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

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In the Matter of
Review of the Commission's Program Access
Rules and Examination of Programming Tying
Arrangements
MB Docket No. 07-198
78480

FIRST REPORT AND ORDER

Adopted: January 20, 2010

Released: January 20, 2010

By the Commission: Chairman Genachowski and Commissioners Copps, Clyburn and Baker
issuing separate statements; Commissioner McDowell dissenting and issuing a
statement.

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I. INTRODUCTION

1. In this *First Report and Order* (“*Order*”), we take an important step to further promote competition in the video distribution market. We establish rules to address unfair acts, including exclusive contracts, involving terrestrially delivered, cable-affiliated programming.¹ These rules will provide competitors to incumbent cable operators with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer to their subscribers, thereby promoting competition in the delivery of video to consumers. Our existing program access rules have been a boon to such competition, and we anticipate that the rules we adopt today will have similar procompetitive effects. Our efforts to spur competition in the marketplace for video programming are also aimed at increasing consumer benefits, including better services, innovations in technology, and lower prices. Moreover, we believe broadband adoption to be a further benefit from increased competition and diversity in video programming distribution. Specifically, today we adopt rules permitting complainants to pursue program access claims involving terrestrially delivered, cable-affiliated programming similar to the claims that they may pursue with respect to satellite-delivered, cable-affiliated programming, where the purpose or effect of the challenged act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming.² The types of claims potentially involved include challenges to: (i) exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; (ii) discrimination in the prices, terms, and conditions for the sale of programming among multichannel video programming distributors (“MVPDs”) by a provider of terrestrially delivered programming that is wholly owned by, controlled by, or under common control with one or more of the following: a cable operator or operators, a satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or a satellite broadcast programming vendor or vendors; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated provider of terrestrially delivered programming to sell its programming to a competitor.

2. MVPDs seeking to compete with incumbent cable operators have provided the Commission with examples of actions by cable operators involving terrestrially delivered, cable-affiliated programming that they allege have harmed competition in the video distribution market. In light of these claims, the Commission adopted a Notice of Proposed Rulemaking (the “*NPRM*”) in September 2007 seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming.³ The Commission stated its belief that unfair acts involving

¹ Throughout this *Order*, we use the terms “cable-affiliated programming” and “cable-affiliated programmer” to refer to a cable programming vendor in which a cable operator has an attributable interest, as defined by the Commission’s cable attribution rules. See 47 C.F.R. § 76.1000(b); see also 47 C.F.R. § 76.501, Notes 1-5.

² The Commission has previously established goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases. See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17856, ¶ 107 (2007) (“*2007 Program Access Order*”), appeal pending sub nom. *Cablevision Systems Corp. et al v. FCC*, No. 07-1425 et al (D.C. Cir). These goals will also apply to complaints filed pursuant to the rules established in this *Order*.

³ See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17859-70, ¶¶ 114-138 (2007) (continued....)

terrestrially delivered, cable-affiliated programming are a significant concern because they can adversely impact competition.⁴ Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming.⁵

3. We find below that Section 628 of the Communications Act of 1934, as amended (the “Act”),⁶ grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming. Congress expressly declared that a purpose of Section 628 was “to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market”⁷ Congress found that the “cable industry has become vertically integrated” and that “[v]ertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.”⁸ Congress “expect[s] the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies.”⁹ To arm the Commission for that effort, Congress granted the Commission broad authority in Sections 628(b) and 628(c)(1) of the Act to prohibit unfair acts of cable operators that significantly hinder or prevent their competitors from providing video programming to consumers.¹⁰

4. In addition to this broad grant of authority, Congress in Section 628(c)(2) required the Commission to adopt specific regulations partly implementing Section 628(b) by prohibiting cable operators or affiliates from engaging in unfair acts involving cable-affiliated programming that is delivered to cable operators via satellite (“satellite-delivered programming”).¹¹ The three unfair acts Congress required the Commission to address were: (i) exclusive contracts between a cable operator and a cable-affiliated programmer; (ii) discrimination by a cable-affiliated programmer in the prices, terms,

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_____ (“*NPRM*”). This *Order* addresses only the issues of terrestrially delivered, cable-affiliated programming and a temporary standstill of an existing contract pending resolution of a program access complaint. This *Order* does not address the other issues raised in the *NPRM*.

⁴ See *id.* at 17860, ¶ 116.

⁵ See *infra* ¶ 17 (discussing these cases).

