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	)	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

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS

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The National Telecommunications Cooperative Association (NTCA) submits these comments in response to the above referenced *Notice of Proposed Rulemaking* (NPRM) and its accompanying initial regulatory flexibility analysis.[1] In its NPRM, the Federal Communications Commission (Commission or FCC) seeks comment on revisions to the Commission's program access and retransmission consent rules and asks whether it should preclude wholesale video programming venders from tying popular video programming with unpopular video programming when entering into video content agreements with multi-channel video programming distributors (MVPDs).[2]

[1] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition,* MB Docket No. 07-29, *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (rel. October 1, 2007) (Report and Order or NPRM).
[2] 47 U.S.C. § 522(13) ("multichannel video programming distributor" means "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television

I. INTRODUCTION AND SUMMARY

The provision of video is an increasingly vital component of the suite of services NTCA's members offer their rural customers. All of NTCA's 580 members are full service rural incumbent local exchange carriers. The vast majority of NTCA members provide voice, video, wireless, and broadband service to their rural communities. NTCA members are also MVPDs offering retail video service. Specifically, 276 NTCA members provide coaxial cable (CATV) service, 106 members provide direct broadcast satellite (DBS) service, 76 members provide Internet Protocol television (IPTV) service, and 61 provide video over digital subscriber line (DSL).[3] The ability to offer a quality video product to customers is viewed as a key driver of broadband deployment in rural areas and is essential to the long-term viability of rural communications providers. Successful deployment is contingent on rural carriers having access to technology and the ability to acquire desirable content on reasonable terms and conditions.

NTCA recommends the following changes to the FCC's rules to enhance competition, diversity and affordability in the retail video programming market:

- **Exclusive Programming Contracts Should Be Prohibited, Including Terrestrially Delivered and Non-Cable Affiliated Video Programming.** The current ban on exclusive contracts contained in Section 628(c)(2)(D) should be extended to non-cable affiliated programming, such as DirecTV and EchoStar, and terrestrially delivered programming. The FCC has ancillary jurisdiction under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Communications Act of 1934, as amended, to implement an exclusive contracts ban on non-cable affiliated programming and terrestrially delivered programming.

- **Video Content Tying Arrangements Should Be Prohibited.** Many over-the-air commercial broadcast networks and cable programming networks require CATV and IPTV providers to take unwanted video programming and put it in their basic or expanded basic tier in order to have access to the network's flagship programming. The end result is that consumers are paying higher cable rates for unwanted video programming in order to have

receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming"). The term "competitive MVPD" refers to MVPDs that compete with incumbent cable operators.

[3] NTCA Membership Directory and Yellow Pages 2007-2008, p. 177.

access to wanted video programming. Tying arrangements have been increasing consumer cable rates for decades.

- **Video & Broadband Content Tying Arrangements Should Be Prohibited.** Large wholesale content providers are now attempting to require small MVPDs to provide and pay for web content. In exchange for "must have" video programming, wholesale content providers are seeking to required IPTV or CATV providers to not only carry and pay for several undesired video channels, but also pay for broadband content. This broadband content must be made available to all of the CATV or IPTV provider's *broadband* customers, whether or not the customer subscribes to the CATV or IPTV service, whether or not the broadband customer is situated within the video service territory, and whether or not the customer utilizes the broadband content. The CATV or IPTV provider pays the content provider a set amount on a per *broadband* subscriber basis, a cost that is ultimately borne by the broadband subscribers.

- **Commercial Television Broadcast Station Retransmission Consent Rules and DMA Restrictions Must Be Amended.** Today there are six over-the-air commercial broadcast television networks (Broadcasters) in the United States: ABC, NBC, CBS, Fox, The CW and ION Television. The six broadcast networks currently provide commercial television broadcast signals to designated marker areas (DMAs) throughout the United States. Section 76.56(b) of the FCC rules, however, requires many CATV and IPTV providers located in a DMA to carry only the local commercial broadcast television stations located in that DMA. Under today's rules, many rural video providers cannot take a lower programming rate from an alternative broadcast station in a neighboring DMA. Because many rural CATV and IPTV providers cannot shop in neighboring DMAs for lower rates, rural video providers are at the mercy of all Broadcasters operating in their DMA. The Commission should amend its retransmission consent rules to allow small IPTV and CATV providers with 400,000 subscribers or less to: (a) enter into agreements to provide out-of-DMA commercial broadcast channels, (b) pool bargain, and (c) exercise Most Favored Nation status through the use of other existing retransmission consent agreements.

- **Shared Head-Ends Must Be Allowed.** Some wholesale video content providers have attempted to impose unfair and costly restrictions on small retail CATV and IPTV providers that share or seek to share a head-end. Many small CATV and IPTV providers have created an opportunity to provide retail video services to their communities by pooling their resources and jointly purchasing a head-end or leasing a head-end from another head-end owner. Sharing a head-end with several small companies substantially reduces initial investment and allows small video providers the opportunity to give consumers an affordable video services offering. Without the shared head-end option, many rural consumers would not have terrestrial video service or would be limited to DBS service without any other competitive offering.

- **Encryption Should Not Be Mandatory For Traditional CATV Providers.** Some content providers are insisting that small radio frequency CATV providers upgrade their systems to support encryption. Many small rural video providers do not have the economies of scale and scope to incur the cost of providing encryption on their networks. Mandatory encryption would result in a substantial increase in rates to consumers or would put some small rural CATV providers out of business.

- **The Commission's Rules Should Permit Voluntary Arbitration.** The Commission should modify its program access complaint rules through the implementation of an early "final offer" step in complaints that relate to the price of video programming. The "final offer" step would allow the FCC to adopt one of the parties' final offers on price as interim compensation pending final resolution of the complaint or as the rate in the program access complaint final decision. The "final offer" step is consistent with the Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584, and is within the Commission's authority.

- **The Commission Should Use Standstill and Temporary Orders to Further the Goals of Diversity and Competition and Promote the Efficient Settlement of Cases.** Standstill and temporary orders maintain the status quo during a complaint proceeding and act as an incentive to encourage settlement which in turn furthers the Commission's goals of speedy resolution of Section 628 complaints as required by Congress. The Commission should adopt some form of standstill or temporary relief to permit small MVPDs to buy programming pending resolution of a program access complaint. The Commission should specifically adopt a procedure similar to the "standstill" provision in Appendix B(2)(c) of *Adelphia Order***;** this will benefit small providers that have little leverage in negotiating with large vertically integrated wholesale video programming vendors.

- **The Commission Should Use Interim Orders to Encourage Compliance with Section 628 and Provide Timely Relief to New Entrants and Small MVPDs Seeking Initial Programming Agreements with Programming Vendors.** The Commission should adopt some form of stay or temporary relief based on a presumption that first time buyers that are small MVPDs have a right to purchase "must-have" programming at the lowest available rate offered to competing or similarly situated MVPDs. Alternatively, the Commission should provide relief based on a simplified showing that harm will accrue to small MVPDs seeking to provide service for the first time unless providers are required to permit small MVPDs to buy programming pending resolution of the dispute.

- **Non-Disclosure Agreements Should Be Prohibited**. Virtually all of the contracts negotiated between content providers and large multiple systems operators (MSOs) include non-disclosure agreements. By restricting the flow of information, the video content providers make it virtually impossible to establish any semblance of "market rates." Consequently, small retail CATV and IPTV providers are significantly disadvantaged in negotiations with video programming providers. The Commission may institute an inquiry pursuant to its authority under Section 403 of the Act for the purpose of gathering additional information to create a complete record on the issue. Section 1.1 of the FCC's rules provides that the Commission may hold a proceeding for the purpose of obtaining information necessary or helpful in the determination of its policies or amendment of its rules and regulations." Given the inability of MVPDs to volunteer all of the specific information necessary to establish a complete record in this proceeding, NTCA believes the Commission should institute a Section 403 Inquiry to review a representative sample of relevant agreements and/or prohibit the use of non-disclosure agreements in case-by-case program access disputes through the use of protective orders.

Programming access and retransmission consent rules may have a significant economic impact on a substantial number of small entities, such as small rural MVPDs. The Regulatory Flexibility Act (5 U.S.C. §601) requires the FCC to consider alternative rules that will reduce the economic impact on small entities. NTCA's proposed amendments to the Commission's program access and retransmission consent rules would reduce the impact on small rural MVPDs. NTCA's proposals will also promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market and spur development of new communications technologies.

II. THE COMMISSION SHOULD EXTEND THE PROGRAM ACCESS RULES INCLUDING THE EXCLUSIVE CONTRACT PROHIBITION TO TERRESTRIALLY DELIVERED CABLE-AFFILIATED PROGRAMMING

A. Existing Legal Precedent Supports the Commission's Authority to Extend the Exclusive Contract Prohibition and Program Access Rules to Terrestrially Delivered Cable-Affiliated Programming Pursuant to Sections 2, 4, and 628 of the Communications Act of 1934, as Amended.

