

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's Program Access)	MB Docket No. 07-198
Rules and Examination of Programming)	
Tying Arrangements)	

COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

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Dated: January 4, 2008

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SUMMARY

Congress, the Commission, and state and local regulators all recognize and support the need for more video competition and the expansion of broadband networks. Competitive Broadband Service Providers (BSPs) have an extensive history of delivering the type of additional wireline networks that have proven to be the most effective type of competition that brings consumers advanced broadband services and also yields them significant benefits in terms of their cable rates and service options. Over the past ten years BSPs have demonstrated that assured access to content is essential to develop and sustain competition in the multichannel video programming distribution (“MVPD”) market and the further development of broadband networks.

The BSPA joins with the Coalition for Competitive Access to Content (“CA2C”) in urging the Commission to close the so-called ‘terrestrial loophole’ to eliminate artificial distinctions between distribution technologies. This will assure competitive access to “must have” programming that would otherwise be subject to the program access rules, but for its delivery over terrestrial networks.¹ Further, any early sunset of the important prohibitions against program contract exclusives on a market-by-market basis is premature given the nascent levels of competition and the extensive control that incumbents have over critical programming in both competitive and non-competitive markets. BSPA sees no substantive market benefit to creating an opportunity for an early blanket sunset of the rules prohibiting exclusives for any specific market and recommends that this concept be deferred for consideration in five years when the current exclusivity prohibition is once again reviewed for further extension.

¹ Comments of CA2C, *Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198 (filed Jan. 4, 2008).

In addition, the BSPA supports adoption of the proposed “arbitration-like” final, best offer procedure for the Commission to adjudicate the prices, terms or conditions for carriage in the relief phase of a program access complaint proceeding. In addition, the Commission should impose the proposed standstill requirement for pre-existing carriage agreements pending adjudication of a program access complaint.

The BSPA also supports the application of the program access rules to all MVPD-affiliated programming, including programming networks affiliated with DBS providers. In addition, the Commission should prohibit the enforcement of new exclusive contracts for the sale of unaffiliated sports networks and programming to MVPDs and further explore options to address existing unaffiliated sports exclusivity arrangements.

BSPA members also support having greater flexibility for how they can package and distribute the content most desired by their customers. This is particularly the case with sports programming, for which carriage obligations requiring MVPDs to carry programming on their expanded basic tier has substantially raised the costs of that tier to consumers. Such wholesale programming practices that include tying and bundling of content and the required placement on particular tiers constrain the way MVPDs can package their services to subscribers and their ability to respond to consumer demand in their competitive MVPD markets.

That being said, there may also be benefits to some program tying and bundling obligations in terms of keeping costs of programming reasonable and introducing new programming to the marketplace. Accordingly, BSPA believes that the promulgation of new rules to address this complex issue will require a clear understanding of the operational and cost structures of new digital networks, and submits that it would also be useful for the Commission

to initiate an independent staff study of this new industry digital operating environment to help clarify many of the issues that will be affected by any significant change in program carriage.

In contrast to other types of programming for which negotiations with programmers in connection with the digital transition may obviate the need for Commission intervention, however, the ‘must have’ nature of sports programming, and the magnitude of the effect that sports carriage obligations have on escalating rates, necessitates more immediate Commission action for this type of programming. In particular, immediate Commission action is required to eliminate sports programming bundling and carriage requirements that inflate the cost of the expanded basic tier and decrease MVPD flexibility to permit subscribers to avoid such increased costs.

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The Broadband Service Providers Association (“BSPA”)² hereby submits these comments in response to the Notice of Proposed Rulemaking of the Federal Communications Commission (“Commission” or “FCC”) in the captioned proceeding.³ Among other things, the *Notice* seeks comment on whether the program access rules adopted pursuant to Section 628(c)(2) of the Communications Act of 1934, as amended (the “Communications Act”),⁴ including Section 628’s exclusivity prohibition and anti-discrimination provisions, should be extended to: (1) terrestrially delivered cable-affiliated programming services; (2) any programming service affiliated with a multichannel video programming distributor (“MVPDs”) (rather than the current application to programming services affiliated with a cable operator); and (3) non-vertically integrated programming services (i.e., those not affiliated with a cable operator or an MVPD). The *Notice* also seeks comment on a number of issues related to program access complaint proceedings, including the potential use of what it terms an “arbitration-type step” as

² The current members of BSPA, all of which are last-mile, facilities-based providers, are: Everest Connections, Hiawatha Broadband, Knology, PrairieWave Communications, RCN, and SureWest Communications.

³ *Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, NPRM, 22 FCC Rcd 17791 (2007)(“*Notice*”).

⁴ 47 U.S.C. § 548(c)(2).

part of the remedy phase of a program access complaint, and the imposition of a standstill requirement to preserve the status quo during certain program access complaint proceedings.

Finally, the *Notice* seeks comment on a number of practices involving so-called bundling and tying arrangements, including issues surrounding various programmer vendor requirements and “incentives” related to the purchase of bundles of channels from a programming vendor by an MVPD and the required placement of those channels on a particular tier, which has served to define the current expanded basic channel line up. The Commission has questioned whether it should mandate changes in current program content industry wholesale practices involving tying and bundling of programming, and in particular, how such changes would affect consumer choice, competition, and the cost of video services for at least some segments of the MVPD-served market.

INTRODUCTION AND BACKGROUND

The BSPA continues to see compelling evidence that facilities based wireline competition brings unique market benefits that are not created by satellite networks or other MVPD options. The U.S. Government Accountability Office (GAO) identified the unique market impact of wireline market entry by BSPs on incumbent cable operator conduct and on consumer prices for cable and telecommunications services in 2004.⁵ The GAO concluded in its *Wire-Based Competition Report* that a second cable company's "entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services ... and improving customer service."⁶ These market benefits of wireline

⁵ Government Accountability Office (GAO), *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004) (“*GAO Wire-Based Competition Report*”).

⁶ *Id.* at 4.

competition have not changed, and the BSPA urges the FCC and Congress to pursue policies that will foster the continuing and sustained development of additional facilities based wireline competition.