⁶ Section 628 was passed as part of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”). See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); see also H.R. Rep. No. 102-628 (1992); S. Rep. No. 102-92 (1991), reprinted in 1992 U.S.C.C.A.N. 1133; H.R. Rep. No. 102-862 (1992) (Conf. Rep.), reprinted in 1992 U.S.C.C.A.N. 1231.

⁷ See 47 U.S.C. § 548(a).

⁸ See H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 2, reprinted in 1992 U.S.C.C.A.N. 1231.

⁹ See *id.* at 93, reprinted in 1992 U.S.C.C.A.N. at 1275.

¹⁰ Section 628(b) provides that it shall be unlawful for a cable operator 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 multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” See 47 U.S.C. § 548(b). Section 628(c)(1) authorizes the Commission to prescribe regulations to specify the particular conduct prohibited by Section 628(b). See 47 U.S.C. § 548(c)(1). Throughout this *Order*, we use the term “unfair act” as shorthand for the phrase “unfair methods of competition or unfair or deceptive acts or practices.”

¹¹ See 47 U.S.C. § 548(c)(2). Section 628(c)(2) pertains only to “satellite cable programming” and “satellite broadcast programming.” See 47 U.S.C. § 548(c)(2)(A)-(D). Both terms are defined to include only programming transmitted or retransmitted by satellite for reception by cable operators. See 47 U.S.C. § 548(i)(1) (incorporating the definition of “satellite cable programming” as used in 47 U.S.C. § 605); *id.* § 548(i)(3).

and conditions for sale of programming among MVPDs; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to competitors.¹² The Commission has adopted rules to carry out that congressional command (the “program access rules”).¹³ Those rules are a success. While competitors to incumbent cable operators served less than five percent of video subscribers nationwide when the program access provision of the 1992 Cable Act was passed,¹⁴ that percentage has increased to over 30 percent today.¹⁵ Competitors to incumbent cable operators widely credit the program access rules for this increase in competition.¹⁶ An outgrowth of this increase in competition is an increase in employment in the video programming sector of the economy.¹⁷

5. Congress did not require the Commission to adopt program access rules for cable-affiliated programming that is delivered to cable operators via terrestrial means, such as programming transmitted to cable operators by fiber (“terrestrially delivered programming”). While an earlier version of the legislation that became Section 628(c)(2) would have encompassed terrestrially delivered programming, Congress did not explain why the final version of its bill removed this provision.¹⁸ This gap in the coverage of Section 628(c)(2) is commonly referred to as the “terrestrial loophole.”¹⁹ Under Sections 628(b) and 628(c)(1), however, Congress granted the Commission broad authority to address this “loophole” by adopting additional regulations beyond those listed in Section 628(c)(2) to address unfair acts of cable operators.

¹² See 47 U.S.C. § 548(c)(2)(A)-(D).

¹³ See 47 C.F.R. §§ 76.1000-1004.

¹⁴ See *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, 17326, ¶ 21 (2001).

¹⁵ See *infra* ¶ 27.

¹⁶ See Comments of The Coalition for Access to Competitive Content at 2 (“CA2C Comments”) (“The exclusivity prohibition and the anti-discrimination provisions in Section 628(c)(2) of the Communications Act were major factors in the development of today’s MVPD competition. . . . Even if every other issue that historically has been identified as a potential barrier to competitive video entry (franchising, MDU access, technical standards, etc.) were fully resolved, competition would be seriously impaired if vertically integrated cable operators were allowed to pursue foreclosure strategies related to content.”); Comments of Broadband Service Providers Association at 2 (“BSPA Comments”); see also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12153, n.205 (2002) (“2002 Program Access Order”) (stating that Direct Broadcast Satellite (“DBS”) operators credit the exclusivity prohibition in making DBS a competitive option to cable); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, 1149, ¶ 230 (1998) (stating that the program access rules have been credited as having been a necessary factor in the development of both the DBS and the Multichannel Multipoint Distribution Service industries).

¹⁷ The relationship between competition and employment in an industry is an obvious one. Firms maximize profits in a concentrated industry by reducing output in order to increase prices. This exertion of market power has, as a natural outcome, a negative effect on industry employment. Increasing the level of competition in an industry increases output, reduces prices, and increases employment. This intuitive result has been shown to hold in practice. Christoph Weiss found a negative relationship between the long-run equilibrium level of employment and the level of concentration in U.S. industries. See Christoph Weiss, “Is Imperfect Competition in the Product Market Relevant for Labour Markets?” *Labour*, Vol. 12 No. 3, at 451-71 (1998).

