commission to further prolong a rule that has

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[84] Comcast Comments at 24-25. Comcast also noted that "it is anomalous that Cable Company X cannot have an exclusive agreement for programming that is owned by completely unrelated Cable Company Y," and that "it is exceptionally incongruous to allow non-cable MVPDs to have exclusives for their own vertically integrated programming." *Id.* at 25.

[85] *See* Cablevision Comments at 8-10; *cf. Sunset Order* ¶ 69 ("Besides being difficult to classify which programming services would be designated essential, making such a channel-by-channel determination would place the Commission in the untenable position of designating certain programming as more essential than others and thus raise constitutional questions.").

become so illogical in light of the realities of today's video marketplace. "If the Commission concludes that the exclusivity ban is 'necessary,' . . . it must tailor the ban as narrowly as possible to constrain only the minimum number of exclusivity arrangements necessary to preserve and promote competition in the distribution of video programming in order to meet First Amendment requirements."[86] Comcast has proffered several recommendations for how the Commission could scale back the exclusivity prohibition to make it more competitively neutral.[87] In addition, Cablevision proposed that "the ban should not be applied to restrict a cable-owned programmer from entering into exclusive arrangements outside the footprint of its affiliated cable operator."[88] It also proposed that the Commission exempt from the exclusivity prohibition programming that cannot be considered "necessary" to protect competition, for example new services, national networks with low average prime-time ratings, and regional non-sports programming.[89] Were the Commission, despite the compelling record evidence to the contrary, to find that the exclusivity prohibition continues to be "necessary," the Commission should limit application of the exclusivity prohibition in the ways that Comcast and Cablevision proposed.

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86 Cablevision Comments at 30.

87 *See* Comcast Comments at 26. Comcast proposed that the Commission limit standing under the rules to: (1) only those MVPDs that do not themselves exploit exclusive contracts for competitive advantage; (2) companies that do not have extensive resources to negotiate program carriage contracts for themselves (*e.g.*, companies with over 10 million customers, or companies that are part of an enterprise with a market capitalization of over $100 billion; or (3) MVPDs that have been in the video distribution industry for more than five years. *See id.*

88 Cablevision Comments at 30-31.

89 *See id* at 31.

B. Proposals To Expand the Scope of the Exclusivity Prohibition Are Beyond the Commission's Statutory Authority and Would Further Distort Competition in the Marketplace.

In this docket, as was the case five years ago, and in numerous intervening proceedings and hearings during the past five years, there have been calls for the FCC to expand the scope of the exclusivity prohibition to programming that is not covered by the statute. Moreover, some commenters urge the Commission to address in this proceeding issues that are wholly irrelevant to whether the exclusivity prohibition continues to be necessary. As it did in the past, the Commission should once again reject calls for it to exceed its statutory authority by expanding the scope of the exclusivity prohibition. The Commission should also reject invitations to address issues beyond whether the exclusivity prohibition continues to be necessary, especially in the absence of an adequate factual record.

Certain commenters renew their calls for the Commission to expand the scope of the exclusivity prohibition to include terrestrially-delivered programming and other content that is not covered by the program access rules.[90] However, with respect to terrestrially-delivered programming, the Commission "has concluded that the language of Section 628(c) expressly applies to 'satellite cable programming and satellite broadcast programming,' and that terrestrially delivered programming is 'outside of the direct coverage of Section 628(c).'"[91]

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90 *See* AT&T Comments at 8-9; BSPA Comments at 16-18; EchoStar Comments at 4; SureWest Comments at 4-8; Verizon Comments at 13-14. Verizon puts a new spin on its terrestrial argument by urging the Commission to "curb the ability of cable operators to evade the existing ban by shifting the HD feed of vertically integrated cable programming that is otherwise transmitted by satellite to terrestrial delivery." Verizon Comments at 13. Verizon's characterization of an HD feed of a network as simply a different feed of the same programming aired on a different medium ignores the fact that HD networks are distinct from their analog counterparts, and that the Commission has recognized them as distinct in its annual video competition reports. *See, e.g., 12th Annual Report* Table C-2.

