Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198
	)	

COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

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COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

USTelecom is pleased to submit its comments in the above referenced proceeding regarding the program access rules.[1] The decision by the Federal Communications Commission (Commission) to extend the program access rules for five additional years is essential to ensuring increased competition in the multichannel video program distribution (MVPD) market, particularly for the growing wireline competition to incumbent cable operators. The United States Telecom Association (USTelecom)[2] agrees with the conclusion reached in the Commission's accompanying order that the exclusive contract prohibition continues to be

[1] These comments are submitted in response to, Report and Order and Notice of Proposed Rulemaking, *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 72 FR 61559 (rel. Oct. 31, 2007) (*Program Access NPRM*).

[2] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

necessary to preserve and protect competition and diversity in the MVPD market.[3] The Commission's market-opening video orders have led to increased video competition benefiting consumers across the nation and are providing a key incentive for increased broadband deployment.

USTelecom's comments focus on four issues relevant to the Commission in its *Program Access NPRM*. First, as a general policy matter, the Commission's decision to extend the Program Access rules will continue to promote nascent wireline video competition to cable incumbents. Because wireline video entrants are in the early stages of market entry, continued access to vertically integrated content remains essential. Assured access to video programming in turn, leads to increased video competition and the inherent consumer benefits including greater broadband deployment.[4]

Second, the Commission must close the so-called terrestrial loophole, and has ample legal authority to do so. In particular, Section 628(b) of the Communications Act provides the Commission with sufficient legal authority to address this anti-competitive practice increasingly being used by cable incumbents.

Third, it is premature for the Commission to consider sunsetting its program access rules prior to their recently extended five year term. It is imperative that new, wireline entrants be afforded sufficient time to deploy their video networks to compete with cable incumbents, and

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[3] *Program Access NPRM*, ¶1.

[4] *See e.g., Remarks of FCC Chairman Kevin J. Martin, Phoenix Center, USTelecom 2006 Symposium*, December 6, 2006 (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268845A1.pdf) (visited December 28, 2007) (during which Chairman Martin stated that "the ability to deploy broadband networks rapidly and the ability to offer video to consumers are linked intrinsically."); Statement of Chairman Kevin J. Martin, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order, Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (*MDU Order*), (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277763A2.pdf) (stating his pleasure that "the Commission has taken action that will not only enhance video competition but advance broadband deployment by encouraging the deployment of facilities by new entrants.").

build their competitive subscriber base. Moreover, the proposed market-by-market analysis – particularly with respect to small, rural MVPD competitors – fails to account for incumbent cable's national market leverage.

Finally, the Commission should address the unique problems faced by small and rural wireline MVPD distributors. In particular, the Commission should address issues relating to the important role that shared head-ends play in rural video and broadband deployment.

I. THE COMMISSION'S EXTENSION OF THE PROGRAM ACCESS RULES HAS PROMOTED NASCENT WIRELINE VIDEO COMPETITION TO CABLE INCUMBENTS AND SUPPORTED SUBSTANTIAL CONSUMER BENEFITS.

When the Commission recently extended its program access rules it acknowledged some of the stark realities in today's MVPD market.[5] It appropriately concluded that vertically integrated programmers continue to have the both the incentive and ability to favor their affiliated cable operators over competitive MVPDs.[6] This marketplace reality is particularly true for wireline entrants who are in the early stages of video deployment. With the Commission's extension of the program access rules, however, nascent competition to cable incumbents will continue to flourish. This increased wireline competition will also lead to substantial consumer benefits as well, including lower prices for video programming, enhanced services, and increased broadband deployment.

[5] The Commission concluded that the number of national and regional satellite-delivered programming networks vertically integrated with cable operators has increased (*Program Access NPRM*, ¶¶18, 21), while the percentage of subscribers receiving video programming from one of the four largest vertically integrated cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased "significantly." *Id*., at ¶27. Finally, and perhaps most relevant to the discussion of the terrestrial loophole, the amount of regional clustering of cable systems has "remained significant." *Id.*, at ¶28.

[6] *Program Access NPRM*, ¶29.