Exclusivity and discrimination in access to programming are the most powerful tactics that incumbent operators use in an effort to block or otherwise constrain wireline competition. Like the Coalition for Competitive Access to Content (CA2C), whose comments filed concurrently in this proceeding BSPA supports and adopts by reference, BSPA urges the Commission to extend the exclusivity prohibition and anti-discrimination provisions adopted pursuant to Section 628 for satellite-delivered, cable-affiliated programming, to terrestrially-delivered cable-affiliated programming. As discussed by CA2C, the Commission has explicit authority to do so under 628(b). In addition, as the Commission recognized in the *Notice*, it has additional authority to close the terrestrial loophole under its mandate under Section 706 to support the further development of broadband facilities and services which, as the Commission has recognized, is furthered by the deployment of video services on new bundled networks. In addition, as discussed below, numerous other provisions of the Communications Act likewise provide the Commission with authority to close the terrestrial loophole.

Further, the BSPA strongly opposes adoption of a rule that would provide for the early sunset of the exclusivity prohibition in particular markets. BSPA sees no substantive market benefit to creating an opportunity for an early blanket sunset of the rules prohibiting exclusives for any specific market and recommends that this concept be deferred for consideration in five years when the current exclusivity prohibition is once again reviewed for further extension.

BSPA also supports the Commission's adoption of its proposed "arbitration-type" process as an alternative procedure for adjudicating the price, terms, or conditions of carriage in

the remedies phase of a program access complaint proceeding. In addition, the BSPA submits that the Commission should adopt the proposed standstill requirement for pre-existing carriage agreements during the pendency of a program access complaint proceeding.

Recognizing current market realities, the Commission should apply the program access rules to programming affiliated with any MVPD, including DBS providers, not just programming that is affiliated with a cable operator. In addition, the Commission should prohibit the enforcement of new exclusive contracts for the sale of unaffiliated sports networks and programming to MVPDs and further explore options to address existing unaffiliated sports exclusivity arrangements.

The BSPA also agrees with the *Notice* that the current practices of tying and bundling programming at the wholesale level can serve to restrict other programmers from obtaining carriage by tying up available “shelf space,” and more importantly, can limit how competitive MVPDs can respond to consumer demand in ways that can potentially lower prices and eliminate programming that consumers do not wish to purchase. On the other hand, while BSPA members believe that having more flexibility in the purchase of programming and its placement would provide BSPs with greater flexibility to respond to consumer demand with respect to how programming is packaged, we believe that it would be premature for the Commission to adopt broad rules in this area given the ongoing digital transition, and what little is known about market structure and competition in an all or predominantly digital environment. Accordingly, BSPA does not recommend broad policy action by the Commission at this time, or address the Commission’s authority to adopt rules in this area. Rather, our industry needs to have a better understanding of the cost and operating structures of this new environment before recommending

whether new wholesale distribution and carriage rules for all-digital platforms would be warranted.

The same cannot be said, however, for sports programming networks. As even BSPA's large incumbent cable competitors have recently recognized in their various disputes and efforts to carry Major League Baseball (MLB) and place expensive National Football League (NFL) programming outside of their expanded basic service tiers in order to keep the cost of such tiers from increasing, one area where the Commission should act more quickly is with respect to sports programming.

DISCUSSION

I. THE COMMISSION SHOULD EXTEND THE PROGRAM ACCESS RULES TO CABLE-AFFILIATED, TERRESTRIALLY DELIVERED CONTENT.

As noted above, the BSPA adopts and incorporates by reference herein the comments and recommendations of the CA2C for closing the terrestrial loophole.⁷ Access to “must have” content distributed by programmers that are vertically integrated with incumbent cable operators is essential to the development and preservation of competition in the MVPD market and the development of broadband networks. The Commission has correctly concluded that incumbent cable continues to have both the incentive and ability to use discriminatory access to programming to harm competition. Application of these pro-competitive rules should not be affected by the technology by which programming is delivered to MVPDs, and the Commission should apply program access rules to the cable-affiliated programming delivered via terrestrial networks.

⁷ Comments of CA2C, MB Docket No. 07-198 (filed Jan. 4, 2008).

The exclusivity prohibition and the anti-discrimination provisions in Section 628(c)(2) have been major factors in the development of MVPD competition. Competitive MVPDs rely on these rules to ensure access to “must have” programming that would be otherwise withheld by incumbent providers or made available only on discriminatory terms and conditions. So long as cable operators with ownership interests in essential content can use that programming to sustain market shares and contain or block competition, assured access to such content by the Commission will be required.

Terrestrial distribution already hosts content that has been deemed by the Commission to be “must have” programming as evidenced by the Commission’s *Adelphia* decision.⁸ The use of terrestrial distribution will grow and will potentially become a preferred distribution vehicle for local and regional programming. As correctly noted by the Commission, the extent of incumbent cable regional clusters combined with their scale creates additional incentive and opportunity for a vertically integrated programmer’s delivery of programming via terrestrial distribution, which will allow operators under current rules to deny competitors access to “must have” programming.

The BSPA also adopts and incorporates herein by reference CA2C’s comments on the Commission’s authority under Section 628(b) to close the terrestrial loophole, and will not repeat those arguments here.⁹ Although Section 628(b) of the Act provides ample authority for the Commission to close the terrestrial loophole, as the Commission has recognized in the *Notice*

⁸ See *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 8203, 8274 (2006) (“*Adelphia Order*”)

⁹ See CA2C Comments at 13-18. Section 628(b) makes it unlawful for a cable operator or a vertically integrated satellite cable programming vendor to “engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming . . . to subscribers or consumers.” As CA2C notes, on its face, Section 628(b) does not limit the “unfair methods of competition or unfair or deceptive acts or practices” to conduct involving satellite-delivered programming, and provides ample authority for the Commission to close the terrestrial loophole.

and numerous other contexts involving the promotion of competition to incumbent cable operators, other sections of the Communications Act also provide broad authority for the Commission to take such action.