91 *Sunset Order* ¶ 73 (citing *DIRECTV, Inc. v. Comcast Corp.*, 15 FCC Rcd. 22802 (2000)). The Commission noted that:

(footnote continued…)

Despite commenter claims to the contrary,[92] nothing has changed to alter that conclusion. Moreover, commenters' claims that the Commission can rely on other provisions of the Communications Act to expand the program access rules to terrestrially-delivered programming and other content not within the scope of the rules are wholly without merit.

Even if the Commission had power to rewrite the statute, there is no reason to do so. The claims by some parties that cable operators have "the incentive and ability" to migrate programming from satellite to terrestrial delivery,[93] or to deny certain content to other MVPDs, have been made in identical form by the same parties for a decade,[94] and they have yet to provide

(…footnote continued)

> the legislative history to Section 628 reinforces our conclusion. The Senate version of the legislation that became Section 628 would have applied the program access provisions to all "national and regional cable programmers who are affiliated with cable operators." The House version, by contrast, expressly limited the provisions to "satellite cable programming vendor[s] affiliated with a cable operator." The Conference agreement adopted the House version with amendments.

Id. (citing H.R. Conf. Rep. 102-862, at 91-93 (2000)).

92 *See* AT&T Comments at 9 n.24 (asserting that the "Commission *has* ample authority to address the problems posed by terrestrially delivered programming, whether migrated from satellite delivery or otherwise"); SureWest Comments at 7 ("Because it would consume [too many] resources to litigate individual cases showing that moving programming to terrestrial delivery was motivated to evade the exclusivity prohibition, the FCC should eliminate the Terrestrial Loophole by rulemaking.").

93 *See, e.g.*, AT&T Comments at 8-9; Qwest Comments at 4; SureWest Comments at 4-5; USTelecom Comments at 16 n.24.

94 *See* Comcast Reply Comments, MB Dkt. No. 06-189, at 27 n.115 (Dec. 29, 2006) (citing DIRECTV Comments, CS Dkt. No. 97-141, at 5-6 (July 23, 1997); DIRECTV Comments, CS Dkt. No. 98-102, at 6-7 (July 31, 1998); DIRECTV Comments, CS Dkt. No. 99-230, at 3 (Aug. 6, 1999); DIRECTV Comments, CS Dkt. No. 00-132, at 8, 15 (Sept. 8, 2000); DIRECTV Comments, CS Dkt. No. 01-129, at 8-10 (Aug. 3, 2001); DIRECTV Comments, MB Dkt. No. 02-145, at 9-11 (July 29, 2002); DIRECTV Comments, MB Dkt. No. 03-172, at 10 (Sept. 11, 2003); DIRECTV Comments, MB Dkt. No. 04-227, at 18-23 (July 23, 2004); DIRECTV Comments, MB Dkt. No. 05-255, at 14-15 (Sept. 19, 2005); EchoStar Comments, CS Dkt. No. 99-230, at 4-5 (Aug. 6, 1999); EchoStar Comments, CS Dkt. No. 01-129, at 10-11 (Aug. 3, 2001); EchoStar Comments, MB Dkt. No. 02-145, at 10-11 (July 29, 2002); EchoStar Comments, MB Dkt. No. 04-227, at 11-13 (July 23, 2004); EchoStar Comments, MB Dkt. No. 05-255, at 3-6 (Sept. 19, 2005); RCN Reply Comments, CS Dkt. No. 97-141, at 6 (Aug. 20, 1997); RCN Comments, CS Dkt. No. 99-230, at 18-22 (Aug. 6, 1999); RCN Comments, CS Dkt. No. 00-132, at 13-21 (Sept. 8, 2000); RCN Comments, CS Dkt. No. 01-129, at 9-10 (Aug. 3, 2001); RCN Comments, MB Dkt. No. 03-172, at 7-10 (Sept. 11, 2003); RCN Comments, MB Dkt. No. 04-227, at 9-10 (July 23, 2004); RCN Comments, MB Dkt. No. 05-255, at 7-11 (Sept. 19, 2005); BSPA Comments, Dkt. No. 02-145, at 11-16 (July 29, 2002); BSPA Comments, Dkt. No. 03-