Section 2 (a) of the Act,[4] gives the Commission broad authority to regulate communications.[5] Section 2 (a) is explicitly applicable to "all interstate and foreign communication by wire or radio…" It is indisputable that terrestrially delivered cable-affiliated programming involves the transmission of interstate wire communications subject to Section 1.[6] "Wire Communication" or "communication by wire" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission…." [7]

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[4] 47 U.S.C. § 152(a).
[5] Communications Act of 1934, as amended (Act), 47 U.S.C. § 152(a).
[6] 47 U.S.C. § 151.
[7] 47 U.S.C. § 153(5).

Long before there was a Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act)[8] and a Section 628 of the Act, the Supreme Court sanctioned the Commission's exercise of ancillary jurisdiction over the "communications" provided by cable providers. *United States v. Southwestern Cable*, 392 U.S. 157, 88 S. Ct. 1994 (1968), and *U. S. v. Midwest Video Corp.* 406 U.S. 649, 92 S. Ct. 1860, 32 L. Ed. 2d 390, 95 Pub. Util.Rep. 3d (PUR) 468 (1972). ("*Midwest I*"). When the Supreme Court affirmed the Commission's reliance on ancillary jurisdiction in 1968, CATV services were -- as they are now -- undergoing rapid and significant changes that required the Commission to act to protect the public interest despite the absence of specific laws providing for the regulation of CATV providers. In *Southwestern* and *Midwest I,* the crucial measure by which the Commission's ancillary jurisdiction to regulate interstate communications under Section 2(a) was judged was whether regulation of CATV was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The *Southwestern* court affirmed the Commission's authority to impose restrictions on CATV systems and forbade the importation by CATV of distant signals into the 100 largest television markets. [9]

In subsequent decisions, the Courts have restated the test in *Southwestern* as a two part test requiring (1) that the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Section 2(a) which, encompasses "all interstate and foreign communications by wire or radio," and (2) that the subject of the regulation must be "reasonably ancillary to the effective performance of the Commission's various responsibilities." *American*

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[8] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[9] Recognizing the dynamic nature of the changes that brought about the fledging CATV industry and the Commission's authority to regulate in the void of specific legislation, the Court said, "This Court has recognized that 'the administrative process (must) possess sufficient flexibility to adjust itself' to the 'dynamic aspects of radio transmission,' [citing] *F.C.C. v. Pottsville Broadcasting Co,* 309 U.S., at 138, 60 S. Ct., at 439, and that it was precisely for that reason that Congress declined to 'stereotype the powers of the Commission to specific details …." *Southwestern,* p. 181.

Library Association v. FCC, 406 F.3d 689, 693 (D.C. Cir. 2005). Also, in *American Library Association*, the D. C. Circuit explained the limits of ancillary jurisdiction in a manner that supports the Commission's exercise of jurisdiction here. The Court distinguished *Southwestern* from *FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S. Ct. 1435 (1979) ("*Midwest II*"), the latter being a case in which the FCC's exercise of ancillary jurisdiction was struck down.[10] The fact that it was beyond doubt that CATV systems involved interstate "communication by wire or radio," and that the regulations in question were needed to ensure that the Commission could effectively perform specific duties entrusted to it, *i.e.*, the regulation of television broadcasting, was determinative in *Southwestern. Midwest II*, on the other hand, involved a case in which the Communications Act explicitly directed the Commission not to treat broadcasters as common carriers.

Terrestrial delivery of cable-affiliated programming involves "wire communications" over which the Commission has regulatory authority pursuant to Section 2(a).[11] The communications involved are video programming delivered to MVPDs for distribution to retail subscribers by terrestrial means such as fiber wires. Identical programming is delivered by satellite vendors and broadcasters who are subject to the program access rules, including the rule prohibiting exclusive contracts. The facts surrounding terrestrial delivery satisfy the first element in the *Southwestern*; the matter involves an area over which the Commission has authority, *i.e.*, interstate or foreign communications by wire or radio. The second element of the *Southwestern* test is also met, the exercise of the Commission's authority over terrestrial delivery of cable-affiliated programming is necessary to the effective performance of the Commission's

[10] The rules at issue in *Midwest II* required that cable television systems carrying broadcast signals and having at least 3,500 subscribers develop at least a 20-channel capacity, make certain channels available for third-party access, and furnish equipment for access purposes. 440 U.S. at 691, 99 S. Ct. 1435.
[11] 47 U.S.C. § 152(a)

general duty under Sections 2(a) and 4(i). Section 4(i) plainly provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[12] Section 303(r) reflects Section 4(i) and gives the Commission authority to make rules and prescribe regulations needed to carry out the provisions of the Act.[13] While Section 4(i) and other provisions of the Act support the Commission's exercise of ancillary authority, the Act contains no specific prohibition on the regulation of terrestrial delivery of cable-affiliated programming.

Regulation is also necessary to the effective performance of the Commission's duties under Section 628, the programming access provision of the Act.[14] In at least two instances, the Commission has made findings that withholding of terrestrially delivered cable-affiliated programming has had a material adverse impact on competition in the video distribution market.[15] Competition and the goals of the Act will be defeated if the Commission stands by and does not extend the program access rules and exclusive contract prohibitions to terrestrially delivered cable-affiliated programming. Failure to extend the rules will provide a loophole that allows cable-affiliated programmers to avoid sanctions for defeating the purposes of Section 628. The harm to MVPDs from exclusive contracts and violations of Section 628 is the same regardless of who the malfeasants are. An MVPD can be injured by exclusive contract practices, refusals to deal, discriminatory practices and other anticompetitive behavior whether

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[12] 47 U.S.C. § 154(i).

[13] 47 U.S.C. § 303(r) gives the Commission the authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

[14] 47 U. S. C. § 548.

[15] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition an Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*, Report and Order, MB Docket No. 07-29, 07-198, ¶115, FCC 07-169 (rel. October 1, 2007). (Report and Order).

the conduct is that of a cable-affiliated programmer that delivers programming terrestrially or one that delivers content by satellite. The manner of delivery makes no difference to the injured party. The injury is the same and thus so should the remedy.

Defeat of the Congressional purpose to prevent injury to unaffiliated MVPDs should not hinge on the fact that Congress did not specifically provide that the rules apply to terrestrial delivery. The foremost purpose of Section 628 is to reach vertically integrated systems that are in a position to discriminate in favor of their own incumbent operators and stifle competition from non-affiliated potential competing MVPDs.[16] Congress plainly did not prohibit application of Section 628 to terrestrially delivered programming. Parties that are aggrieved by conduct prohibited by Section 628 should be allowed to complain and seek relief against vertically integrated cable-affiliated programmers regardless of the manner they choose to deliver their programming. The Commission should not have to limit available remedies to complainants who can prove that the programming at issue was delivered via satellite. Many new entrants are beginning to offer service and a prohibition would be of limited help in deterring violations against them if the Commission limits its jurisdiction over terrestrially delivered cable-affiliated programming to instances where the programmers have switched from satellite to a terrestrial system.

The stated purposes of Section 628 (a) include the promotion of the "public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming" and spurring the "development of communications technologies."[17] Section 628(c)(4) mirrors this purpose by requiring that the Commission consider four factors that impact the public interest whether or not exclusive contracts are between satellite providers or

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[16] 47 U.S.C. § 548 (a).
[17] *Id.*

terrestrial providers. Exclusive contracts involving terrestrially delivered programming, like those involving satellite providers, will affect (1) competition in local and national MVPD markets, (2) competition from MVPD technologies other than cable, (3) the attraction of capital investment in the production and distribution of new programming, and (4) diversity in the MVPD market.[18] The Commission is directed to consider these factors in designing rules to govern satellite programming. It has the discretion to consider the same factors in designing regulations to prohibit exclusive contracts by terrestrially delivered cable-affiliated programming systems.

B. Other Provisions of the Act are also Consistent with the Commission's Authority to Extend the Program Access Rules to Terrestrially Delivered Cable-Affiliated Programming Systems.

Various provisions of the Act repeat the goal of diversity and competition in Section 628 and provide additional support for the Commission's exercise of authority. Section 601(4) provides that a purpose of Title VI is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information and services to the public." Section 601(6) lists the promotion of competition as another purpose. Section 616(a) gives the Commission broad authority to prescribe regulations governing programming carriage and related practices regardless of the technology that the programming vendor uses to deliver programming to MVPDs. For purposes of Section 616(a), a "video programming vendor" means a person engaged in the production or wholesale distribution of video programming for sale.[19] In sum, there is ample authority on which the Commission may rely to extend the exclusive contract prohibition and the program access rules to terrestrially deliver cable-affiliated programming.

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[18] 47 U.S.C. § 548 (c) (4).
[19] 47 U.S.C. § 536.