Congress delegated to the Commission the task of administering the Communications Act and, as the Supreme Court has found, established the Commission to serve “as the ‘single Government agency’ with ‘unified jurisdiction’ and ‘regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio.’”¹⁰ Thus, “[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility.”¹¹ Section 201(b) authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”¹² The Supreme Court explained that “[t]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’”¹³

Other provisions of the Communications Act reinforce the Commission’s general rulemaking authority and its broad power to prescribe rules and adopt procedures necessary to “discharge [its] multitudinous duties.”¹⁴ For example, Section 303(r) states that “the Commission from time to time, as public convenience, interest, or necessity requires shall ... make such rules and regulations and prescribe such restrictions and conditions, not inconsistent

¹⁰ *Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and FNPRM, 22 FCC Rcd 5101, 5127-128 (2007) (“*Local Franchising Report and Order*”), citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968).

¹¹ *Local Franchising Report and Order*, 22 FCC Rcd at 5128, citing *United Tel. Workers, AFL-CIO v. FCC*, 436 F.2d 920, 923 (D.C. Cir. 1970).

¹² 47 U.S.C. § 201(b).

¹³ *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999).

¹⁴ *FCC v. Schreiber*, 381 U.S. 279, 290 (1965).

with law, as may be necessary to carry out the provisions of this Act...”¹⁵ Section 4(i) states that the 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”¹⁶ and was cited by the Commission in its recent *Local Franchising Report and Order* as providing authority to enact rules prohibiting franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.¹⁷ And Section 601(6) of the Act states that one of the purposes of Title VI is to “promote competition in cable communications.” It is clear that, either separately or taken as a whole, these provisions of the Communications Act give the Commission the authority, as it concluded it had with respect to unreasonable franchising requirements and MDU exclusives, to address discriminatory or exclusive arrangements for terrestrially-delivered programming in order to promote competition in cable communications.¹⁸

¹⁵ 47 U.S.C. § 303(r); *see also* 47 U.S.C. § 151 (The Commission “shall execute and enforce the provisions of this Act”); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979); *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) (“[w]e are not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret [47 U.S.C.] § 541 [*i.e.*, § 621 of the Act] and to determine what systems are exempt from franchising requirements”); *see also City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) (“§ 303 of the Communications Act continues to give the Commission broad rulemaking power ‘as may be necessary to carry out the provisions of this chapter,’ 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters”); *NCTA v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005) (“Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act . . . and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act”). This authority, of course, not only extends to the Communications Act of 1934, as originally enacted, but to subsequent amendments to the Act. *AT&T Corp.*, 525 U.S. at 378.

¹⁶ 47 U.S.C. § 154(i).

¹⁷ *See, Local Franchising Report and Order*, 22 FCC Rcd at 5127-128. That Order also relied on the broad authority granted to the Commission under Sections 201(b) and 303(r) of the Communications Act. *Id.*

¹⁸ *Cf., Matter of Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016, 9028 (2006), wherein the Media Bureau relied on authority under Section 4(i) combined with authority under Sections 623 and 632 of the Act to require Time Warner to reinstate carriage of the NFL Network.

II. THE COMMISSION SHOULD NOT ADOPT RULES ALLOWING FOR THE EARLY SUNSET OF THE PROHIBITION ON EXCLUSIVE CONTRACTS FOR VERTICALLY INTEGRATED CABLE PROGRAMMING.

The BSPA strongly opposes adoption of a rule that would provide for the early sunset of the exclusivity prohibition in particular markets. Such an early sunset of the important prohibitions against program contract exclusives on a market-by-market basis is premature given the nascent levels of competition and the extensive control that incumbents have over critical programming in both competitive and non-competitive markets. BSPA sees no substantive market benefit – and only competitive harm – that could come from creating an opportunity for an early blanket sunset of the rules prohibiting exclusives for a specific market, and therefore urges that this concept be deferred for consideration in five years when the current exclusivity prohibition is once again reviewed for further extension.¹⁹

III. THE COMMISSION SHOULD ADOPT THE BEST, LAST OFFER, “ARBITRATION-TYPE” PROCEDURE FOR THE RELIEF PHASE OF PROGRAM ACCESS PRICING DISPUTES, AND A STANDSTILL REQUIREMENT PENDING COMPLETION OF PROGRAM ACCESS COMPLAINT PROCEEDINGS.

The BSPA supports the changes to the program access procedural rules regarding discovery and the program access complaint procedures adopted in the *Sunset Report and Order*. The *Notice* asks whether the Commission should also adopt the use of standstill arrangements during the pendency of a program access complaint and the use of an “arbitration-type” procedure as part of the remedy phase of a program access dispute involving the prices, terms, or conditions of carriage, based on similar approaches adopted in the *Adelphia* and *DIRECTV*

¹⁹ The BSPA adopts and incorporates herein by reference CA2C’s comments in the instant proceeding opposing adoption of rules that would provide for the early sunset of the exclusivity prohibition in particular markets, and will not repeat those arguments here. *See* CA2C Comments at 22-25.

mergers.²⁰ Under such a final offer arbitration procedure, the Commission would request in the remedy phase of the proceeding that the parties each submit their best, final offer proposal for the rates, terms or conditions under review, and the Commission would choose between them.²¹

The BSPA has supported the use of third party binding arbitration as an appropriate remedy for pricing disputes and the use of a standstill requirement for pre-existing carriage during adjudication of program access disputes.²² The BSPA also supports the use of the “arbitration-type step” proposed in the *Notice*, which strictly speaking is not arbitration at all, but merely a procedural vehicle in the remedy phase of a program access complaint whereby the Commission (and presumably staff, on delegated authority) would “establish prices, terms, and conditions of sale of programming to the aggrieved” MVPD.²³ The BSPA views this approach as an appropriate alternative for efficiently resolving pricing disputes and creating incentives for the parties to settle the case. The BSPA also believes that a standstill for pre-existing carriage arrangements is needed and appropriate during a complaint proceeding. Both of these additional requirements will assure that complaint proceedings will be resolved in as timely a manner as

²⁰ In its decision in the *Adelphia and DIRECTV* mergers, the Commission imposed program access requirements on the programming of the merged parties, and provided what it referred to as a “commercial arbitration remedy” in connection with regional sports networks (“RSNs”) of the merged parties, giving an aggrieved MVPD the ability to submit a program access dispute to “last offer” arbitration. *Adelphia Order*, 21 FCC Rcd at 8227; *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp. Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 553-555 (2004) (“*DIRECTV Order*”). In last or final offer arbitration, each side submits its best offer to the arbitrator, who can award either of the offers, but can’t compromise between them. The Commission also required that to the extent the contract between the aggrieved MVPD and the programmer had expired, the aggrieved MVPD would have continued access to the programming in question under the terms and conditions of the expired contract (known as a “standstill” requirement), pending resolution of the program access dispute. *Id.* at 552.