(footnote continued…)

evidence of a single network that has so migrated or content that has actually been denied. For example, as explained above, RCN's claims that PBS KIDS Sprout is "must-have" content and that it has been denied access to Comcast SportsNet Philadelphia or PBS KIDS Sprout's VOD content are false and have been rejected previously by the Commission.[95] It is long past time when such claims -- or parties who persist in making these claims -- should be given any credence.

Some commenters also encourage the Commission to address issues that are beyond the scope of this proceeding. For example, OPASTCO and NTCA urge the Commission to address issues concerning programmers' negotiations and contracts with MVPDs that share a headend.[96] Although they provide only a vague discussion of their concerns, this is a remnant of last year's legislative session that has no place in this proceeding.[97] Shared headends present a security issue that is not at all relevant to the exclusivity prohibition. When contracting to sell programming to MVPDs that share a headend, networks need to know that those who are

(…footnote continued)

172, at 14-19 (Sept. 11, 2003); BSPA Comments, Dkt. No. 04-227, at 12-14 (July 23, 2004); BSPA Comments, Dkt. No. 05-255, at 12-15 (Sept. 19, 2005)).

95 *See 2005 Comcast Video Competition Reply* at 25 n.96 ("Contrary to what its comments imply, RCN has carried CSN Philadelphia without interruption since the network signed on in October 1997. RCN has always been offered the same terms and conditions as all other affiliates, despite the fact that CSN Philadelphia is not required to offer RCN any terms for carriage. After 18 months of refusing to sign a contract, RCN subsequently signed a new 5-year affiliation agreement with CSN -- on the same terms as every other affiliate. It is truly unfortunate that RCN repeats the same misstatements over and over again, and that Comcast must correct the record over and over again."). "With respect to RCN's claims that PBS Kids and PBS Sprout programming qualify as 'must have,' we note that several substitutes exist for that programming." *Adelphia Order* ¶ 168 & n.552; *see also id.* ¶ 168 n.552 ("Nickelodeon and Discovery KIDS, among other national programming networks, also offer children's programming. Moreover, we note that Comcast has indicated that Sprout is available for distribution by all multichannel video program distributors.").

96 *See* OPASTCO Comments at 8; NTCA Comments at 6-7.

97 *See* S. 2686, 109th Cong. § 337 (2006), *available at* http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s2686is.txt.pdf.

receiving their programming are paying for it, and that there are security controls so that the programming is not distributed to those that are not paying for it.[98] These are legitimate concerns that the marketplace is fully capable of sorting out. And these concerns apply to all networks, whether they are vertically integrated with a cable operator or not. Therefore, if there is a concern about "shared headend" issues in programming contracts, they should be considered in a separate docket.

IV. AMENDING THE PROGRAM ACCESS COMPLAINT PROCEDURES IS UNNECESSARY AND WOULD BE COUNTERPRODUCTIVE.

In its comments, EchoStar criticizes the Commission and complains that "[t]he Commission has failed to resolve program access complaints on their merits in an expedited manner."[99] EchoStar and a number of other commenters urge the Commission to revise its program access complaint procedures, ostensibly to expedite the Commission's handling of program access complaints.[100] None of these commenters, however, provide any evidence that the Commission's program access complaint procedures are not working precisely as intended.