C. Extension of the Rules to Terrestrially Delivered Programming will Promote the Rapid Deployment of Advanced Services Urged by Section 706 of the Act and the FCC's Broadband Policy.

Section 706 of the Act[20] directs the Commission to adopt policies and regulations to spur broadband deployment. The Commission's findings in a series of Section 706 Reports to Congress confirm the dominance of cable in the broadband market and the need for healthy competition from alternative sources.[21] Extension of the exclusive contract prohibition and program access rules to terrestrially-delivered cable-affiliated programming will support the Commission's interest in fulfilling the mandate of Section 706 of the Act and achieving the objectives of its Broadband Policy. Both Section 628, discussed above, and Section 706 reflect Congress' interest in promoting the deployment of broadband. One of the purposes of Section 628 is to "spur the development of communications technologies." Section 706 directs the Commission to utilize "regulating methods" to encourage the deployment of advanced telecommunications capability.[22] The Commission has concluded that the ability to offer a viable video service is "linked intrinsically" to broadband deployment and therefore crucial to the achievement of its Broadband Policy goals.[23]

NTCA agrees with this conclusion. The NTCA 2006 and 2007 Broadband Surveys demonstrate that access to video content is crucial to achievement of the Commission's Section 706 objectives and to the promotion of broadband deployment by the incumbent local exchange

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[20] *See* § 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act), reproduced in the notes under 47 U.S.C. § 157.

[21] *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[22] The Act defines "advanced telecommunications capability" as follows: "The term "advanced telecommunications capability" is defined without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology. *See* § 706(c) of the 1996 Act. § 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), was reproduced in the notes under 47 U.S.C. § 157.

[23] Report and Order, ¶116.

carriers that make up NTCA members.[24] NTCA members serve rural areas where broadband deployment presents greater challenges than in densely populated areas. Because of the high cost of deploying broadband in rural areas, small ILECs must offer video services along with other applications that support the investment in broadband facilities. Like other incumbent local exchange carriers that have entered the video service market, for these carriers, the success of their plans to deploy broadband ubiquitously depends on their ability to provide consumers a bundle of services that include multichannel video service.

For rural telephone companies seeking to provide MVPD services, the ability to offer a viable video service is "linked intrinsically" to broadband deployment. As was evident by the results of NTCA's 2007 Broadband Survey, the availability of "must have" programming is essential to small MVPD's ability to offer competitive video services and make the necessary investment in broadband facilities capable of offering video services. [25] A key finding of the Survey is that "the ability to provide a video offering is critical to long term competitiveness" for the survey participants.[26] Small MVPDs like larger ones must respond to consumer demand for certain popular programming to be able to sell their services. No NTCA members are affiliated with a programming provider and must rely on vertically integrated or other non-affiliated programmers for programming necessary to compete in the market place. The absence of "must have" channels spells the difference between a viable system that supports broadband deployment and one that is doomed to fail. The Commission should take special note of the needs of rural providers like NTCA members in weighing the need for extending the program access rules and exclusive contract prohibitions to the terrestrially delivered cable-affiliated

[24]http://www.ntca.org/content_documents/2007NTCABroadbandSurveyReport.pdf.
http://www.ntca.org/content_documents/2006%20NTCA%20Broadband%20Survey%20Report.pdf.
[25] http://www.ntca.org/content_documents/2007NTCABroadband Survey Report.pdf.
[26] *Id.*, p. 13.

programming providers on whom the members will increasingly rely for “must-have” programming.

III. THE EXCLUSIVE CONTRACT PROHIBITION SHOULD BE EXTENDED TO NON-CABLE AFFILATED PROGRAMMING

The Commission asks for comments on whether the exclusive contract prohibition should be extended to non-cable affiliated programming affiliated with a different MVPD, principally a Direct Broadcast Satellite (DBS) provider such as DirecTV and EchoStar. DirecTV’s exclusive programming arrangement for certain national sports programming with the National Football League, college basketball, Major League Baseball, and NASCAR are examples of exclusive arrangements that would be affected by a prohibition on exclusive contracts between the DBS providers and non-affiliated programmers.

NTCA members provide video service in rural areas where the principal competition is DBS service. As has been pointed out in the Comments filed in a prior phase of this proceeding, DirecTV has announced an exclusive deal to televise all out-of market Major League Ball games. As a result, these games will no longer be available to the small MVPDs competing with DirecTV in rural markets. The out-of-market MLB games subject to the DirecTV exclusive contract cannot be duplicated or replicated. It is “must-have” programming necessary for the viability of competitive cable service. Without access to this programming, competitors are at a disadvantage and will be harmed. Subscribers view sports as essential and abandon operators that cannot provide access to that programming.

The Commission has recognized the importance of must have programming in the context of the lack of competing MVPDs’ ability to gain that programming from vertically integrated vendors. It explained the harm to competitors as follows: “[t]he more that the programming package offered by a competitive MVPD lacks the ‘must have’ programming that is a part of the incumbent cable operator's programming package, *i.e.* the new entrant offers a similar but differentiated product the less attractive the competitive MVPD's programming package will be to subscribers."[27] In that context, the Commission found that an MVPD's ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists. It also found that there frequently are not good substitutes available for vertically integrated programming services, including services that are considered "must have" programming by competitive MVPDs and the subscribers they serve, such as regional news and sports programming.

The Commission has concluded that DBS providers are not subject to the exclusive contract prohibition in 628(c)(2)(D). This Section applies to cable operators and common carriers or their affiliates that provide video programming. However, it seeks comment on whether another subsection, 628(b), provides it the authority to extend the prohibition to DBS providers. The legal precedent that supports the Commission's exercise of ancillary jurisdiction under Sections 2(a) 4(i), 628 and other provisions of the Act in the case of exclusive contracts by terrestrially delivered cable-affiliated programmers applies equally to contracts under which DBS systems enter into exclusive deals. These DBS deals give the DBS providers the sole right to carry certain programming, especially sports programming that is "must-have" programming without which MVPDs cannot fairly compete in the market place.

Section 628(b) contains a general prohibition against "unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel

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[27] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order, 17 FCC Rcd 12124 ¶ 34, (2002).

video programming or satellite broadcast programming to subscribers or consumers."[28] Section 628(b) applies to cable operators that are MVPDs as well as cable-affiliated satellite programming vendors and broadcast programming vendors. The Commission has concluded that the principal purpose of Section 628 is to "remedy" and "eliminate" unfair and anticompetitive behavior.[29] A fair application of the Section 628 remedies is needed to ensure that similarly situated providers are held to the same standard and that the Commission has the ability to enforce Section 628 in a consistent and effective manner. The need for fairness and even-handed regulation should dictate. DBS providers are protected MVPDs and, as such, have the right to avail themselves of the protections from unfair and anticompetitive conduct prohibited by Section 628(b). They have substantial market power and have advanced no legitimate grounds to justify their exclusive deals. Unless the Commission extends the exclusive contract prohibition to them, they will have the ability to defeat the purposes of Section 628(b) and engage in practices that could inflict significant harm on the small MVPDs with whom they compete in rural areas. The Commission should exercise its ancillary jurisdiction to extend the exclusive contract prohibition to DBS providers. Those providers are MVPDs subject to the Section 628(b) prohibitions on unfair and anticompetitive conduct.

In summary, the Commission has the authority to prescribe rules to enforce Section 628(b) and it can craft regulations to out rightly prohibit unfair and anti-competitive exclusive

[28] The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); *see also* 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. § 548(i)(3); *see also* C.F.R. § 76.1000(f).

[29] *In the Matter of 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, ¶46, (1993).

contracts between DBS service providers and non-affiliated programmers.[30] Its authority is bolstered by Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 discussed above. NTCA urges the Commission to use its authority to prohibit these contracts.

IV. THE COMMISSION SHOULD PRECLUDE WHOLESALE VIDEO CONTENT DISTRIBUTORS FROM REQUIRING THE TYING OF "MUST HAVE" VIDEO PROGRAMMING WITH UNDESIRABLE VIDEO PROGRAMMING.

As the Commission recognizes in its NPRM, programmers often tie undesired content with "must have" programming.[31] There is certain programming a MVPD must provide subscribers in order to offer a competitive video service that consumers want. In order to gain access to the "must have" programming, programmers typically require MVPDs to pay for additional content for which there is limited or no demand and put it on a basic tier of service. Despite programmer assertions to the contrary, the contracts are offered on a "take it or leave it" basis, leaving MVPDs with no viable alternative.