²¹ See *Notice*, 22 FCC Rcd at 17868-869. Here, however, rather than submitting the competing offers to an outside commercial arbitrator, Commission staff would choose among the competing offers.

²² See Comments of Broadband Service Providers Association, *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Docket No. 07-29, at 7 (filed Apr. 2, 2007).

²³ See Section 628(e)(1), 47 U.S.C. § 548(e)(1).

possible.

A. The Commission’s Proposed “Arbitration-Type” Procedure for the Remedies Phase of Program Access Complaint Will Provide for the Efficient Resolution of Pricing Disputes and Will Create Incentives for the Parties to Reach Negotiated Settlements, and the Commission Has Clear Authority to Adopt the Proposal.

The arbitration-type conditions adopted by the Commission in the *Adelphia* and *DIRECTV Orders* address the very same public interest concerns that are at the core of Section 628’s program access regime, and are essential to blunt the ability of distributors to engage in vertical foreclosure strategies with respect to their controlled programming. A “neutral dispute resolution forum would provide a useful backstop” to prevent rival MVPDs from either being forced to accept inordinate affiliate fee increases for access to programming and/or other unwanted programming concessions.²⁴ The Commission reasoned that:

Our arbitration condition is also intended to push the parties toward agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive “ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.”²⁵

Thus, when negotiations fail to produce mutually acceptable prices, terms and conditions, the Commission authorized the MVPD to demand commercial arbitration, and specified the rules and procedures by which such arbitration would be conducted.²⁶

The BSPA believes that the primary benefits of this type of arbitration can also be achieved through an internal FCC process in the remedies phase of a complaint proceeding, and it is clearly part of the Commission’s authority to adopt appropriate remedies for complaint

²⁴ *DIRECTV Order*, 19 FCC Rcd at 552.

²⁵ *Id.* (Citations omitted.).

²⁶ *Id.* at 552-55, 572-75.

proceedings. The arbitration rules that the Commission adopted in the *DIRECTV* and *Adelphia Orders* are a good template for arbitration rules that the Commission should extend to its program access rules. Accordingly, attached hereto as Exhibit A, are the BSPA's proposed procedures for the 'best offer' remedy phase of a program access dispute, based primarily on the best offer submission procedures adopted by the Commission in *Adelphia* and *DIRECTV*.²⁷

The Commission has the authority, pursuant to Section 628 and other provisions of the Communications Act, to adopt the best offer procedure proposed in the *Notice* to adjudicate the remedies phase of program access proceedings. Section 628(e), in particular, provides the Commission with plenary authority to order remedies for violations of program access disputes, including the explicit "power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved" MVPD. As the Commission has previously found, its authority under Section 628(e) "is broad enough to include any remedy the Commission reasonably deems appropriate."²⁸

Importantly, in addition to the general grants of authority discussed at 7 – 9, *supra*, which supports the Commission's authority to adopt its best offer remedy procedure, Section 4(j) of the Communications Act empowers the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Courts have

²⁷ A significant difference between the procedures adopted in *Adelphia* and *DIRECTV* and those proposed here is that (1) the proposed best offer procedures are invoked only in the remedies stage of a program access proceeding, after a violation of the program access rules has been found; and (2) the offers are submitted to Commission staff as part of its adjudication of the program access matter, rather than to an outside arbitrator.

²⁸ See *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1910 (1994)(Emphasis added.).

recognized that this provision gives the Commission broad plenary discretion to determine how best to conduct its proceedings. As the Supreme Court recognized in *FCC v. Schreiber*:²⁹

The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings; it also delegates broad discretion to prescribe rules for specific investigations, and to make ad hoc procedural rulings in specific instances. Congress has “left largely to the [FCC’s] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate” the proper dispatch of its business and the ends of justice.³⁰

Given the Commission’s specific “power to order appropriate remedies” for program access violations under Section 628(e), combined with its more general authority to adopt rules implementing the Communications Act, and more specifically, to prescribe procedural rules necessary to “discharge [its] multitudinous duties,”³¹ the Commission can adopt the necessary rules implementing such a procedure if it determines that use of the “arbitration-type step” proposed in the *Notice* is the most effective way to determine the appropriate relief in program access disputes.

B. The Program Access Complaint Procedures Should Provide for the Use of Standstill Agreements.

The *Notice* also asks whether the Commission should adopt mandatory standstill agreements as part of its program access procedures.³² In the *DIRECTV Order* and the *Adelphia Order*, the Commission required that to the extent the contract between the aggrieved MVPD and the programmer expire prior to the resolution of a program access complaint, the aggrieved MVPD will have continued access to the programming in question under the terms and conditions of the expired contract, pending resolution of the complaint.

²⁹ 381 U.S. 279 (1965).

³⁰ *Id.* at 289. (internal citations omitted).

³¹ *Id.* at 290.

³² *See Notice*, 22 FCC Rcd at 17868-870.

In the Commission's view, the imposition of such a "standstill" requirement was necessary to constrain the merged parties' ability to use temporary foreclosure strategies during negotiations for programming. Vertically integrated programmers covered by the program access rules have similar incentives to use temporary foreclosure strategies during the pendency of a complaint, and for the same reason that this form of standstill obligation made sense as a condition in the *DIRECTV* and *Adelphia Orders*, such standstill requirements should be incorporated into the Commission's general program access complaint procedures.

In particular, BSPA proposes that the Commission amend its internal program access complaint rules to provide that upon filing of a program access complaint (1) the aggrieved MVPD has the right to continued carriage pending resolution of the complaint proceeding; (2) the price, terms, and conditions of the existing contract (or of the most recent expired contract) will apply to continued carriage pending resolution of the complaint; (3) sale of disputed programming is not required pending resolution if no carriage agreement had previously existed between the parties; and (4) any new price will be applied retroactively to the date of the pre-filing notice.