In fact, the evidence in the record shows that the program access procedural rules have resulted in efficient resolution of those few program access disputes that have arisen, usually by

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98 A few commenters also urge the Commission to address conditioning access to certain programming networks and VOD programming on the purchase of other programming networks or the use of a particular VOD vendor. The bundling of programming, however, is not relevant to whether the exclusivity prohibition has been violated or should be extended.

99 EchoStar Comments at 14.

100 *See id.* at 15-18; *see also* AT&T Comments at 29-30; BSPA Comments at 7-15; CA2C Comments at 20-25; OPASTCO Comments at 8; RCN Comments at 18-21; SBA Comments at 8; USTelecom Comments at 20-29; Verizon Comments at 15-16.

a mutually-agreed upon settlement of the parties.[101] Where the Commission has had to make a decision on the merits, it has done so in a reasonable amount of time under the already expedited procedural rules it adopted in 1998.[102] Rather than further expedite the Commission's handling of these complaints, these proposals would make the program access complaint process more complicated, more costly, and more time-consuming. Worse, they would make it far more likely that parties will file unnecessary complaints to address issues that would otherwise be successfully resolved in private commercial negotiations. This would waste precious resources -- for the Commission and for industry -- and would not accelerate resolution of complaints. Moreover, these proposals invite the Commission to adopt dubious legal positions.

A. There Is No Evidence That the Commission's Program Access Complaint Procedures Are Inefficient or Need Fixing.

Parties criticizing the Commission and its procedures, and proposing changes to those procedures, fail to point to any significant problems with the current process for deciding program access complaints. Instead, they distort the factual history of program access complaints and falsely infer that their proposals will expedite the Commission's decision-making process. Moreover, many of the proposals commenters urge the Commission to adopt have been

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101 *See* Comcast Comments at 27-28 (noting that fewer than 50 program access complaints have been filed in the past 15 years, and the majority of those have been settled); EchoStar Comments at 14-15 (noting that 10 of the 13 program access rules that have been filed since the Commission adopted expedited program access procedures have been settled); NCTA Comments at 9 (noting that "[p]rogram access complaints have been few and far between over the last 15 years" and "[t]hose that have been filed have been disposed of relatively quickly or settled by the parties").

102 *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage,* Report & Order, 13 FCC Rcd. 15822 ¶¶ 5, 46 (1998) ("*1998 Program Access Order*").

made before, carefully considered, and wisely rejected. Evidence in the record makes clear that the Commission's procedures -- in this area anyway -- are working exactly as intended.

When the Commission previously examined the question of whether to impose strict time limits on its decision-making process, it recognized "that the adoption of time limits for the resolution of program access disputes" could benefit competition.[103] At the same time, it recognized "that any time limits imposed must reflect the myriad circumstances and complexity inherent in the program access provisions."[104] The Commission also noted that "any time limits imposed by the Commission *must afford a meaningful opportunity to pursue settlement negotiations*."[105] The Commission decided that five months was a reasonable amount of time to resolve programming cases (*i.e.*, unreasonable refusals to sell, petitions for exclusivity, and exclusivity complaints), and nine months was a reasonable amount of time to resolve "[a]ll other program access complaints, including price discrimination cases."[106] There is no evidence that this timeline has not been effective in realizing the Commission's goals. In fact, the evidence submitted in the initial comments shows the exact opposite.[107] That said, to the extent the Commission undertakes additional steps to establish and meet new deadlines for program access complaints -- steps that do not appear likely to expedite the process -- the Commission should

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103 *Id.* ¶ 38.

104 *Id.*

105 *Id.* ¶ 42 (emphasis added).

106 *Id.* ¶ 41.

107 *See* Comcast Comments at 27-28; EchoStar Comments at 14-15 (noting that the three program access complaints decided on the merits since 1998 were decided by the Commission on average within seven months); NCTA Comments at 9.

make a broader effort to process and decide a wide range of petitions, such as effective competition and timely-filed petitions for waiver.