In reaching its decision, the Commission acknowledged a Government Accountability Office (GAO) report that detailed the continuing problem of escalating cable rates.[7] The GAO concluded that wireline video entry provides more price discipline to cable than direct broadcast satellite (DBS) and is more likely to force cable operators to enhance their own services and to improve customer service.[8] Unfortunately, because incumbent cable operators continue to control nearly 70% of the MVPD market, and wireline competitive entry is in its early stages, prices for video services across the country have been *increasing* on average at a pace that far surpasses the rate of inflation.[9]

There is one clear exception to this general rule of cable rate increases – where a cable incumbent faces competition from a wireline-based video provider, its rates are approximately 17% lower than the same operator's rates elsewhere.[10] Where the cable incumbent faces competition with a broadband service provider offering video service, it appears that the cable operator goes even further, responding "by providing more and better services and by reducing

[7] GAO, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004) (*GAO Report*).

[8] *Program Access NPRM*, ¶24 (citing in part, *GAO Report*). *See also* Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087, 15091 (2006).

[9] According to the Commission's most recent report on cable industry prices, as of January 2005, cable prices increased more than 5 percent and by 93 percent since the period immediately prior to Congress's enactment of the Telecommunications Act of 1996. Expanded basic prices rose more than 6 percent or twice the rate of inflation during the same period. Importantly, the Commission noted that prices are 17 percent lower where wireline cable competition is present. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report On Cable Industry Prices, 21 FCC Rcd 15087, ¶2 (2005) (*2005 Cable Prices Report*). Indeed, even with the presence of two DBS competitors, cable operators have been steadily increasing their prices more than 300% as fast as the Consumer Price Index (CPI). United States GAO, *Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, at 20 (Oct. 2003) (*2003 GAO Report*) (available at http://frwebgate.access.gpo.gov). GAO reported that cable rates increased 40% over a five-year period compared with a 12% increase in the CPI.

[10] *2005 Cable Prices Report*, ¶2. *See also*, 2003 *GAO Report* at 3, 10 (cited in S. 1349, 109th Cong., 1st Sess. § 2(3) (2005)).

rates and offering special deals."[11] In fact, customers see the benefits of wireline competition in the form of substantially greater price cuts (on average 300% greater) for video services from wireline competition than from satellite competition.[12]

So far, relatively few consumers today see the benefits of direct wireline competition, since fewer than 2% of the nation's households reside in markets where head-to-head competition exists.[13] But that is slowly changing. With wireline video entry finally emerging as a competitive reality for cable incumbents, retention of the program access rules through their full term is imperative.

II. THE COMMISSION HAS AMPLE LEGAL AUTHORITY AND COMPELLING PUBLIC POLICY REASONS FOR CLOSING THE TERRESTRIAL LOOPHOLE.

There is, unfortunately, a significant caveat to this optimistic assessment of the impact of the Commission's decision to extend the program access obligations. The current exception for terrestrially delivered programs creates a significant loophole which integrated cable programming owners are increasingly using to deny must-have programming to new entrant competitors. The Commission has ample legal authority under Section 628(b) of the Act to address cable incumbents' anti-competitive use of the terrestrial loophole. This legal authority, coupled with compelling public policy goals, warrants immediate Commission action.

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[11] GAO, *Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241,at 12 (Feb. 2004) (finding that "the monthly rate for cable television service was 41% lower compared with the matched market, and in 2 other [broadband service provider] locations, cable rates were more than 30% lower when compared with their matched markets"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Tenth Annual Report, 19 FCC Rcd 1606, ¶ 11 (2004) (*Tenth Report*).

[12] GAO, *Report to the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary: Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets*, GAO 05-257 (2005).

[13] *Program Access NPRM*, ¶24 (referencing AT&T Comments at 4 (MB Docket No. 06-189) (November 29, 2006)).

A. Compelling Policy Reasons Exist for Closing the Terrestrial Loophole.

Substantial policy reasons exist for the Commission to close the terrestrial loophole. As discussed above, competition from wireline providers yields significant and important consumer benefits. Where true, wireline competition to cable incumbents exists, consumers benefit from lower costs, greater availability of advanced services, and increased broadband deployment.

Abuse of the terrestrial loophole by cable incumbents creates an unwarranted – and detrimental – exception to Commission's program access rules. There is simply no substantive distinction between programming delivered terrestrially, and programming delivered via satellite. Rather than focus on *how* programming is delivered, the appropriate Commission analysis should focus on the effect that such delivery has in the MVPD market.

For example, the Commission has previously concluded that lack of access to regional sports network (RSN) programming can decrease an MVPD's market share "significantly," thereby having a "material adverse impact" in the MVPD market.[14] As the Commission is already aware, incumbent cable operators are significantly expanding their regional clusters throughout the country.[15] These clusters now extend over major population regions and entire states, and provide incumbent cable operators with both the incentive and opportunity to deliver local and regional programming terrestrially to thwart video competition and evade the program access rules.