Mandatory tying of content is the most prevalent and pernicious problem faced by small MVPDs in the market today and it is a problem that continues to worsen. Rural telephone companies entering the video services business may gain access to virtually all available programming, but they must agree to unreasonable terms that drive up the price of the service they offer. In order to obtain carriage rights for the primary channels of the 10 most widely distributed basic programmers, small rural MVPDs must contract for, pay for and distribute 120

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[30] *See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 F.C.C.R. 18223, ¶ 86 (1996) where the Commission expressed its opinion about the latitude given it to regulate emerging anticompetitive conduct pursuant to 628(b): "We believe that, in order to further the purposes of the program access rules and statute, we must extend the current program access rules to apply to these arrangements in the open video system context. As the Commission stated in the *First Report and Order in MM Docket No. 92-265* and in the *DBS Order,* we believe that Section 628(b) authorizes the Commission to adopt additional rules to accomplish the program access statutory objectives "should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."
[31] NPRM, ¶¶ 199-120.

to 125 video channels offered by those programmers. The lineup of "must have" programming changes little year to year, but the channel lineup is growing every larger and ever more expensive as each large programmer adds additional programming that is then tied to the must have programming.

The egregious tying conduct is amplified by terms in the contracts requiring that the undesirable programming be carried on certain channel settings and that payment be based on certain subscriber penetration level. Therefore, the MVPD must provide as many as 13 channels from one programmer and 23 channels from another to nearly all of its subscribers. There is no opportunity to offer an affordable "basic" or "expanded basic" package. Contract terms make it impossible for a small MVPD to offer popular programming such as CNN, ESPN, Fox News, and others of similar popularity in a low-priced basic tier. To carry such popular programming triggers the requirement that the rest of the 125 (plus or minus) channels also be carried. Because of the prevalence of tying arrangements the basic and expanded basic tiers have now become bloated with programming and consequently have increased the rates consumers pay.

Keith Galitz, President and General Manager of Canby Telcom, in Oregon expressed his frustration with the tying and penetration contract requirements in a November 29, 2007 letter to the Commission.[32] He asserts that the NFL Network and Comcast SportsNet Northwest would not permit Canby Telecom to place their sports programming on a separate "sports tier" for interested customers. NFL Network and Comcast SportsNet made the programming available on the condition that it would be offered on Canby's most popular television package, a requirement that would drive up the cost of service offered by Canby Telecom by more than $3.00 per subscriber per month. Canby Telecom informed its customers that it could not "in good

[32] *See, ex parte* letter of Keith Galitz, President and General Manager of Canby Telecom, MB Docket No 07-29 (filed Nov. 29, 2007).

conscience" pass on an additional $3.00 per month fee increase to all customers for the two sports networks alone and declined to carry the programming.

In the December 28, 2007 edition of the USA Today, the NFL Network ran a full page advertisement in the Sports section that started off with "Big Cable is stonewalling the fans . . ." This assertion is false. The NFL Network and other sports programmers are refusing to negotiate with big and small MVPDs alike, stonewalling consumers with take it or leave it contracts. Agreeing to forced sports programming in basic tiers drives up prices for all video customers, including those who perceive no benefit from the additional access to games.

Programmers recently asserted that they do offer "stand alone" programming.[33] This assertion is very much at odds with what NTCA's members report. NTCA's members say that they are provided a contract that contains very definite clauses about how many channels are to be provided, where in the channel line-up those programs must be situated and what the penetration rate will be. Those few members who have been able to gather information about "stand alone" programming report that it would be more expensive to carry just the one desired program than to take the entire group of programs – a "false alternative."[34]

The content providers are not genuine in their efforts to negotiate with small MVPDs serving rural markets. The NPRM emphasizes that programmers are required to negotiate in "good faith," explaining that "take it, or leave it" negotiating tactics fail to comply with the Commission's rules.[35] In truth, alternatives, if offered at all, are "false alternatives" with terms that are too onerous as to be a realistic and genuine offer. Small rural MVPDs lack leverage in

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[33] *See, e.g., ex parte* letter of the Walt Disney Company describing a telephone conversation between Commissioner Deborah Tate and Anne Sweeney, Co-Chairman Disney Media Networks and attached Declaration of Benjamin N. Pyne, Executive Vice President, Disney and ESPN Network Affiliate Sales and Marketing , MB Docket No. 07-29 (filed Sept. 10, 2007).
[34] It is worth noting that no company that claims to offer "stand alone" programming also claims to offer it according to reasonable terms and conditions.
[35] NPRM, ¶¶ 122-123.

negotiations for more favorable terms and conditions. Wholesale video programming tying arrangements drives up the price of video service, ties up bandwidth and drives up the price of broadband service. Commission action is necessary to protect rural MVPDs and the consumers they serve. NTCA urges the Commission to exercise its ancillary jurisdiction under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Communications Act of 1934, as amended, to curtail unreasonable practices by content providers and preclude mandatory tying arrangements.[36]

V. THE COMMISSION SHOULD PRECLUDE WHOLESALE VIDEO CONTENT DISTRIBUTORS FROM TYING WEB CONTENT TO VIDEO CONTENT.

A recent development in the struggle for access to untied and affordable content involves the tying of web content to video content.[37] Large wholesale content providers are attempting to require small CATV and IPTV providers to provide and pay for web content. In exchange for "must have" video programming, the IPTV/CATV provider is now being asked to not only carry several undesired video channels, but also to provide broadband content. Content providers are requesting that broadband content be made available to all of the IPTV provider's *broadband* customers, whether or not the customer subscribes to the IPTV service, whether or not the broadband customer is situated within the video service territory, and whether or not the customer utilizes the broadband content. The IPTV provider would pay the content provider a set amount on a per *broadband* subscriber basis, a cost that is ultimately borne by all broadband subscribers.

Verizon currently provides video content from Disney and ESPN Networks and

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[36] The Commission has authority to regulate in this manner as described in detail in Section II, *supra.*

[37] At least one popular programmer is now attempting to tie its broadband (Web-based) content to its video programming and seeking to require that small rural MVPDs promote those Websites on the MVPDs homepage and pay the programmer for every broadband customer served by the MVPD, irrespective of whether or not the customer is receiving the video content from the MVPD, nor ever utilizes the broadband content.

broadband content from ABC News, Disney Online, ESPN and Movies.com. Through this video/broadband programming arrangement Verizon offers a full collection of content from Disney and ESPN Networks on both its consumer broadband and television platforms. The video programming content includes thirteen channels carried in Verizon's expanded basic tier. The broadband content includes ESPN360, SOAPnet, ABC News Now, Disney Kids, and MovieMax.[38]

Verizon Communications Inc. is a Dow 30 company which delivers voice, data, and video services to wireline and wireless customers. Verizon operates a wireless network, serving approximately 51.3 million customers nationwide. Verizon has a workforce of approximately 250,000 and generates annual consolidated operating revenues of approximately $90 billion. Given its size, economies of scope and scale, as well as its annual revenues, Verizon can probably absorb these costs video and broadband programming costs and demand lower per-subscriber fees from Disney and ESPN Networks. Small, rural MVPDs cannot.

NTCA has been advised by some of its members that they are currently being strong armed into offering a similar service for each broadband customer, even if the customer is not in the same market where the MVPD is offering video services. (For example, an MVPD that is offering broadband in communities A and B, but offering video services only in community A, is being asked to pay this programmer a per subscriber fee for access to the Web content in *both* community A *and* B). Hence, a consumer who is taking DSL or fiber broadband service in a market is being asked to pay for broadband video services (delivered to the desktop) even if that consumer does not subscribe to the video service offered by the MVPD. This attempt to impose

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[38] See, *Verizon Launches Extensive Broadband and Video-On-Demand Lineup From ABC News, Disney Online and ESPN*, Verizon News Release, February 23, 2006. http://newscenter.verizon.com/press releases/verizon/2006/page.jsp?itemID=29671682.

video/broadband content tying arrangements on small rural MVPDs is an unreasonable practice that must be curtailed. If every content provider jumps on this bandwagon and begins to charge $.10 - $.25 per broadband subscriber for access to web content, broadband subscribers will see their monthly bills increase substantially.

These developing wholesale video/broadband programming tying arrangements are a clandestine attempt by the wholesale video programming vendors to establish costly, unfair and discriminatory terms and conditions in the wholesale broadband content market concealed by non-disclosure agreements. The practice will stall the rollout of broadband at a time when this country and the FCC are concentrating efforts on increasing broadband availability and demand. The Commission has ancillary jurisdiction under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Communications Act of 1934, as amended, to curtail unreasonable practices by content providers by precluding this type of tying arrangement.[39] The Commission should act now to preclude mandatory tying of popular video programming with undesired video and/or broadband content programming.