According to EchoStar, the "recent history of program access complaints attest to the ineffectiveness of the current mechanism" because it took the Commission, on average, seven months to resolve on the merits the three out of the thirteen complaints filed since December 1998 that the parties did not settle.[108] Seven months, however, is not an unreasonable amount of time, especially where the cases involved multiple claims and complex issues that the Commission had to resolve.[109] Moreover, as NCTA notes, out of the fourteen complaints filed since 1998, "*the FCC has found not a single program access violation*."[110] Thus, even if the Commission had made a faster decision on these complaints, the results would not have been different. EchoStar seems to suggest that the fact that only three complaints have been decided on the merits means the procedures are not working, but that is plainly wrong. The Commission *wanted parties to settle* their differences, and it is clear that this goal is being achieved.[111]

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108 EchoStar Comments at 14-15.

109 *See In re EchoStar Communications Corp. v. Comcast Corp.*, Memorandum Opinion & Order, 14 FCC Rcd. 2089 ¶¶ 11, 13 (1999) (denying claims based on "an impermissible refusal to sell prohibited by Section 628(c)(2)(B)," undue influence "in violation of Section 628(c)(2)(A)," and an "unwillingness to negotiate" alleged to be an unfair practice under Section 628(b)); *In re RCN Telecom Servs. of N.Y. v. Cablevision Sys. Corp.*, Memorandum Opinion & Order, 14 FCC Rcd. 17093 ¶ 1 (1999) (denying claims based on "discrimination and unfair practices" in violation of Sections 628(b) and (c)); *In re Everest Midwest Licensee, L.L.C. v. Kansas City Cable Partners*, Memorandum Opinion & Order, 18 FCC Rcd. 26679 ¶ 1 (2003) (denying a claim that a programming network unaffiliated with a cable operator violated the exclusivity prohibition in Section 628(c)(2)(D) and a claim under Section 628(b)).

110 NCTA Comments at 11 (emphasis in original).

111 *See 1998 Program Access Order* ¶ 42 ("If parties choose to pursue negotiations, an alternative that we think provides the most efficient and effective resolution of program access disputes, these time limits will be suspended. We think this properly places on the parties a commensurate responsibility that these matters be resolved expeditiously."). EchoStar appears to accuse the Commission of dereliction of duty in its handling of those cases. *See* EchoStar Comments at 15-16 (claiming that "[p]rogram access proceedings remain pending far beyond a

(footnote continued…)

In short, none of the proponents of changes to the program access complaint procedures can get past the fact that, as Comcast and NCTA pointed out in their comments, the program access complaint procedures are already working to accomplish their stated objectives.[112] The evidence in the record confirms this fact.

B. Proposals for Amending the Program Access Complaint Procedures Will Impose Additional Costs and Delays in Processing Complaints, and Directly Conflict with the Commission's Stated Objectives.

Several commenters urge the Commission to expand "discovery" in program access complaint proceedings.[113] The current rules, however, already permit discovery when it is appropriate, and they properly leave it up to the Commission to make that determination on a case-by-case basis.[114] Proposals to allow automatic discovery without the Commission's prior approval would enable complainants to engage in fishing expeditions and rummage through the most confidential business documents that programming networks possess.[115] Commenters offer no justification for expanded discovery that can outweigh the widely recognized fact that these documents are extraordinarily sensitive, and keeping them confidential is key to safeguarding

(…footnote continued)

commercially reasonable time frame to resolve programming disputes, increasing the probably [sic] that complainants lose faith in the Commission's process").

112 *See* Comcast Comments at 26-28; NCTA Comments at 9-11.

113 *See, e.g.*, AT&T Comments at 30-31; CA2C Comments at 22-24; EchoStar Comments at 17; USTelecom Comments at 21-24.

114 *See* 47 C.F.R. §§ 76.7(f) (noting that the "Commission staff may in its discretion order discovery limited to the issues specified by the Commission"), 76.1003(a) (noting that program access complaints "shall be filed and responded to in accordance with the procedures specified in § 76.7").