The Commission is already aware of instances where this competitive abuse has occurred, particularly with respect to "must-have" sports and high definition (HD) programming.

[14] *Program Access NPRM*, ¶39.
[15] The Commission noted in its *Program Access NPRM* that the amount of regional clustering of cable systems "has remained significant." In particular, it noted that the percentage of cable subscribers that are served by systems that are part of regional clusters has increased since 2002, from 80% to as much as 85% to 90%. *Program Access NPRM*, ¶28.

For example, the Commission notes instances where Rainbow Media Holdings, LLC – a vertically integrated programming subsidiary of Cablevision Systems Corporation (Cablevision) – delivered HD feeds of its sports programming terrestrially to avoid the program access rules. Concurrent with its terrestrial delivery of this programming, Cablevision's advertising campaign in the New York City market emphasized its ability to offer more HD sports than its competitors.[16]

Similarly, the Commission specifically pointed to the withholding of cable-affiliated RSNs in Philadelphia and San Diego, where competitive MVPD subscription rates were 40% and 33% below, respectively of what would otherwise be expected. This is exactly the type of anti-competitive behavior the Commission's rules were meant to address, and there is simply no policy reason to allow this activity to persist. While such activity may fall outside the purview of Section 628(c), its anti-competitive effects can be sufficiently addressed by Section 628(b). Indeed, in its recent order extending the program access rules, the Commission deemed this withholding by cable incumbents "significant," since it demonstrated that, "absent a prohibition, cable-affiliated programmers *will* engage in withholding of programming from competitive MVPDs."[17]

Commission action in this area would also ensure more robust broadband deployment by wireline entrants. As the Commission has noted on numerous occasions, broadband deployment and entry into the MVPD business are "inextricably linked."[18] Abuse of the terrestrial loophole by cable incumbents, and its potential proliferation, constitute a significant barrier to the

[16] *Program Access NPRM*, p. 35.
[17] *Id*. at ¶51 (emphasis added).
[18] *See e.g.*, Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, ¶51 (2006) (*Franchise Reform Order*); *MDU Order*, ¶20.

provision of competitive video services. Because the deployment of broadband networks and the provision of video service are intrinsically linked, abuse of the terrestrial loophole by cable incumbents compromises the ability of wireline competitors to deploy other advanced services to consumers.

B. Section 628(b) Provides Ample Legal Authority to Close the Terrestrial Loophole.

The Commission asks whether it would be appropriate to extend its program access rules to all terrestrially delivered cable-affiliated programming pursuant to Section 628(b) of the Communications Act.[19] Section 628(b) makes it unlawful for a cable operator or a vertically integrated satellite cable programming vendor to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming . . . to subscribers or consumers." The provision does not delineate specific conduct that might fall under its purview, but rather focuses on the *effect* that any such conduct may have.

Indeed, the Commission used Section 628(b) as the basis for its decision in its recent order banning exclusive contracts in multiple dwelling unit (MDU) units.[20] The application of Section 628(b) in the Commission's MDU proceeding did not focus on video programming per se, but rather on the anti-competitive effect that exclusive contracts in MDUs had on the broader MVPD market.[21]

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[19] *Program Access NPRM*, ¶16.
[20] *MDU Order*, ¶4.
[21] Specifically, the Commission concluded that the use of exclusivity clauses in contracts for the provision of video services to MDUs "constituted an unfair method of competition or an unfair act or practice proscribed by Section 628(b)." *MDU Order*, ¶16.

In the MDU proceeding, the Commission noted that Section 628 is, among other things, "designed to increase 'competition and diversity' in the [MVPD] marketplace."[22] It went on to note that the section "specifically prohibits cable operators from engaging in unfair methods of competition or unfair acts or practices that have the purpose or effect of hindering significantly or preventing any MVPD from providing satellite cable programming or satellite broadcast programming to consumers."[23]

Application of this same standard is directly analogous to addressing the terrestrial loophole. When competitors are denied access to terrestrially delivered regional sports programming that has not historically been covered by the program access rules, their ability to enter the market and provide multichannel video programming, including satellite delivered programming, to consumers is "significantly hindered" or "prevented" outright.[24] USTelecom urges the Commission to address this anti-competitive behavior by cable incumbents by closing the terrestrial loophole.