VI. THE COMMERCIAL BROADCAST STATION RETRANSMISSION CONSENT RULES HARM CONSUMERS AND MUST BE AMENDED.

Evolving technologies and changes to the competitive and economic landscape since the 1992 Cable Act demand that the Commission's must carry and retransmission consent rules be amended. NTCA has commissioned Ball State University Digital Policy Institute to write a white paper on the existing must carry and retransmission consent rules and the current economic and regulatory realities faced by MVPDs.[40] The paper finds that the current regulatory

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[39] The Commission has authority to regulate in this manner as described in detail in Section II, *supra.*

[40] Enclosed with NTCA's Comments please see the White Paper by the Ball State University Digital Policy Institute (DPI), Commissioned by the National Telecommunications Cooperative Association (NTCA), released October 3, 2007 entitled RETRANSMISSION CONSENT, MUST CARRY AND THE PUBLIC: CURRENT ECONOMIC AND REGULATORY REALITIES OF MULTICHANNEL VIDEO PROVIDERS.

environment supports the maintenance of a skewed playing field where Broadcasters control all elements of price, terms and conditions of negotiations with MVPDs. Allowing the use non-disclosure agreements to hide the terms and price of agreements with other systems prevents the establishment of a marketplace price for content and, in turn, limits the opportunity for negotiations between parties in an open market.

Today, there are six broadcast television networks in the United States: ABC, NBC, CBS, Fox, The CW and ION Television. These six broadcast networks currently provide over-the-air commercial television broadcast signals to DMAs throughout the United States. The term "DMA" specifies a geographic area established by Nielsen Media Research for the purpose of rating the viewership of broadcast television stations. DMAs represent the geographic areas covered by groups of competing commercial television broadcast stations. Section 76.56(b) of the FCC's rules, however, require most CATV and IPTV providers located in a DMA to carry only the local commercial broadcast television stations located in that DMA.

There are approximately 110 million television households in the United States. DMA boundaries therefore are of considerable financial importance to commercial broadcast stations because they determine the number of viewers each station can claim, and, thus, the dollar amount the station can charge per unit of advertising time. In the past, broadcast television stations relied solely on advertising revenues to run their businesses and earn a reasonable return on their investment. Rural and non-rural video providers carried broadcast stations for free to help expand the viewership within a DMA, and, hence, increase the adverting revenues to Broadcasters. Today, in addition to their enormous profits from advertising revenues, Broadcasters seek additional revenues by charging small and medium rural video providers rates as high as $1.00 per subscriber per month to carry a broadcast station in-DMA signal/channel.

Given that there are six broadcast networks this could increase the price per subscriber by $6.00 per month.

The statutory rules that regulate retransmission consent agreements were established in 1992. Over the last fifteen years technology and the economic landscape relevant to this bi-lateral market has changed significantly. These market transformations have tilted bargaining power towards favoring major broadcasting networks. This shift in power is especially harmful to the interest of smaller independent and rural MVPDs and their customers. Modifications of the rules governing retransmission agreements need to be examined and amended.

Under the Commission's retransmission consent rules, many MVPDs must pay whatever rate the in-DMA market broadcaster charges and may not look to neighboring markets for better deals. Lower programming rates may be available from a neighboring DMA.[41] Because many rural video providers cannot shop in neighboring DMAs for lower rates, rural providers are at the mercy of all broadcasters operating in their DMA. Moreover, given that rural video provider markets are so sparsely populated, refusal to carry a broadcaster's station would not negatively impact the broadcaster's Nielson rating/advertising revenues, and thus, rural video providers have no leverage in negotiations with broadcasters. Many rural video providers, therefore, are required to pay a broadcaster's unreasonable in-DMA programming rate or rural consumers will not receive their local broadcast channel programming. Either way, rural consumers are harmed.

NTCA urges that Commission to rule on the *ACA Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission and Consent, Non-Duplication, and Syndicated Exclusivity,* RM-11203, and adopt the following NTCA proposed amendments to the FCC's rules so that the 7.7 million households served by rural video providers may consider and receive lower programming rates from alternative broadcast stations in neighboring DMAs.

[41] 47 C.F.R. §§ 76.56, 76.64, 76.93, and 76.103.

These mutually inclusive amendments will allow only small IPTV and CATV providers with 400,000 or fewer subscribers to: (a) enter into agreements to provide out-of-DMA commercial broadcast channels, (b) pool bargain, and (c) exercise Most Favored Nation status through the use of other existing retransmission consent agreements.

<u>Rural Commercial Broadcast Video Programming Reform:</u>

New Section 47 CFR §76.64 (n) Retransmission Consent Negotiations:
(n) Where a commercial broadcast station seeks consideration for retransmission consent from a small CATV or IPTV provider beyond carriage and channel placement, neither such commercial broadcast station nor any other party shall take any action which has the purpose or effect of hindering or preventing the small CATV or IPTV provider from retransmitting the signal of any other local or non-local commercial broadcast station. Any CATV or IPTV provider with 400,000 subscribers or less meets the definition of a "small cable company" as defined by the Communications Act of 1934, as amended. A party shall be deemed to be preventing or hindering a small CATV or IPTV provider where such local commercial broadcast station or any other party does the following:

(1) Asserts network non-duplication or syndicated exclusivity under Sections 76.92 and 76.101 of this Part with respect to such small cable company.

(2) Influences or controls by contract or otherwise a commercial broadcast station's decision or ability to grant retransmission or influences or controls by contract or otherwise the terms and conditions of such station's retransmission consent for retransmission of its signal by a small CATV or IPTV company.

New Section 47 CFR §76.64 (o) Out-of DMA Negotiations and Pool Bargaining:
(o) IN GENERAL.— In addition to New Section 47 CFR §76.64 (n)**,** any small CATV or IPTV provider that meets the Commission's definition of a small cable company may combine with any other small CATV or IPTV provider meeting such definition and appoint a bargaining agent(s) to bargain collectively on their behalf in negotiating carriage with a local or non-local commercial broadcast station(s) in any designated market area (DMA) throughout the United States. Any CATV or IPTV provider with 400,000 subscribers or less meets the definition of a "small cable company" as defined by the Communications Act of 1934, as amended. Any small CATV or IPTV provider may also negotiate directly with any local or non-local commercial broadcast station(s) in any DMA throughout the United States. Small cable companies may enter into agreements with in-DMA and out-of-DMA commercial broadcast stations simultaneously and broadcast in-DMA and out-of-DMA commercial broadcast station programming simultaneously to their consumers.

New Section 47 CFR §76.64 (p) Network/Parent Company, Affiliated Company, or Non-Affiliated Company Influences:

(p) IN GENERAL.— In addition to New Sections 47 CFR §76.64 (n) and (o), contracts or other influences between commercial broadcast stations and their network/parent company, affiliated company, or non-affiliated company, entity or person shall not prohibit any commercial broadcast station from negotiating and entering into agreements to provide in-DMA or out-of-DMA commercial broadcast programming to small CATV, IPTV providers, or their bargaining agent(s). No commercial broadcast station can refuse to negotiate with a small cable company.

New Section 47 CFR §76.64 (q) Most Favor Nation Status:
(q) IN GENERAL.— In addition to New Sections 47 CFR §76.64 (n), (o), and (p) when a commercial broadcast station seeks consideration for retransmission consent from a small CATV or IPTV provider, the CATV or IPTV provider may request the same price, terms and conditions from any of the existing retransmission consent agreements the commercial broadcast station has entered into and the terms and conditions of these retransmission agreements shall be made available to the CATV and IPTV provider, notwithstanding any non disclosure agreements.

New Section 47 CFR § 76.93. Parties entitled to network non-duplication protection. Subject to 47 CFR §76.64(n), television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to 47 CFR §76.92 in accordance with the contractual provisions of the network-affiliate agreement that are consistent with the Federal Communications Commission's rules.

New Section 47 CFR §76.103(a). Parties entitled to syndicated exclusivity. Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to §76.101 in accordance with the contractual provisions of their syndicated program license agreements that are consistent with the Federal Communications Commission's rules, and with §76.109 and subject to §§76.64(n), (o), (p) and (q) in particular.[42]

NTCA's proposed rules would permit rural video providers to consider and receive lower programming rates from alternative broadcast stations in neighboring DMAs. This would enable the establishment of fair market rates for rural broadcast programming, and would further reduce rural video provider costs, lower retail video prices, and provide broadcast television services to all consumers receiving service from rural video service providers. This would also ensure rural consumers receive access to comparable video services at rates comparable to consumers living in areas served by non-rural cable providers.

[42] The proposed language in New Section 47 CFR §76.64 (n) was originally authored by the American Cable Association (ACA) and can be found in the ACA Petition for Rulemaking to Amend 47 CFR §§ 76.64, 76.93 and 76.103, filed with the Federal Communications Commission on March 2, 2005.

Because the proposed exception is limited to rural video providers, it would **not** affect 93% of the television households in the United States served by large, non-rural CATV and IPTV providers. Large video providers possess adequate leverage and market power which enables them to negotiate reasonable broadcast rates and reduce the economic burden on non-rural consumers. Conversely, rural video providers lack leverage and market power due to their sparsely populated service territories and require regulatory and/or legislative reform to ensure reasonable broadcaster programming rates. Ensuring reasonable broadcaster programming rates in rural video provider service areas would allow rural consumers to receive access to comparable video services at rates comparable to consumers living in areas served by non-rural cable providers. The Commission has authority under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Communications Act of 1934, as amended, to amend the current retransmission consent rules and DMA restrictions.[43] NTCA urges the Commission to expeditiously revise its current retransmission consent rules by adopting the above proposed amendments.