¹⁸ See *infra* ¶ 24.

¹⁹ See, e.g., *2002 Program Access Order*, 17 FCC Rcd at 12157, ¶ 71.

6. As discussed below, we take action pursuant to Sections 628(b) and 628(c)(1) of the Act to facilitate competition in the video distribution market by establishing rules for the consideration of complaints alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming. Our action today attempts to chart a middle course between two extremes proposed by commenters. On one hand, vertically integrated cable operators argue that there is no need and no statutory authority for the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming. In their view, exclusive arrangements for terrestrially delivered, cable-affiliated programming should be permitted because they enhance innovation, programming diversity, and competition. On the other hand, competing MVPDs urge the Commission to adopt a *per se* prohibition on exclusive arrangements involving most, if not all, terrestrially delivered, cable-affiliated programming. In their view, all such exclusive arrangements should be prohibited because they hamper competition. The case-by-case approach we adopt today establishes a fair process to address those situations in which MVPDs may be significantly hindered from competing, while at the same time allowing cable operators to use exclusive arrangements in cases where competition is not significantly harmed.

7. We begin by analyzing the statutory language and legislative history of Section 628 as well as the Commission's program access rules. We discuss our statutory authority under that section to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. We then discuss the bases for our conclusion that there is a need for Commission action to address such complaints: Cable operators have an incentive and ability to engage in unfair acts involving their affiliated programming; record evidence indicates that cable operators have engaged in unfair acts involving certain terrestrially delivered, cable-affiliated programming; and these unfair acts have impacted competition in the video distribution market in certain cases. We conclude, however, that there is insufficient record evidence to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming will have the purpose or effect set forth in Section 628(b) in every case. Accordingly, we adopt a case-by-case approach rather than a *per se* rule for addressing these unfair acts. We then explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.

8. We next set forth the requirements for complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. A complainant alleging such an unfair act will have the burden of proof that the defendant's activities have the purpose or effect set forth in Section 628(b). We conclude that a complainant is unlikely to satisfy this burden when seeking access to readily replicable programming, such as local news and local community or educational programming. We also explain, however, that some programming may be non-replicable and sufficiently valuable to consumers that an unfair act regarding this programming presumptively – but not conclusively – has the purpose or effect set forth in Section 628(b). Based on Commission precedent in which the Commission has considered certain Regional Sports Networks (“RSNs”) and the record in this proceeding, we find that such networks fall within this category. In program access cases alleging an unfair act involving such programming, the defendant will be required to overcome the presumption that arises from our precedent and the record evidence here. In all program access cases involving terrestrially delivered, cable-affiliated programming, we provide the defendant with 45 days – rather than the usual 20 days – from the date of service of the complaint to file an Answer to ensure that the defendant has adequate time to develop a full, case-specific response.

9. This distinction between replicable and non-replicable programming will promote innovation and continued investment in programming. If particular programming is replicable, our policies should encourage MVPDs or others to create competing programming, rather than relying on the efforts of others, thereby encouraging investment and innovation in programming and adding to the diversity of programming in the marketplace. Conversely, when programming is non-replicable and

valuable to consumers, such as regional sports programming, no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace. In addition, in light of the growing importance of high definition (“HD”) programming in the marketplace today and its distinctive characteristics, we will analyze the HD version of a network separately from the standard definition (“SD”) version with similar content for purposes of the statutory analysis. Thus, the fact that a complainant offers the SD version of a network to subscribers will not alone be sufficient to refute the complainant’s showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b). Similarly, in cases involving the category of RSN programming addressed by our precedent and the evidence here, withholding the HD feed will be rebuttably presumed to cause significant hindrance even if an SD version of the network is made available to competitors.