III. IT IS PREMATURE FOR THE COMMISSION TO CONSIDER A SUNSET OF THE PROGRAM ACCESS RULES.

A mere three months ago, the Commission retained its exclusive contract prohibition after concluding that it remains "necessary to preserve and protect competition and diversity" in the MVPD market.[25] The Commission based its conclusion on a number of factors, including – in what the it calls a "significant development since 2002"[26] – the fact that cable incumbents are

[22] *Id*. at ¶27.
[23] *MDU Order*, ¶27.
[24] 47 U.S.C. § 628(b).
[25] *Program Access NPRM*, ¶12.
[26] *Id*. at ¶24.

finally facing aggressive competition from wireline telecom entrants.[27] Based upon this recent – and crucial – marketplace development, it is premature for the Commission to consider an early sunset.

A. Adequate Time is Needed for the Commission's Recent Orders to Achieve Success.

While recent Commission actions have established a regulatory framework favorable for increased video competition and broadband deployment, it is now up to competitors in the market to achieve the Commission's goal of robust video competition. In this context, it is imperative that the Commission provide adequate time for its recent orders to reach fruition, particularly with respect to wireline entrants.

Many USTelecom members are already stepping up to the plate to make this robust competition a reality. For example, USTelecom member SureWest Communications (SureWest) announced in November that it had added 11,364 fiber marketable homes to its advanced all-fiber network. SureWest's expansion of its advanced network increased its total marketable homes penetration rate to 30% from 27% from the prior year.[28]

Similarly, HickoryTech Corporation headquartered in Mankato, Minnesota, recently announced the launch of a state-of-the-art IPTV service in portions of its service territory. The

[27] This development is particularly important, since the Commission recently reported to Congress that "[r]elatively few consumers have a second wireline alternative" to incumbent cable. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶9 (2006) (*Twelfth Report*). Indeed, the Commission's recent order program access order acknowledges that "[d]espite the significant investments made in competitive wireline networks . . . wireline entrants have no more than 1.9 percent of all MVPD subscribers." *Program Access NPRM*, ¶24.

[28] *See* SureWest News Release, *SureWest Reports Third Quarter 2007 Results Broadband Segment Posts Strong Results*, November 8, 2007 (available at: http://www.surw.com/media_relations/press/releases/ShowPR.php?Head_ID=225) (visited December 28, 2007). According to the company, the significant increase in fiber marketable homes "was a result of the continued expansion and upgrading of the fiber footprint into regions with the potential to achieve greater than 35% penetration."

$4 million investment enables residents to subscribe to the video service on a stand-alone basis, or as part of a money-saving bundle that includes high-speed DSL with speeds up to 6 Mbps, local telephone and long distance.[29]

This substantial deployment is typical of the North American service providers' industry. By one estimate, North American service providers' capital expenditures totaled $68.6 billion in 2006, up 8% from 2005, and are projected to increase 12% to $76.7 billion in 2010. It is projected that over the 5-year period from 2006 to 2010, North American service providers will spend a cumulative $369.6 billion on capital expenditures.[30]

A principal goal of the Commission in the last decade has been the promotion of competition to cable incumbents in the MVPD market. Starting with its licensing of the first DBS licensees in the late 1980s, the Commission has carefully implemented targeted measures that have increased competition in the MVPD market: implementation of the initial program access rules in 1993;[31] their subsequent extension in 2002;[32] implementation of the Satellite Home Viewer Improvement Act of 1999 (SHVIA);[33] their subsequent renewal via the Satellite Home Viewer Extension and Reauthorization Act (SHVERA) of 2004.[34]

[29] *See* Hickory Tech Corporation, News Release, *HickoryTech Launches Digital TV Service in North Mankato and Janesville*, July 30, 2007 (available at: http://phx.corporate-ir.net/phoenix.zhtml?c=79055&p=irol-newsArticle&ID=1033331&highlight=) (visited December 28, 2007).
[30] *See* Infonetics Research, Press Release, *North American Telecom Carrier Capex Hits $69B in 2006*, April 11, 2007 (available at: http://www.infonetics.com/pr/2007/msna07.cpx.2h06.nr.asp) (visited December 28, 2007).
[31] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359 (1993).
[32] *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 and Order, 17 FCC Rcd 12124 (2002) (*2002 Extension Order*).
[33] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918 (2001).
[34] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004/Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 (2005).

Although these affirmative actions by the Commission had a positive effect in the MVPD market, their impact was limited: cable rates continued to rise despite the introduction of much needed competition to cable incumbents. To address this marketplace imbalance, the Commission has only recently implemented measured regulatory changes to foster increased competition from *wireline* MVPDs.