VI. THE COMMISSION SHOULD DECLARE THAT WHOLESALE CONTENT PROVIDERS MAY NOT DENY RURAL MVPDS ACCESS TO CONTENT DUE TO THEIR USE OF SHARED HEAD-ENDS

In the NPRM the Commission seeks comments on programming access issues related to small rural IPTV and CATV providers that share a head-end in order to provide competitive retail video services to their communities.[44] Since 2005, NTCA has been negotiating on behalf its members that utilize shared head-ends. NTCA's shared head-end negotiations have focused on the "transport" of the video content over the shared head-end system contained which is contained in the wholesale video content vendor's "transport agreement" or "subdistribution

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[43] The Commission has authority to regulate in this manner as described in detail in Section II, *supra*.
[44] NPRM, pp. 77-78.

agreement." Contracts concerning rights to access to wholesale video content and the pre-subscriber rates for the content are contained separately in the wholesale video content vendor's "programming agreement."

For the most part, the vast majority of wholesale video programming vendors do not discriminate against small IPTV and CATV shared head-end providers. A small segment of wholesale video programming vendors, however, has threatened to prohibit carriage of its programming unless each retail IPTV or CATV provider purchase its own stand-alone head-end or purchase a separate receiver, encryption and other costly expenditures. The costs associated with these actions are prohibitive and would hinder competition and affordability in the retail video and broadband markets in these rural communities.

Many small rural video providers would not be able to offer video services if they could not jointly purchase/lease a shared head-end with other small video providers. Some small video providers serve less than 300 residents within their service areas. If many small rural video providers were required to invest approximately $1 to $3 million in a head-end, manage and maintain the network and absorb the programming costs, they could not expect to recover their investment nor provide affordable/competitive video services throughout their service areas. These small video companies have the ability to provide video services by pooling their resources and jointly purchasing a head-end or leasing a head-end from another head-end owner. Sharing a head-end with several small companies substantially reduces initial investment and provides small video providers the opportunity to provide consumers with an affordable video service offering. Without the shared head-end option, many rural consumers would not have video service or would be limited to direct broadcast satellite service without any other competitive offering.[45]

Over the last three years, NTCA shared head-end members have been able to negotiate and enter into shared head-end transport/subdistribution agreements with most of wholesale video programmers. NTCA is currently negotiating a shared head-end programming contract on behalf of a radio frequency CATV shared headend system serving approximately 6,000 subscribers. Some wholesale content providers insist that small radio frequency CATV providers upgrade their systems to support encryption. Many small rural video providers, however, do not have the economies of scale and scope to incur the cost of providing encryption on their networks. Mandatory encryption would result in a substantial increase in rates to consumers or would put some small rural CATV providers out of business.

Some content providers also assert they are concerned with the ability of third parties (*i.e.*, the controlling head-end entity) to manage administrative procedures for control and security of their content. However, legitimate concerns regarding security, billing and other management issues may be contractually addressed. Furthermore, any and all concerns about security are easily remedied with an IPTV system. In addition to whatever contractual obligations are undertaken by the head-end and each system, the encryption goes through to the consumer's set top box (STB) and each STB is individually addressed via a unique IP address. The STB is then virtually authorized each time the channel is changed. Sets of IP addresses can be assigned to each distributor on a shared system so the programmer has the ability to track

[45] For example, if a head-end cost $2 million, and a small MVPD serves a community of 6,000 potential subscribers, the cost of the head-end for this small MVPD would average $5.55 cents per month, per-subscriber, over five years, assuming 100 percent subscriber penetration. If subscriber penetration is 33 percent, which is more realistic, it would require a $16.83 per month, per-subscriber retail price to recover the initial cost of the head-end over five years. This retail price does not factor in labor cots, programming costs, middleware costs, facilities to the home or business, set-top boxes, and other costs associated with the provision of MVPD service.

usage, payments, Video on Demand (VOD), etc. on a system-by-system basis and even on a box-by-box basis.

Shared head-end video providers are concerned that when their current licensing agreements expire that they may be denied access to video programming from some video content providers. This problem impacts both video competition and broadband deployment. The Commission has jurisdiction to address this issue under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Act. NTCA urges the Commission to make clear that the use of shared head-ends is not, in itself, a valid or legitimate reason to restrict or deny small rural MVPDs access to content.

VII. THE COMMISSION SHOULD ENCOURAGE THE USE OF BEST "FINAL OFFERS" IN CERTAIN TYPES OF DISPUTES

A. Pricing Disputes are Appropriate for the Best "Final Offer" Step.

The Commission's rules permit voluntary arbitration.[46] The Commission request comments here on whether it has the authority to require, as part of its evaluation of an appropriate remedy in a complaint matter, that parties, when feasible, submit a best "final offer" proposal for the rates, terms, or conditions under review.[47] The Commission also asks whether it should have the discretion to adopt one of the parties' proposals as the remedy for the program access complaint.[48] NTCA supports mandatory arbitration in disputes involving price. In view of the fact that the Commission has chosen not to adopt mandatory arbitration at this time, NTCA believes that the best "final offer" step is the next best procedure to employ in pricing disputes that result in complaints to the Commission.

[46] *See* 47 C.F.R. § 76.7(g)(2). Section 572(a) of the Administrative Dispute Resolution Act ("ADRA") provides that "[a]n agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 572(a). Section 575(a)(1) authorizes the use of arbitration as an alternative means of dispute resolution "whenever all parties consent." 5 U.S.C. § 575(a)(1).
[47] NPRM, ¶¶ 134-137.
[48] Id.

Despite the high cost of litigation at the Commission and the harm that follows delays in the complaint process, NTCA members are under increasing pressure to utilize litigation to resolve disputes. Programming vendors and broadcasters are increasingly imposing unilateral terms and conditions and charging exorbitant prices for their programming and retransmission rights. NTCA members have provided examples of this intractable and unilateral conduct. Some of those examples are provided here to illustrate the need for the Commission to seek alternative remedies to maintain diversity in programming, foster the development of broadband and promote competition in the MVPD market place. In one case involving a group of small rural MVPDs in the western two-thirds of Nebraska, the cost of a single Fox broadcast channel that is considered "must have" has risen by an average of *45% per year* from 1994 to 2007. The price to a small system with 900 subscribers that paid a $100 fee for the channel in 1994 has risen to $12,480 per year. One NTCA member, a small MVPD in Oregon, reports that the cost of Comcast Sportsnet Northwest is prohibitive. The programming consists of Northwest sporting events including the NBA's Portland Trail Blazer games. Comcast is requiring that the small MVPD carry the channel on its Essentials tier and will not allow the small MVPD to offer the channel on a sports tier. The monthly per subscriber fee of $2.00 with annual increases is prohibitive for the small MVPD, since it would be applied to the majority of their base.

As indicated by the examples provided, pricing disputes arise in the context of programming rates as well as for retransmission consent. The agreements that small MVPDs like NTCA's members must negotiate with satellite programming vendors and broadcasters take various forms. The simplest disputes involve only the rate for particular programming that is purchased on affiliate agreements. Affiliate agreements can involve numerous other issues related to programmers tying arrangements and tiering. NTCA members utilizing a shared head-end must also negotiate transport agreements for the right to transport programming. These can involve technical requirements warranties, intellectual property considerations, copyright, security measures and encryption issues that do not lend themselves to boiler plate agreements fitting the unique circumstances and needs of the small MVPDs. Retransmission consent negotiations can also involve a range of issues unrelated to price. The more straightforward disputes, *e.g.*, price for a particular program or the right to retransmit a broadcast station, are ripe candidates for the best "final offer" step the Commission proposes. The best "final offer" proposal described in the NPRM is similar to what is used in the arbitration of Major League Baseball players' salaries.

NTCA supports a change that would give the Commission the discretion to use a "final offer" step in complaints that relate to the price of programming, but not in complaints that involve complicated and highly disputed issues. Section 628 complaints that involve refusals to deal or anti-competitive and onerous terms and conditions in programmer's contracts: The best "final offer" step will provide small MVPDs an avenue other than the lengthy and costly litigation. Small MVPDs need an alternative that will motivate the large vendors with whom they must deal to reach agreements. The step is consistent with the Administrative Dispute Resolution Act of 1990.[49]

Discrete issues such as price are appropriate subjects especially in cases where other terms and conditions of the potential bargain are not in dispute. Parties should have the option to agree on the issues that are appropriate for the "final offer" step. However, the Commission should retain procedures that permit it to designate discrete issues for the best "final offer" step in the event that parties cannot agree. Under the current rule, 47 C.F.R. §76.7(g)(1), Commission staff may designate discrete issues for an adjudicatory hearing.

[49] 5 USC §§ 571-584.