The Commission has the authority to adopt such a provision as part of its program access rules. As noted above, the Commission has previously found that its authority under the remedy provision of Section 628(e) "is broad enough to include any remedy the Commission reasonably deems appropriate."³³ Taken together with Section 4(i), which authorizes the Commission to "make such rules and regulations . . . as may be necessary in the execution of its functions,"³⁴ and Section 4(j), which empowers the Commission to "conduct its proceedings . . . as will best

³³ *Program Access Reconsideration Order*, 10 FCC Rcd at 1910.

³⁴ 47 U.S.C. § 154(i).

conduce to the proper dispatch of business *and to the ends of justice*,”³⁵ the Commission has clear authority to adopt the proposed standstill requirement. Indeed, as the Commission has previously held, given these provisions, the Commission has “ample authority to take interim actions to preserve the status quo.”³⁶

IV. THE PROGRAM ACCESS RULES SHOULD BE APPLIED TO ANY PROGRAMMING IN WHICH AN MVPD, INCLUDING A DBS PROVIDER, HAS AN ATTRIBUTABLE INTEREST, AND THE COMMISSION SHOULD PROHIBIT THE ENFORCEMENT OF NEW EXCLUSIVE CONTRACTS FOR THE SALE OF UNAFFILIATED SPORTS NETWORKS AND PROGRAMMING TO MVPDs.

A. The Program Access Rules Should Be Applied to any Programming in which an MVPD, including a DBS Provider, Has an Attributable Interest.

The Commission has already determined that the public interest requires that programming vertically integrated with a major DBS operator should be subject to program access conditions. This was the conclusion when program access merger conditions were imposed in the *DIRECTV Order*,³⁷ and the imposition of similar program access conditions is again a key issue in the Commission’s consideration of the proposed acquisition of DIRECTV by

³⁵ 47 U.S.C. § 154(j)(Emphasis added). *See also FCC v. Schreiber, supra*, 381 U.S. 279, 289-90 (“Congress has ‘left largely to the [FCC’s] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate’ the proper dispatch of its business and the ends of justice.”)

³⁶ *Matter of Appropriate Framework for Broadband Access to the Internet over Wireless Facilities, et al.*, First Report and Order and NPRM, 20 FCC Rcd 14853, 14916 (2005). *See also MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (1984)(“substantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated”). The adoption of a standstill requirement here is completely analogous and no less compelling than one in the context of a rulemaking. The purpose of the standstill agreement is to maintain the status quo pending the program access adjudication and ensure that the objectives of the adjudication would not be frustrated if the affiliated programmer were otherwise left to its own devices. For an example of the use of an order preserving the status quo in a pole attachment dispute while the parties continued to negotiate a lawful rate, *see Alabama Cable Telecom. Assoc. v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12217 (2001). There, in denying an application for review, the Commission found that in a pole attachment dispute, the Bureau’s decision to order Respondent to allow the Complainant to continue to remain attached to the poles pending the negotiation of a rate in accordance with the Commission’s formula “is well within the Commission’s jurisdiction to enforce the access provisions of the Pole Attachment Act as well as the Commission’s jurisdiction to ensure that conditions of pole attachment agreements are just and reasonable.” *Id.*

³⁷ *DIRECTV Order*, 19 FCC Rcd 473 (2004).

Liberty Media Corp. The *DIRECTV Order* reached the correct conclusion. Given the scale of DBS operations and their level of vertical integration, they should be subject to the same program access conditions that were initially enacted for incumbent cable who at the time were the only significant vertically-integrated MVPDs. Assured access to “must have” programming controlled by a DBS operator is no less important than similar content subject to major incumbent cable ownership. This is particularly true for more rural or second tier markets where DBS is often the major competitor to smaller MVPDs.

The BSPA’s recommendation to expand the program access rules related to vertical integration to all MVPDs is based on the need for the Commission to create a sustained and predictable market where all MVPDs are subject to the same rules of competition. While in the near term BSPA members and other new entrants have assured access to all of DIRECTV’s integrated programming as a result of prior Commission merger conditions, the Commission should nonetheless apply the same regulations that pertain to other MVPDs. So long as the Commission concludes that the prohibitions on exclusives and discrimination are needed to promote competition, those rules should apply to all MVPDs, and not be subject to changes in ownership and the imposition of conditions related to a particular transaction.

B. The Commission Should Prohibit the Enforcement of New Exclusive Contracts for the Sale of Unaffiliated Sports Networks And Programming to MVPDs and Further Explore Options to Address Existing Unaffiliated Sports Exclusivity Arrangements.

The Commission has found that sports programming is essentially unique, and an MVPD ‘must have’ the ability to offer sports programming to sports fans in order to be a viable

competitor.³⁸ Sports fan subscribers expect that access to their sports teams – whether professional, college, or high school -- should not be dependent on their choice of MVPD, or on changing from one MVPD to another.

The ongoing importance and unique nature of sports programming is evidenced by past proceedings at the Commission and in Congress. Indeed, there are few programming issues that receive the level of attention or cause the degree of consumer frustration as does exclusive sports programming. For example, the Commission created merger conditions that were specific to regional sports networks (“RSNs”) as part of the DIRECTV and Adelphia merger proceedings where the programming services involved would not otherwise be subject to the program access rules.³⁹ Assured access to all RSNs regardless of affiliation with an MVPD also had significant bipartisan support in legislation introduced in the Senate Energy and Commerce Committee during the 109th Congress⁴⁰ and the potential for an exclusive MLB contract with an MVPD prompted hearings in the Senate Energy and Commerce Committee.⁴¹

³⁸ *Adelphia Order*, 21 FCC Rcd at 8267-72, 8341-50 (App. D); *see also id.* at 8271-72 (“We conclude that there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN.”); *DIRECTV Order*, 19 FCC Rcd at 546-47 (stating that withholding of RSN programming will cause consumers to lose access to highly desired programming and some consumers will leave their preferred MVPD provider to access the foreclosed programming on a less-desired MVPD platform).