In the last two years alone, the Commission has streamlined the franchise approval process,[35] banned exclusive contracts for the provision of video services to multiple dwelling units (MDUs)[36] and – most recently – extended its program access rules for an additional five years.[37] The importance of these changes is further underscored based on the Commission's recent conclusion that broadband deployment and deployment of video programming are "inextricably linked."[38]

The Commission decision to extend the program access rules, however, is most critical for fostering increased wireline competition to cable incumbents. While streamlining the franchise approval process and increasing access to MDUs will foster *where* wireline entrants compete, the program access rules provides some guarantee of access to must have programming that determines *how effectively* wireline entrants compete with cable incumbents.

Of course, like SHVIA and SHVERA, the competitive impact of these Commission actions will not bear results overnight. Indeed, it was not until 2004 that the Commission finally acknowledged that DBS had become "the most significant national competitor to cable."[39] This competitive marketplace reality did not occur until a full sixteen years after DBS's initial

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[35] *Franchise Reform Order*.
[36] *MDU Order*.
[37] *See Program Access NPRM*.
[38] *See e.g.*; *Franchise Reform Order*, ¶51; *MDU Order*, ¶20.
[39] *Tenth Report*, ¶5

licensing, twelve years after passage of the original program access rules, eleven years after DBS's initial market entry, and three years after passage of SHVIA. The Commission's recent actions to foster wireline video competition are young by any measure,[40] and it is imperative that they be afforded sufficient time to achieve positive competitive results.

B. Wireline Video Entrants Need Sufficient Time to Deploy Their Networks and Build Their Subscriber Base.

Competitive wireline video entry in the MVPD market is a recent and important development acknowledged by the Commission and others. In the limited areas where this head-to-head competition exists, consumers are already seeing benefits in the form of lower prices, enhanced offerings and better service. But such nascent competition to incumbent cable operators must be afforded time to develop and flourish. On this basis alone, the Commission would be ill advised to sunset its exclusive contracts prohibition.

For example, according to cable industry statistics, incumbent cable operators pass 123 million homes – a full 98% of households – in the United States.[41] In contrast, while even the largest telecom competitors are aggressively deploying their respective video services, their projected homes passed rates remain well below those of cable. For example, AT&T estimates that by the end of 2008, its video service will be available to 17 million homes,[42] while Verizon

[40] Key measures implemented by the Commission to foster this competition have only occurred in the last year: franchise reform less than one year ago, MDU access less than two months ago, and more importantly, extension of the program access rules mere weeks ago.

[41] *See* Cable Industry Statistics, NCTA website (available at: http://www.ncta.com/Statistic/Statistic/Statistics.aspx) (visited December 20, 2007).

[42] See Todd Spangler, *AT&T Ups U-verse Spending Estimates by $500 Million; Telco Also Cuts Projected Number of Homes Passed, to 17 Million by End of 2008*, Multichannel News, November 6, 2007 (available at: http://www.multichannel.com/article/CA6497700.html (visited January 3, 2008).

estimates video service to 15 million households by 2010.[43] Combined, these two companys' wireline video services will be available to approximately one quarter of the homes served by cable in the next two years.

For smaller competitors, the story is similar. The National Exchange Carrier Association (NECA) recently reported that while small, rural companies are doing "an admirable job"[44] of deploying wireline video services to consumers in rural areas, they remain in the early stages of deployment.[45] For example, of 1,114 members surveyed, only about 400 members are currently deploying video services.[46]

A small portion of these members -- 114 according to the report – are deploying the "next wave of video services technology" in the form of IPTV, and 132 more plan to deploy IPTV in 2008 or beyond.[47] Because NECA cites the cost of programming as a substantial obstacle to video deployment for these companies, the Commission would be ill-advised to sunset the program access rules. While both large and small wireline entrants are doing an admirable job of deploying video services in direct competition to cable, sufficient time is needed for these competitors to achieve a position that guarantees consumers the benefits of real competition. Any such decision by the Commission to sunset the prohibition on exclusive contracts in two years would stall these deployment efforts.

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[43] *See* Verizon News Release, *Verizon FiOS TV Customers Have a Powerful New Way to Find and Enjoy Home Entertainment*, July 17, 2007 (available at: http://newscenter.verizon.com/press-releases/verizon/2007/verizon-fios-tv-customers.html) (visited January 3, 2008).
[44] Report, *Trends 2007, Building Tomorrow's Network*, National Exchange Carrier Association, p. 4 (available at: http://www.neca.org/source/NECA_Publications_4943.asp) (visited December 27, 2007) (*NECA 2007 Report*).
[45] *NECA 2007 Report*, p. 9. NECA also stressed the obstacles faced by these companies in serving low-density rural markets. They include not only the high cost of last mile and middle mile backbone connections, but the equally formidable issue of "[g]aining access to and paying for video content." *Id*.
[46] *NECA 2007 Report*, p. 4.
[47] *Id*. at p. 14.