Parties need to be apprised of the specific rules that will govern the "final offer" step procedure. NTCA agrees that the procedures in Appendix B and C in the Adelphia *Order*[50] provide adequate guidance for the arbitration process. Similar procedures are needed to provide guidance for the best "final offer" step whenever a small MVPD is involved. The Appendix B timing procedures for filing papers and exchanging offers and reaching agreement can be adopted here. Similarly, the parties' right to *de novo* review by the Commission should be preserved. Appendix B (5) provides that a small MVPD meeting the definition of a small cable company under 47 C.F.R. 76.901(e) may appoint a bargaining agent to bargain collectively on its behalf. NTCA supports adoption of a rule permitting a similar agency agreement between small MVPDs engaged in negotiations under the best "final offer" step. 47 C.F.R. 76.901(e) defines a small cable company as one that serves a total of 400,000 or fewer subscribers over one or more cable systems. NTCA recommends that the agency provision reflect the fact that non-cable MVPDs are also protected by Section 628. The agency provision should therefore apply to any MVPD with 400,000 subscribers or less.

The complaint process by itself advantages large litigants with deep pockets. Those potential litigants have the incentive to delay negotiations in order to extract anticompetitive agreements and the resources to defend litigation that may result from their anticompetitive conduct. For example, a small MVPDs faced with a refusal to deal cognizable under Section 628 is harmed if it chooses to file a complaint and wins. Business plans and start up of operations are all put on hold during this type of dispute. The small MVPD loses potential customers and delays deployment of facilities while waiting. The best "final offer" step in the complaint process has

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[50] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et. al.*, Memorandum Opinion and Order, 21 FCC Rcd 8336, (2006) Appendix B, and 8340, Appendix C. See also, *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors*, 19 F.C.C.R. 473¶167-179. (2004)

the potential of moving the settlement process quickly so as to reduce the advantages of delaying tactics. The step will promote the Commission's interest in competition in the delivery of video service by making it easier for competing MVPDs to resolve issues that prevent them from offering programming.

B. Some Disputes Require Prompt Commission Action but may not be Appropriate for Baseball-Style Arbitration.

NTCA believes that baseball-type arbitration is not appropriate for disputes that involve novel or complicated issues, *e.g.*, *refusals* to permit transport agreements for small telcos using shared head-ends. The ADRA provides guidance for the types of issues that are not appropriate for dispute resolution. 47 U.S.C. § 572 (b) provides:

> (b) An agency shall consider not using a dispute resolution proceeding if--
>
> (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
>
> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
>
> (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
>
> (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
>
> (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
>
> (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

The Commission should consider the above factors before deciding whether to employ the best "final offer" approach. However, the damage that results to small MVPDs from intransigence and delay by vendors and broadcasters with a high degree of leverage should not be underestimated. To the extent that pricing is the only issue in a dispute or that rate questions can be isolated, the Commission should utilize the best "final offer" approach.

VIII. THE USE OF STANDSTILL AND TEMPORARY ORDERS WILL FACILITATE DISPUTE RESOLUTION AND PROMOTE ENFORCEMENT OF SECTION 628

A. The Use of Standstill and Temporary Orders Will Further The Goals of Diversity and Competition and Promote the Efficient Settlement of Cases.

The Commission asks for comments on a "standstill" proposal that would allow complainants to request a stay of any action or proposed action that would change an existing contract that is the subject of a complaint, pending resolution of the complaint. The Commission should adopt a procedure similar to the "standstill" in Appendix B (2) (c) of the *Adelphia Order*. That procedure provides that upon receiving timely notice of the MVPD's intent to arbitrate, a programming vendor shall allow continued carriage under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in the old contract. The "standstill' provision acknowledges the unequal bargaining power between large programming vendors and small MVPDs.

The Commission may also pursuant to Section 4(i) enter temporary orders to maintain the status quo during the pendency of a complaint proceeding. Stay orders can act as incentives to encourage settlement which in turn furthers the Commission's goals of speedy resolution of 628 complaints as required by Congress. Stay Orders can benefit small providers that have little leverage in negotiating with large vertically integrated providers. The Commission should adopt some form of stay or temporary relief based on a presumption that first time buyers that are small MVPDs have a right to purchase "must-have" programming at the lowest available rate offered to competing or similarly situated MVPDs. Alternatively, relief should be granted on a simplified showing that harm will accrue to small MVPDs seeking to provide service for the first time unless providers are required to permit small MVPDs to buy programming pending resolution of the dispute.

B. The Commission Should Use Interim Orders to Encourage Compliance with Section 628 and Provide Timely Relief to New Entrants and Small MVPDs Seeking Initial Agreements with Programming Vendors

NTCA does not recommend adoption of a provision similar to that in Appendix B(2)(d) of the *Adelphia Order* which provided that carriage of disputed programming during the period of arbitration is not required in the case of first time requests for carriage. Small MVPDs and new entrants would be disproportionately injured by a similar provision. The purpose of using this "alternate means of dispute resolution" is ultimately to speed the settlement of disputes that left unsettled impair competition by keeping new entrants out of the market place. The Commission should retain the ability to enter interim or interlocutory orders directing programming vendors to provide carriage during the pendency of "final offer" procedures whether or not the dispute involves programming that was the subject of an existing contract prior to the dispute. The Commission has the authority to enter interim orders to further enforcement of the Act and promote the policies inherent in Title VI and Section 706.

The Commission needs to be able to order carriage where there is no prior agreement to ensure that small MVPDs seeking to enter the market place for the first time have a quick and available remedy. The Commission can evaluate the technical sophistication and financial ability of small MVPDs and decide whether they are able to follow through on their obligations to pay for programming and protect programmer's intellectual property rights during the pendency of negotiations over the final price and other terms.

The interim order process can be simplified by use of presumptions in cases involving small MVPDs. For example, the Commission could assume that it is unfair or anticompetitive in violation of Section 628 for a vendor to demand unreasonable security requirements or non-negotiable rates for specific programming. It could also use benchmarks to determine what disputes are appropriate for interim orders directing vendors to provide "must have" or other programming to the small MVPDs. What is critical is that the Commission has some expedited procedure for granting interim relief to MVPDs that have no existing contract with a given vendor. The need to acquire access to programming is just as important to these vendors as it is to MVPDs with prior agreements. Decisions about entering the MVDP marketplace are preceded by planning, the purchase of equipment and upgrades to facilities and the deployment of the facilities needed to begin operations. Small MVPDs are as likely to suffer immediate harm from the inability to put these investments to work as are MVPDs with existing agreements.

IX. THE COMMISSION SHOULD PROHIBIT THE USE OF NON-DISCLOSURE AGREEMENTS

Virtually all of the contracts negotiated between content providers and large MSOs include non-disclosure agreements. By restricting the flow of information, the content providers make it virtually impossible to establish any semblance of "market rates" and small retail CATV and IPTV providers are significantly disadvantaged in negotiations with video programming providers. Smaller carriers must enter into their negotiations at a significant disadvantage, as they possess far less information than the party with whom they are negotiating.[51]

Non disclosure clauses prevent individual companies from stepping forward and discussing unreasonable terms and conditions with NTCA or the FCC. Some member

[51] This imbalance – dubbed by economists as "asymmetric information" – is a significant impediment to the establishment of an efficient marketplace.

companies will not address the Commission for fear of reprisal from the programmers when it comes time to renew contracts for the "must have" programming. While some MVPDs may wish to tie certain content together, the common practice among programmers is to offer packaged content on a "take it or leave it" basis, providing the small MVPD no alternative. The practice of tying is rampant in the industry and is getting worse and more imaginative. Commission action is necessary to protect rural MVPDs and the consumers they serve.

According to the National Cable Television Association (NCTA), more than 112 million homes in the U.S. are passed by a local cable system.[52] The vast majority of these are passed by large multiple system operators (MSOs). However, many residents living and working in rural America receive their video service from small, rural providers.

Small video providers serving rural America lack the leverage of larger MSOs in dealing with content providers, to the detriment of rural consumers. In general, the larger the number of subscribers, the greater the degree of negotiating power and the better the eventual deal. Providers of programming content make much of their money by selling advertising, and can charge higher rates if they deliver more potential viewers. It is in the program providers' best interests, then, to take whatever steps are necessary to insure that their programming is carried by the larger MSOs. Content providers simply cannot afford to have the large MSOs not carry their content. The large MSOs use this fact to their own advantage. Consequently, they demand—and receive—more beneficial terms from the content providers than they otherwise might.

Smaller carriers, on the other hand, lack the leverage afforded by a large customer base, but their subscribers expect access to the same programming. Content providers are aware of this, and are thus able to take a relatively inflexible position in their negotiations with small

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[52] NCTA website, http://www.ncta.com/ContentView.aspx?contentId=54, accessed November 29, 2006.

carriers. Small carriers are not in a position to walk away from the negotiating table, and even if they did, the content providers' bottom line would be largely unaffected. Ultimately, this lack of leverage and negotiating power may lead to higher programming rates for the consumers served by smaller rural carriers.