³⁹ In *DIRECTV*, the Commission applied its program access-related merger conditions to programming that post-merger would be affiliated with a DBS provider, though would not have been affiliated with a cable operator and hence subject to Section 628. 19 FCC Rcd 473. In *Adelphia*, the Commission applied analogous conditions to terrestrially delivered programming that was not subject to Section 628.

⁴⁰ Sports Freedom Act of 2006, H.R. 5252, 109th Cong. §401 (2006). It is worth noting that while the 2006 Senate telecommunications bill did not have the needed support in the Senate for passage, closing the terrestrial loophole and providing for assured access to all regional sports programming regardless of affiliation was one of the only provisions that was supported in both the Stevens Majority Draft and in the Minority alternative proposed bill.

⁴¹ *See* Senate Commerce and Energy Committee, Full Committee Hearing: “*Exclusive Sports Programming: Examining Competition and Consumer Choice*” (Mar. 27, 2007). Chaired by Senator John Kerry, Senator Kerry’s Opening Remarks available at <http://kerry.senate.gov/cfm/record.cfm?id=271361>.

The BSPA agrees with past actions taken by the Commission in the context of merger proceedings when it has applied program access-like conditions to sports programming that was not otherwise subject to the program access rules. However, the full scope of these issues will not be resolved until Section 628's prohibition on exclusive arrangements, are extended to all sports programming networks and packages sold to MVPDs, regardless of the program provider's affiliation with a cable operator or other MVPD. The negative impact of exclusive sports arrangements on competitors is well documented. At a minimum the BSPA urges the Commission to take action to prohibit MVPDs from enforcing any new sports exclusive arrangements absent the public interest determination in Section 628(c)(4), and that the Commission further explore options to address existing exclusivity arrangements with MVPDs involving sports programming that are not currently subject to the rules.⁴²

V. EXISTING TYING, BUNDLING AND CARRIAGE PLACEMENT OBLIGATIONS IMPOSED BY CONTENT PROVIDERS LIMIT FLEXIBILITY AND INNOVATION IN COMPETITIVE SERVICE OFFERINGS AND SHOULD BE REVIEWED IN THE CONTEXT OF THE EVOLVING ALL-DIGITAL INDUSTRY.

The legacy structure of expanded basic carriage has been driven by the technology issues of analog distribution and the wholesale contracts that define what is carried. It is technically

⁴² The same provisions of the Act discussed above outside of Section 628(b) that provide the Commission with authority to close the terrestrial loophole, similarly provide the Commission with authority to extend the program access rules to programming services in which an MVPD has an attributable interest as well as to prohibit MVPDs from enforcing exclusive arrangements for unaffiliated sports programming networks and packages sold to MVPDs. See 7 – 9, *supra*. In addition, as the Commission recognized in the recent *MDU Exclusivity Report and Order*, the Commission has ancillary jurisdiction to prohibit cable operators and other MVPDs from enforcing or executing exclusivity clauses for the provision of video service to MDUs, and, similarly, would have ancillary jurisdiction here to prohibit MVPDs from enforcing exclusive contracts for sports programming absent a public interest determination under Section 628(c)(4). See *Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and FNPRM, MB Docket No. 07-51, FCC 07-189, ¶ 52-60 (2007) (“*MDU Exclusivity Report and Order*”) (noting that in addition to Section 628, Commission's ancillary jurisdiction provides basis for regulating specific MVPDs' conduct with respect to MDU exclusives, rejecting arguments that the Commission has no authority to regulate MVPD contractual conduct because of the tangential effect of such regulation on unregulated MDU owners).

difficult and costly to segment analog carriage into smaller packages or individual channels for sale. In addition, current programming contract provisions related to tying, bundling and placement of a channel on the expanded basic tier restrict the ways that an MVPD can offer that content to consumers and also serve to constrain the ability of an MVPD to carry other content not subject to such provisions, primarily content produced by independent programmers. The extensive affiliation agreements of major programmers tie up capacity on the most widely distributed and viewed expanded basic analog channel packages. Delivery of the expanded basic structure in this technical environment has been historically necessary but has also made it difficult for competitive MVPDs to have the flexibility to offer consumers more choice and more cost effective purchasing options.

The expected migration of infrastructure to all-digital platforms has set the stage for the continuing convergence of communications services through all-digital content and delivered services that all network subscribers will eventually have access to. With the support and encouragement of regulators, the industry is making significant investments in the conversion to all-digital systems. The anticipated completion of the broadcast digital transition in February 2009 will be a major milestone in this process. This migration to all-digital formats is expected to bring significant benefits in the areas of spectrum recovery and utilization, expanded system capacity versus analog formats, greater two way communication capability, along with increased network control and flexibility in the delivery of content. An additional benefit of an all-digital world should be the added flexibility of delivering better choice to consumers. Consumers should have a choice in provider, content, and new and varied packages that today's analog systems cannot technically or economically deliver. Emerging all-digital systems will not have the limitations of analog carriage and network operators will have the technical ability to offer

new levels of consumer choice at reasonable operating cost, subject to contract carriage requirements and related pricing issues.

It remains to be seen whether this improved technological flexibility will be matched by increased flexibility on the part of content providers to agree to carriage arrangements that similarly permit MVPD's to develop more flexible service offerings. The current tying and bundling obligations along with pricing incentives to place a channel on the expanded basic tier constrain MVPDs from packaging content in response to consumer interests. It is the intent of BSPA members to negotiate new and different carriage agreements with programmers to effectively use the new all-digital operating environment to increase competitive choice and service options for consumers. Depending upon the outcome of these efforts, and the experience gleaned from the operational and economic challenges posed by the digital transition, it may be necessary for the Commission to intervene in order to remedy a market failure.

No doubt various interested parties will submit studies and papers from their own economists, analyzing the market, and recommending particular Commission action or inaction on policy issues associated with wholesale bundling and tying arrangements. The BSPA reserves the right to comment on the specific merits of such studies and projections, but as a general matter believes that all will suffer from the fact that they are based on historical industry data and economic analysis undertaken from analog networks and not information generated and applicable to the operating characteristics of all-digital networks. Rather than the Commission choosing winners and losers in this battle of the experts, the BSPA believes that the Commission should instead allow its thinking in this area to be informed by an independent study, that will be focused on developing a better understanding of the current and evolving industry structure, the

implications of particular regulatory approaches that are being advanced, and that will make unbiased, and independent recommendations of how the Commission should proceed.