C. A Market-by-Market Analysis Fails to Account for Incumbent Cable's National Market Leverage.

The Commission seeks comment on whether it would be appropriate to sunset the program access rules through a market-by-market analysis in a designated market area (DMA) where a cable incumbent can show competition from new MVPD entrants.[48] Such an analysis is flawed at the outset, since it fails to account for the realities of the programming market, and incumbent cable's national market leverage.

While analysis of the MVPD market at the local level may seem appealing, such an approach ignores cable incumbents' national market presence. This marketplace reality is even more acute for smaller, rural wireline video entrants. Specifically, smaller, wireline entrants – particularly those competing in the vast majority of smaller DMAs – are competing against large, national cable incumbents that are much better able to spread the costs of programming across their nationwide customer base.

For example, BEVCOMM, Inc. (BEVCOMM), a small, rural telecom provider, launched its video service in New Prague, Minnesota in December 2004, where it competes with Comcast Corporation (Comcast)[49] – the largest MVPD in the country, with 24.2 million subscribers and ownership in substantial programming interests.[50] Like other wireline entrants throughout the country, BEVCOMM's competitive entry is introducing substantial consumer benefits. In particular, the company's video service is driving a marked increase in broadband acceptance by its customers.

[48] *Program Access NPRM*, ¶114.
[49] *See* Ex Parte Notice, BEVCOMM, April 18, 2005 (RM-11203).
[50] Comcast Corporation 10Q, Filed October 26, 2007, for the Quarterly Period Ended September 30, 2007, p. 24 (available at: http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=5234139&format=PDF) (visited January 3, 2008).

But under the Commission's proposed market-by-market analysis, BEVCOMM would be placed on equal competitive footing with Comcast, despite the vast differences in overall market share, number of subscribers and program purchasing power. Such an approach would inure solely to the benefit of major cable incumbents such as Comcast, and would allow for sunset of the rules in the very markets where wireline competition to cable is most needed. Under the proposed market-by-market analysis, large cable incumbents could simply refuse to provide must-have programming to nascent wireline competitors upon Commission designation of a competitive market, thereby extinguishing the competitive threat and its inherent consumer benefits.

IV. THE COMMISSION SHOULD ADDRESS UNIQUE PROBLEMS FACED BY SMALL AND RURAL WIRELINE VIDEO DISTRIBUTORS.

The Commission also seeks comment on obstacles faced by small and rural MVPDs in obtaining access to video programming.[51] Many of USTelecom's members are small, rural telecom providers in varying stages of video deployment. Some have been in the marketplace for several years, while others are just now entering. But regardless of how long they have been in the market, many face similar obstacles to deploying video services.

Of all the factors facing small, rural entrants, one of the most formidable is the "often costly and lengthy process of acquiring the rights to carry video programming from the local authority and content owners."[52] For this reason, continued, affordable access to program content is the most fundamental obstacle currently facing these new wireline entrants. The Commission's recent extension of its program access rules is an important and welcome measure

[51] *Program Access NPRM*, ¶133.
[52] *NECA 2007 Report*, p. 14.

that will help ensure increased competition to cable incumbents and greater broadband deployment to rural areas.

But in addition to programming access, USTelecom encourages the Commission to foster policies that will promote the use of shared headends by small, rural telecom providers deploying video services. Shared headends are an important component for many small video entrants competing in today's market. Their use provides an economic means for multiple rural MVPDs to provide video service in a high-cost area.

USTelecom is aware that some video program owners have imposed significant and costly obligations on smaller competitors that share headend facilities. In one instance, a USTelecom member utilizing a shared headend facility was obligated to pay tens of thousands of dollars for added encryption hardware to secure carriage of a particular cable programming network. Other cable programming networks have simply refused to provide their programming to shared headend facilities.

Many small video providers in rural areas are only able to provide video services to their communities by pooling their resources and jointly purchasing or leasing headend facilities. Such arrangements substantially reduce initial investments, thereby allowing small video providers the opportunity to offer rural consumers affordable video services. Without the shared headend option, many rural consumers would not have video service or would be limited to direct DBS without any other competitive offering.

Respectfully submitted,

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