115 *See, e.g.*, USTelecom Comments at 23-25; AT&T Comments at 30-31; RCN Comments at 20; CA2C Comments at 23-24.

competition in the programming marketplace.[116] In addition, these commenters paper over the fact that introducing such procedures would dramatically increase the expense, complexity, and time required to properly examine a program access complaint for both the defendant and the Commission. One is left to conclude that these parties simply want to see what others are paying in the hopes of using the information to negotiate more favorable terms for themselves.

Other proposals offered by commenters similarly lack any rational relationship with a procedural problem that needs fixing, and they appear designed to increase distributors' ability to secure preferential programming agreements. For example, the "shot clock" proposals offered by several parties would require Commission action on program access complaints in 45 days,[117] 120 days,[118] or 5 months.[119] One commenter wants program access complainants to continue to have up to a year to prepare their complaints but proposes to shorten the time for a defendant to respond to an insanely short ten days.[120] Aside from the fact that these proposals are not based on any demonstrated problems with the existing complaint procedures,[121] the fact is, as NCTA pointed out,

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116 *See EchoStar Satellite L.L.C. v. Home Box Office, Inc., Request for Enhanced Confidential Treatment,* Order, 21 FCC Rcd. 14197 ¶ 9 (2006) (recognizing that certain documents and information such as programming contracts are "so competitively sensitive that additional protection [beyond that ordinarily afforded under the Commission's protective orders] is warranted").

117 *See*, *e.g.*, EchoStar Comments at 25.

118 *See*, *e.g.*, AT&T Comments at 6; CA2C Comments at 21-22.

119 *See*, *e.g.*, Verizon Comments at 15-16.

120 *See* EchoStar Comments at 10. Conveniently, while EchoStar would have the Commission reduce the amount of time that a programmer can reply to EchoStar's program access complaint, it makes no suggestion that the Commission should reduce the amount of time in which an MVPD has to bring a program access complaint. *See* EchoStar Comments at 10.

121 Nor do they explain why program access complaints, which have already been assured speedy processing, should be further accelerated while other important Commission business is allowed to languish. For example,

(footnote continued…)

> [P]rogram access complaints already are put on a fast track: cable operators have only 20 days to answer a program access complaint, and replies are due 15 days thereafter -- among the shortest timeframes anywhere in FCC regulation. Given this short pleading cycle, it is hard to see how reducing it further would materially affect the timing for resolving these disputes.[122]

Several commenters also advocate that the Commission adopt a "standstill" provision whereby a distributor would be allowed to continue carrying programming after its carriage contract has elapsed.[123] Such a standstill provision, however, would severely undermine resolution of carriage disputes and encourage more MVPDs to use program access complaint proceedings as negotiating leverage. MVPDs that knew they would be assured of continued access to programming after a contract expired simply by filing a program access complaint would be more likely to file such a complaint and less likely to negotiate an equitable deal prior to expiration of the contract. They would also be more likely to use the threat of a program access complaint as leverage over a programmer. Moreover, a standstill provision would interfere with programmers' ability to protect themselves from the unauthorized carriage of their programming.

Neither marketplace realities nor any evidence of bad behavior on the part of programmers suggests that such requirements are necessary. In fact, the use of standstill requirements is extremely rare, and the Commission repeatedly has refused to interfere in the

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many requests for waivers filed under Section 629(c) have been left unaddressed well beyond the statutory 90-day deadline. And some petitions for determinations of effective competition have languished for nearly four years. *See* Public Notice, FCC, *Special Relief and Show Cause Petitions* (Apr. 28, 2003) (listing four petitions (CSR-6152-E, CSR-6153-E, CSR-6154-E, and CSR-6156-E) for a determination of effective competition in suburbs of Boston).