It has been nearly 20 years since the Commission assigned a special, independent staff to report on network programming practices in connection with the practices of the dominant broadcast networks. In 1978, the Commission formed the Network Inquiry Special Staff, which examined both traditional broadcasting and evolving new services, analyzing current industry structure and how it was expected to develop. The Special Staff's final report was released two years later.⁴³ A 20-year cycle for such a study and report appears to be appropriate – 20 years earlier than the 1980 report, a special network study staff conducted a similar broad-ranging inquiry into network practices, resulting in the 1957 release of the historic "Barrow Report."⁴⁴ And about 16 years earlier, the Commission completed its first network inquiry into the practices of what was then known as "chain broadcasting."⁴⁵

The BSPA believes that this would be an appropriate time to again convene a special staff to study the practices of programming networks, including the tying and bundling of programming, requirements related to the placement of programming on a particular tier, and industry structure. The BSPA recommends that as an initial step, the Commission release a Notice of Inquiry seeking input on the matters that the special staff should examine, the timing of its report, and other administrative issues.

⁴³ Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report*, (Oct. 1980).

⁴⁴ *Network Broadcasting*, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2nd Sess. (1958) (the "Barrow Report").

⁴⁵ *Report on Chain Broadcasting*, Commission Order No. 37; Docket 5060 (May, 1941) modified, *Supplemental Report on Chain Broadcasting* (Oct. 1941), *appeal dismissed sub nom. NBC v. United States*, 47 F. Supp. 940 (1942), *aff'd*, 319 U.S. 190 (1943).

VI. SPORTS PROGRAMMING REQUIRES MORE IMMEDIATE COMMISSION ACTION TO ELIMINATE CARRIAGE REQUIREMENTS THAT INFLATE THE COST OF THE EXPANDED BASIC TIER AND DECREASE MVPD FLEXIBILITY TO PERMIT SUBSCRIBERS TO AVOID SUCH INCREASED COSTS.

As discussed above, and as articulated by the Commission in its *Adelphia Order*,⁴⁶ must-have sports programming poses unique competitive issues that must be addressed in order for competition to develop and flourish. In addition to taking the steps outlined above to assure access to such programming, the Commission needs to address contractual provisions for sports programming that limit the ability of MVPDs to fashion cost-effective competitive service offerings tailored to the wants and needs of their subscribers. In particular, sports contracts are often subject to content provider-imposed obligations to place such programming on the MVPD's expanded basic (or otherwise most widely distributed tier). Naturally, because of the 'must have' nature of sports programming to a large percentage of consumers, an MVPD (and especially a new entrant MVPD) has virtually no ability to reject such a requirement, and the result has been that expensive sports programming networks have contributed to the size, and more importantly the high cost, of expanded basic cable service. Such requirements have also meant that MVPDs are denied any flexibility to package sports programming in ways that enable consumers to choose whether and what sports programming they want to purchase, and have contributed to rate inflation even in markets with two or more wireline competitors.

The issue of escalating cable rates is a significant concern to BSPA members, who must be able to design distinctive and cost-effective service offerings in order to distinguish themselves in the market; to consumers, who are forced to pay higher rates for services; and to

⁴⁶ *Adelphia Order*, 21 FCC Rcd 8203 (2006).

regulators and legislators, who must respond to consumer dissatisfaction. Sports programming is a major contributing factor to rate increases during recent years, and such programming constitutes the largest single portion of an expanded basic subscription.⁴⁷ Such sports programming is clearly essential programming to many consumers, but it is equally clear that sports programming is not essential to some consumers, especially if they are able to consider the cost of such programming. Carriage requirements that obligate MVPDs to include expensive sports programming on the basic tier mean that virtually all subscribers are forced to pay the high cost of sports content that many might otherwise not choose to purchase.

Unlike other types of programming for which negotiations with programmers in connection with the digital transition may obviate the need for Commission intervention, the ‘must have’ nature of sports programming, and the magnitude of the effect that carriage obligations have on escalating rates, necessitates more immediate Commission action for this type of programming. Indeed, the recent dispute between the NFL and various cable operators highlights the need for Commission intervention involving the bundling and tying of sports networks, since even companies with the scale and scope of Time Warner Cable were unable to negotiate an affiliation agreement for carriage of the NFL Network that did not include its placement on the expanded basic tier.⁴⁸ Similarly, in its dispute with Comcast over carriage of the NFL Network, the NFL has shown that it is willing to go to great lengths to prevent even the largest cable operator from being able “to provide the new high-priced NFL Network to those

⁴⁷ *Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24457 (App. F) (“1998 Cable Report”)

⁴⁸ See, e.g., The New York Sun, “NFL Network, Time Warner Can’t Seem to Get Along.” (Aug. 7, 2006).

customers who want it without imposing additional costs on everyone else....”⁴⁹ Obviously, competitive providers such as BSPA members have no hope of negotiating such arrangements.⁵⁰

BSPA therefore urges that, in light of the unique nature of sports programming, the Commission specifically preclude such restrictive carriage obligations for such programming.⁵¹

⁴⁹ *Ex Parte* Letter to Marlene H. Dortch from James L. Casserly on behalf of Comcast Corp., MB Docket No. 07-42, at Attachment, p.2 (filed Nov. 6, 2007).

⁵⁰ Indeed, some of the BSPA’s members were forced by competitive pressures to sign agreements requiring them to pay extra for the New England Patriots/New York Giants game on December 29th as well as several other games and to carry the games on expanded basic. Their expanded basic rates must now contain the high cost of the NFL Network even though their subscribers ultimately could have watched the December 29th game on broadcast network channels at no extra cost.

⁵¹ This is not to say that an MVPD and a sports programmer cannot or should not be entitled to negotiate and mutually agree upon a carriage obligation as an alternative to a more flexible carriage arrangements, but rather to eliminate the ability of a sports programmer to mandate such requirements to the detriment of competition and consumer choice.