The Commission may institute an inquiry pursuant to its authority under Section 403 of the Communications Act of 1934, as amended, and Section 1.1 of its rules for the purpose of gathering additional information to create a complete record on the issues in this proceeding. Section 403 authorizes the Commission to institutes an inquiry as to any matter or thing concerning "any question" that may arise under the Act. Section 1.1 of the Commission's rules provides that the Commission may "on its own motion … hold such proceedings as it may deem necessary . . . for the purpose of obtaining information necessary or helpful in the determination of its policies . . . [or] the formulation or amendment of its rules and regulations."

Section 1.1 also provides the Commission with the authority to require the production of evidence. The Commission has the authority to treat information gathered as confidential. Confidential information is information submitted to the Commission which the submitting party has determined in good faith (i) constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and (ii) falls within the terms of Commission orders designating the items for treatment as confidential information.[53] The Commission may determine that all or part of the information claimed as confidential information is not entitled to such treatment.[54] In a recent program access dispute, the FCC Media Bureau expeditiously granted a complainant's request for discovery and issued a protective order to safeguard the highly

[53] *See 1998 Program Access Order*, 13 FCC Rcd at 15865, ¶ 1(c).
[54] *See also* 47 C.F.R. § 76.9 (general procedures for protecting confidentiality of information).

confidential discovery subject matter.[55] The Protective Order is intended to facilitate and expedite review of documents containing privileged or confidential trade secrets and commercial or financial information. Given the inability of MVPDs to volunteer all of the specific information necessary to establish a complete record in this proceeding, NTCA believes the Commission should institute a Section 403 Inquiry to review a representative sample of relevant agreements and/or prohibit the use of non-disclosure agreements in case-by-case program access disputes through the use of protective orders.

X. CONCLUSION

Based on the above stated reasons, NTCA recommends the following proposed changes to the FCC's rules which will enhance competition, diversity and affordability in the in the retail video programming market.

- **Exclusive Programming Contracts Should Be Prohibited, Including Terrestrially Delivered and Non-Cable Affiliated Video Programming.** The current ban on exclusive contracts contained in Section 628(c)(2)(D) should be extended to non-cable affiliated programming, such as DirecTV and EchoStar, and terrestrially delivered programming. The FCC has ancillary jurisdiction under Sections 151, 152(a), 153(5), 154(i), 303(r), 601(4), 601(6), 616(a), 628(a), 628(b), 628(c)(4) and 706 of the Communications Act of 1934, as amended, to implement an exclusive contracts ban on non-cable affiliated programming and terrestrially delivered programming.

- **Video Content Tying Arrangements Should Be Prohibited.** Many over-the-air commercial broadcast networks and cable programming networks require CATV and IPTV providers to take unwanted video programming and put it in their basic or expanded basic tier in order to have access to the network's flagship programming. The end result is that consumers are paying higher cable rates for unwanted video programming in order to have access to wanted video programming. Tying arrangements have been increasing consumer cable rates for decades.

- **Video & Broadband Content Tying Arrangements Should Be Prohibited.** Large wholesale content providers are now attempting to require small MVPDs to provide and pay for web content. In exchange for "must have" video programming, the IPTV or CATV provider is required not only carry and pay for several undesired video channels, but also pay for several broadband web pages. The web pages must be made available to all of the CATV

[55] *See EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, CSR 7070-P (filed Nov. 15, 2006).

or IPTV provider's *broadband* customers, whether or not the customer subscribes to the CATV or IPTV service, or whether the broadband customer is situated within the video service territory. The CATV or IPTV provider pays the content provider a set amount on a per *broadband* subscriber basis, a cost that is ultimately borne by the broadband subscribers.

- **Commercial Television Broadcast Station Retransmission Consent Rules and DMA Restrictions Must Be Amended.** Today there are six over-the-air commercial broadcast television networks (Broadcasters) in the United States: ABC, NBC, CBS, Fox, the CW and ION Television. The six broadcast networks currently provide commercial television broadcast signals to DMAs throughout the United States. Section 76.56(b) of the FCC rules, however, require many CATV and IPTV providers located in a DMA to carry only the local commercial broadcast television stations located in that DMA. Under today's rules, many rural video providers cannot take a lower programming rate from an alternative broadcast station in a neighboring DMA. Because many rural CATV and IPTV providers cannot shop in neighboring DMAs for lower rates, rural video providers are at the mercy of all Broadcasters operating in their DMA. The Commission should amend its retransmission consent rules to allow small IPTV and CATV providers with 400,000 subscribers or less to: (a) enter into agreements to provide out-of-DMA commercial broadcast channels, (b) pool bargain, and (c) exercise Most Favored Nation status through the use of other existing retransmission consent agreements.

- **Shared Head-Ends Must Be Allowed.** Some wholesale video content providers have attempted to impose unfair and costly restrictions on small retail CATV and IPTV providers that share or seek to share a head-end. Many small CATV and IPTV providers have created an opportunity to provide retail video services to their communities by pooling their resources and jointly purchasing a head-end or leasing a head-end from another head-end owner. Sharing a head-end with several small companies substantially reduces initial investment and allows small video providers the opportunity to give consumers an affordable video services offering. Without the shared head-end option, many rural consumers would not have terrestrial video service or would be limited to DBS service without any other competitive offering.

- **Encryption Should Not Be Mandatory For Traditional CATV Providers.** Some content providers are insisting that small radio frequency CATV providers upgrade their systems to support encryption. Many small rural video providers do not have the economies of scale and scope to incur the cost of providing encryption on their networks. Mandatory encryption would result in a substantial increase in rates to consumers or would put some small rural CATV providers out of business.

- **The Commission's Rules Should Permit Voluntary Arbitration.** The Commission should modify its program access complaint rules through the implementation of an early "final offer" step in complaints that relate to the price of video programming. The "final offer" step would allow the FCC to adopt one of the parties' final offers on price as interim compensation pending final resolution of the complaint or as the rate in the program access complaint final decision. The "final offer" step is consistent with the Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584, and is within the Commission's authority.

- **The Commission Should Use Standstill and Temporary Orders to Further the Goals of Diversity and Competition and Promote the Efficient Settlement of Cases.** Standstill and temporary orders maintain the status quo during a complaint proceeding and act as an incentive to encourage settlement which in turn furthers the Commission's goals of speedy resolution of Section 628 complaints as required by Congress. The Commission should adopt some form of standstill or temporary relief to permit small MVPDs to buy programming pending resolution of a program access complaint. The Commission should specifically adopt a procedure similar to the "standstill" provision in Appendix B(2)(c) of *Adelphia Order*; this will benefit small providers that have little leverage in negotiating with large vertically integrated wholesale video programming vendors.

- **The Commission Should Use Interim Orders to Encourage Compliance with Section 628 and Provide Timely Relief to New Entrants and Small MVPDs Seeking Initial Programming Agreements with Programming Vendors.** The Commission should adopt some form of stay or temporary relief based on a presumption that first time buyers that are small MVPDs have a right to purchase "must-have" programming at the lowest available rate offered to competing or similarly situated MVPDs. Alternatively, the Commission should provide relief based on a simplified showing that harm will accrue to small MVPDs seeking to provide service for the first time unless providers are required to permit small MVPDs to buy programming pending resolution of the dispute.

- **Non-Disclosure Agreements Should Be Prohibited**. Virtually all of the contracts negotiated between content providers and large MSOs include non-disclosure agreements. By restricting the flow of information, the video content providers make it virtually impossible to establish any semblance of "market rates." Consequently, small retail CATV and IPTV providers are significantly disadvantaged in negotiations with video programming providers. The Commission may institute an inquiry pursuant to its authority under Section 403 of the Act for the purpose of gathering additional information to create a complete record on the issue. Section 1.1 of the FCC's rules provides that the Commission may hold a proceeding for the purpose of obtaining information necessary or helpful in the determination of its policies or amendment of its rules and regulations." Given the inability of MVPDs to volunteer all of the specific information necessary to establish a complete record in this proceeding, NTCA believes the Commission should institute a Section 403 Inquiry to review a representative sample of relevant agreements and/or prohibit the use of non-disclosure agreements in case-by-case program access disputes through the use of protective orders.

Programming access and retransmission consent rules may have a significant economic impact on a substantial number of small entities, such as small rural MVPDs. The Regulatory Flexibility Act (5 U.S.C. §601) requires the FCC to consider alternative rules that will reduce the economic impact on small entities. NTCA's proposed amendments to the Commission's program access and retransmission consent rules would reduce the impact on small rural

MVPDs. NTCA's proposals will also promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market and spur development of new communications technologies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in MB Docket No. 07-29 & MB Docket No. 07-198, FCC 07-169, was served on this 4th day of January 2008 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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