122 NCTA Comments at 9-10.

123 *See*, *e.g.*, EchoStar Comments at 28-30; USTelecom Comments at 27-29; RCN Comments at 19; BSPA Comments at 14-15.

negotiations between programmers and MVPDs.[124] For example, in the retransmission consent context, the Commission recently refused to mandate continued carriage of programming while negotiations between Sinclair Broadcasting and Mediacom were ongoing,[125] even though allowing Sinclair to pull its signal from Mediacom resulted in more than 700,000 Mediacom subscribers not being able to watch their local broadcast programming -- despite the Commission's prior determination that it considers local broadcast programming to be "must-have" programming[126] -- and many also missed the Super Bowl.[127]

One of the most outlandish proposals is that the Commission -- after first arrogating to itself increased power over program access disputes -- then should subdelegate its decisionmaking power to a third-party for binding arbitration.[128] The Commission refused to do so in the Sinclair-Mediacom case.[129] The implicit notion of these arbitration outsourcing proposals seems to be that the Commission is incapable of doing the job that Congress has assigned to it. However, these commenters fail to address how it can be that any single arbitrator of unknown experience and credentials is better qualified than the federal government's expert

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124 *See, e.g.*, 47 C.F.R. § 76.1601, note 1 (imposing a limited standstill provision on both broadcasters and cable operators during "sweeps" periods).

125 *See In re Mediacom Communications Corp. v. Sinclair Broad. Group, Inc.*, *Emergency Retransmission Consent Complaint for Enforcement for Failure To Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion & Order, 22 FCC Rcd. 47 ¶ 25 (2007) ("*Sinclair-Mediacom Order*") ("[W]e recognize the cost to consumers if Mediacom and Sinclair do not reach an agreement . . . . Although we would not have authority to order continued carriage in this case, we would encourage the parties to do so.").

126 *News Corp.-DIRECTV Order* ¶ 202.

127 *See* Ted Hearn & Linda Moss, *FCC Sits Out Sinclair Flap*, Multichannel News, Feb. 5, 2007.

128 *See, e.g.*, EchoStar Comments at 19; OPASTCO Comments at 8; RCN Comments at 19-20.

129 *Sinclair-Mediacom Order* ¶ 25 ("The Commission does not have the authority to require the parties to submit to binding arbitration.").

agency, with its staff of nearly 2000 lawyers, economists, accountants, and other specialists, and a budget of nearly $400 million per year, to assess the merit, or lack thereof, of a program access complaint.[130]

As discussed more fully below, mandatory arbitration proposals raise significant legal concerns, and proponents of mandatory arbitration recognize those concerns. Accordingly, they propose that the Commission have the power to conduct a *de novo* review of any decision by an arbitrator.[131] In summary, those who propose procedural changes to expedite Commission reviews would also inject vastly more time, complexity and expense into the process through the subdelegation of its authority to non-expert arbitrators with the potential for a subsequent *de novo* review. This is just another example of how ill-conceived the requests for procedural revisions really are.

For example, although BSPA points to the Commission's experience "with the reconfiguration of the 800 MHz band" as an example where "the Commission decided to use a third-party, independent 'Transition Administrator,'"[132] it fails to acknowledge that proceedings under that process can take years to resolve.[133] Adding more steps to a process necessarily

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[130] The Commission has requested $426,994,000 in "total proposed gross budget authority" for FY 2008. *See* FCC, *FY 2008 Budget Estimates Submitted to Congress February 2007*, at 3, *available at* http://www.fcc.gov/Reports/fcc2008budget_complete.pdf.

[131] *See* EchoStar Comments at 22; BSPA Comments Attachment A, pt. 3; NCTA Comments at 14.

[132] *See* BSPA Comments at 12-14.