CONCLUSION

WHEREFORE, the BSPA urges the Commission to extend the exclusivity prohibition and anti-discrimination provisions adopted pursuant to Section 628 for satellite-delivered, cable-affiliated programming to terrestrially-delivered cable-affiliated programming. In addition, BSPA urges the Commission to:

- (1) decline to adopt a rule that would provide for the early sunset of the exclusivity prohibition in particular markets;
- (2) adopt its proposed “arbitration-type” process as an alternative procedure for its adjudication of the price, terms, or conditions of carriage in the remedies phase of a program access complaint proceeding;
- (3) adopt the proposed standstill requirement for pre-existing carriage agreements during the pendency of a program access complaint proceeding;
- (4) extend application of the program access rules to programming services affiliated with any MVPDs, including DBS providers; and
- (5) extend application of the program access rules, including the exclusivity prohibition, to any sports network or package sold to MVPDs, regardless of the program provider’s affiliation with a cable operator.

The BSPA agrees with the Commission’s *Notice* that there are competitive and consumer issues associated with tying and bundling obligations imposed by content providers, and its members desire greater freedom to compete by offering consumers alternate carriage options. However, the BSPA does not believe that broad Commission action related to carriage issues is warranted prior to completion of the digital transition and the development of a full

understanding of this new digital operating environment. The BSPA does, however, urge that the Commission expeditiously pursue a study by an independent staff that would make recommendations related to the current and evolving structure of the industry. The BSPA also recommends, as an initial step, that the Commission seek comment on the matters to be examined, the timing of the study, and other administrative issues.

Finally, the BSPA urges that tying, bundling and content carriage mandates involving sports programming be separately addressed in light of the unique nature of this ‘must-have’ programming. In particular, MVPDs should have greater freedom to offer sports programming separate from other program packages so that the high cost of sports programming can be isolated and consumers can make an informed choice as to whether they wish to pay for it.

Respectfully submitted,

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Dated: January 4, 2008

Attachment A

**PROPOSED AMENDMENT TO PROGRAM ACCESS RULES
FOR BEST, FINAL OFFER REMEDY PHASE PROCEDURES**

Section 76.1003 is amended by adding new subparagraph (4) to paragraph (h):

§ 76.1003 Program Access Proceedings.

* * * * *

(h) *Remedies for Violations*— ***

(4) *Order establishing prices, terms, or conditions for sale of programming to aggrieved MVPD.* (i) *Bifurcation.* In all cases where the prices, terms, or conditions for sale of programming to the aggrieved MVPD is at issue, the Commission shall bifurcate the program access violation determination from the determination of the prices, terms, or conditions for sale of programming to the aggrieved MVPD. The determination of the prices, terms, or conditions for sale of programming for which a program access violation has been adjudicated (the “Covered Programming”) shall be in accordance with this subparagraph.

(ii) *Submission of best, final offer.* Within 10 days of the release of the order determining a program access violation, the aggrieved MVPD and the defendant programming vendor shall each submit to the Commission their best, final offer for the Covered Programming setting forth the prices, terms or conditions pursuant to which the aggrieved MVPD proposes to buy the Covered Programming from the defendant programming vendor, and the defendant programming vendor proposes to sell the Covered Programming to the aggrieved MVPD. Each party’s final offer shall be in the form of a contract for the carriage of the programming for a period of at least three years. A final offer may not include any provision to carry any video programming networks or any other service other than the Covered Programming. Upon receipt of both party’s final offers, the Commission shall direct each party to serve by hand, fax or email its final offer on the other party.

(iii) *Cooling off period.* The 10-day period following the parties’ exchange of their respective final offers shall constitute a “cooling off” period during which time the parties shall attempt to resolve the prices, terms or conditions for sale of the covered programming. If at the end of such 10-day period, the parties have not notified the Commission that agreement has been reached regarding the prices, terms, or conditions of carriage of the Covered Programming, the Commission shall commence adjudication of the price, terms or conditions of carriage of the Covered Programming. This 10-day cooling off period may be extended for a single additional 10-day period upon mutual agreement of the parties and notification to the Commission. To the extent the Covered Programming was being carried by the aggrieved MVPD during adjudication of the program access violation by the Commission, the defendant programming vendor shall

allow continued carriage of the Covered Programming under the same price, terms and conditions during the remedy phase of the proceedings.

(iv) *Exchange of information.* The Commission may consider any relevant evidence and may require the parties to submit such evidence to the extent it is in their possession. At the request of any party, or at the discretion of the Commission, the Commission may direct the production of current and previous contracts between either of the parties and with any third party, as well as any additional information that it considers relevant in determining the value of the programming to the parties. The production of such information shall be subject to the procedures set forth in § 76.9 and § 76.1003(k) of this part related to the protection of confidential material and protective orders.

(v) *Commission Order.* The Commission shall issue its order establishing the price, terms or conditions of carriage within 60 days from the commencement of its adjudication of the prices, terms, and conditions of carriage of the Covered Programming. The Commission shall choose the final offer of the party that most closely comports with the relevant requirements of Section 628 of the Act, and Section 76.1001 or Section 76.1002 of the Commission's rules related to the prices, terms or conditions of carriage. The Commission may not compromise between the final offers submitted by the parties; provided that under no circumstances may the Commission choose a final offer that does not permit the defendant programming vendor to recover a reasonable share of the costs of acquiring the programming at issue.

(vi) *Application of Order to Covered Programming Carried During Pendency of Proceeding.* Following entry of an order establishing the price, terms, and conditions of carriage of the Covered Programming, to the extent applicable, the terms of the new affiliation agreement will become retroactive to the date of service of the Complaint. If carriage of the Covered Programming has continued uninterrupted during the program access proceeding, and if the Commission's order requires a higher amount to be paid than was paid during the period of carriage under the applicable affiliation agreement, the MVPD will make an additional payment to the defendant programming vendor in an amount representing the difference between the amount that is required to be paid under the Commission's order and the amount actually paid under the applicable affiliation agreement during the period of arbitration. If carriage of the Covered Programming has continued uninterrupted during the program access proceeding, and if the Commission's award requires a smaller amount to be paid than was paid under the applicable affiliation agreement during the period of carriage, the defendant programming vendor will credit the MVPD with an amount representing the difference between the amount actually paid under the applicable affiliation agreement during the period of arbitration and the amount that is required to be paid under the arbitrator's award.

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