[133] *See, e.g., In re City of Boston and Sprint Nextel Corp., Relating to Rebanding Issues in the 800 MHz Band,* Hearing Designation Order, DA 07-1631, PS Docket No. 07-69, Mediation No. TAM-11155, ¶¶ 4-5 (Apr. 5, 2007) (designating an issue for a hearing and de novo review after two years of negotiations and multiple orders).

increases its complexity and length, and proponents of mandatory arbitration offer no explanation of why binding program access arbitration would differ.[134]

C. Proponents Overreach for Commission Legal Authority To Amend the Program Access Complaint Procedures.

The regulatory feeding frenzy reflected in all of these procedural proposals -- as well as in proposals to expand the program access rules -- is perhaps best illustrated by the assortment of statutory provisions on which the proponents urge the Commission to rely. Rather than basing their proposals on the actual provisions of the statute related to program access, these parties reach in vain for other unrelated provisions of the Communications Act.[135] For example, some commenters would have the Commission find the authority to expand the program access provisions and implement procedural reform in Section 303(r) of the Communications Act,[136] ignoring the fact that this provision is located in the Title of the Communications Act establishing provisions for radio, not for cable.[137] Others would have the Commission invoke Section 4(i),[138] which gives the Commission the power to implement, but not rewrite, the

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134 *See* NCTA Comments at 14 (noting that adding an additional layer of review could almost double the amount of time necessary to handle program access complaints).

135 *See, e.g.*, USTelecom Comments at 28-29 (exhorting the Commission to use Section 4(i)); RCN at 18-21 (suggesting that the Commission has authority to delegate adjudication to a third-party arbitrator under §§ 303(r), and 4(i) and (j)); BSPA at 16 (arguing that Sections 303(r), 4(i), and 4(j) provide the Commission authority to make its suggested changes to the complaint procedures). Yet another commenter proposes to invoke Section 601(6) (the general purposes clauses of Title VI). *See* SureWest Comments at 7-8.

136 *See* BSPA Comments at 10-11; RCN Comments at 18-21.

137 USTelecom argues that the Commission can use its authority in Section 628(e) to adopt a standstill provision. Section 628(e), however, grants the Commission authority to adopt remedies once a program access violation has been found, not to adopt prospective rules to govern parties to a complaint proceeding who have only been accused of violating the rules. *See* 47 U.S.C. § 548(e).

138 *See* BSPA Comments at 10-11; RCN Comments at 18-21; SureWest Comments at 7-8; USTelecom Comments at 28-29.

Communications Act. And still others point to Section 612 (governing leased access) and Section 616 (governing program carriage) as sources of authority for the Commission to address program access issues.[139] In fact, proponents of additional regulation interpret these provisions to give the Commission essentially unfettered authority to do whatever it thinks would help to promote competition, which is not the way in which the Communications Act should be interpreted. To paraphrase what then-Commissioner Martin said the last time the Commission examined similar issues, it is unclear what the Commission could *not* do under such an interpretation of these provisions.[140]

The reality is that these proposals have little to do with speeding up the complaint process, and a great deal to do with increasing these parties' leverage over the specific category of programmers that have been subject to these outdated rules. NCTA hits the nail on the head when it notes that "shortening of the time period for a cable operator's response to a complaint would *merely impose additional hardships on the respondents*."[141] The Commission should decline commenters' invitations to reach for new authority to impose additional regulations, especially in the absence of any evidence that such regulations are needed, and should reject these proposals.

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139 *See* RICA Comments at 5 (urging the Commission to find that the 70/70 test has been met).

140 *See In re Telecommunications Services, Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 18 FCC Rcd. 1342, 1400 (2003) (Separate Statement of Commissioner Kevin J. Martin Approving in Part, Dissenting in Part) ("[T]he interpretation of these provisions in this item offers no limitation on our authority, and thus I am not sure what this interpretation would *not* allow us to do. I am not as comfortable interpreting these provision so broadly.").

141 NCTA Comments at 9-10 (emphasis added).

V. CONCLUSION.

For the reasons set forth above, the Commission should allow the exclusivity prohibition to sunset on October 5, 2007, and should not expand the scope of its program access rules or revise its procedural rules governing program access disputes.

Respectfully submitted,

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April 16, 2007