10. We next describe how the rules applicable to terrestrially delivered, cable-affiliated programming will differ from the rules applicable to satellite-delivered, cable-affiliated programming. We also discuss how these rules will be applied to common carriers and terrestrially delivered programming that is subject to the program access rules as a result of merger conditions. In addition, we explain that the new rules will apply to existing contracts, but not to the unfair acts of cable operators involving terrestrially delivered, cable-affiliated programming that preceded the effective date of these rules. With respect to pending complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming, complainants may continue to prosecute these complaints pursuant to Section 628(d) of the Communications Act. In addition, a complainant that wants a currently pending complaint considered under the new rules can submit a supplemental filing alleging that the defendant has engaged in an unfair act after the effective date of the rules. Finally, we establish procedures for the Commission’s consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

II. BACKGROUND

A. Section 628

11. Congress enacted Section 628 as part of the 1992 Cable Act to “promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.”²⁰ To advance these goals, Sections 628(b) and 628(c)(1) grant the Commission broad authority to adopt rules to prohibit unfair acts of cable operators that have the purpose or effect of preventing or hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.²¹ Section 628(b) provides that:

[I]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor

²⁰ 47 U.S.C. § 548(a). 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) (incorporating the definition of “satellite cable programming” as used in 47 U.S.C. § 605). 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).

²¹ See 47 U.S.C. §§ 548(b), (c)(1).

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 multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.²²

Section 628(c)(1) provides that “the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by” Section 628(b).²³ A federal court of appeals recently held that Section 628(b) is written in “broad and sweeping terms” and therefore “should be given broad, sweeping application.”²⁴

²² 47 U.S.C. § 548(b).

²³ 47 U.S.C. § 548(c)(1). We find no merit in the argument that the Commission cannot rely on Section 628(c)(1) because that provision “limits” rulemaking authority to the 180 days after the date of enactment of Section 628(c)(1). See Letter from Henk Brands, Counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-29 and 07-198, at 2 n.2 (Jan. 8, 2010) (“Cablevision/Brands Jan. 8th *Ex Parte* Letter”). The Commission has an obligation to consider, on an on-going basis, whether its rules should be modified in response to changed circumstances. As the Supreme Court has observed: “An initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis.” *Chevron, supra*, at 863-864, 104 S.Ct. 2778, for example, in response to changed factual circumstances, or a change in administrations. . . .” *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)). That is precisely what the Commission is doing in this *Order*. Cablevision’s interpretation would prevent the Commission from fulfilling its obligation to consider whether its rules should be revised based on new evidence that has come to light. There is no evidence that Congress intended to tie the Commission’s hands in this manner by carving its initial regulations, which were adopted back in 1993, “in stone.” See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359 (1993) (“1993 Program Access Order”), *recon.*, 10 FCC Rcd 1902 (1994), *further recon.*, 10 FCC Rcd 3105 (1994). Nor is there any indication Congress intended to strip the Commission of its rulemaking power under Sections 4(i) and 303(r) after 180 days. See 47 U.S.C. §§ 154(i), 303(r).

Moreover, Cablevision’s interpretation is at odds with judicial precedent regarding statutory deadlines. Statutory deadlines are generally considered directory, rather than mandatory, and even where an agency has failed to meet such a deadline – which is not the case here – it has not been found to remove an agency’s authority to act or impose any other penalty, unless the statute delineates a specific remedy for agency inaction. See *Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984) (quoting *Fort Worth Nat’l Corp. v. Fed. Savings & Loan Ins. Corp.*, 469 F.2d 47, 58 (5th Cir. 1972)); see also *Brock v. Pierce County*, 476 U.S. 253, 260, 262 (1986) (mere use of the word “shall” not enough to reinove Secretary of Labor’s power to act after lapse of a deadline, and “[w]hen . . . there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act”); *Gottlieb v. Peña*, 41 F.3d 730 (D.C. Cir. 1994) (statute mandating Secretary of Transportation to act by certain deadline was directory, not mandatory); *Ralpho v. Bell*, 569 F.2d 607, 627 (D.C. Cir. 1977) (“Statutes that, for guidance of a government official’s discharge of duties, propose ‘to secure order, system, and dispatch in proceedings’ are usually construed as directory, whether or not worded in the imperative, especially when the alternative is harshness or absurdity.” (citations omitted)). Here, there is no indication in the statute that Congress intended the Commission’s rulemaking authority to lapse after the 180-day deadline.

²⁴ *Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (quoting *Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).

12. In addition to this broad grant of authority, Congress in Section 628(c)(2) directed the Commission to include “minimum contents” in its regulations specifying certain unfair acts, relating to satellite-delivered programming, that are among those prohibited by Section 628(b).²⁵ First, Congress required the Commission to prohibit efforts by cable operators to unduly influence the decision of cable-affiliated programming vendors that provide satellite-delivered programming to sell their programming to competitors (“undue or improper influence”).²⁶ Second, Congress required the Commission to address discrimination by cable-affiliated programming vendors that provide satellite-delivered programming in the prices, terms, and conditions for sale of programming among MVPDs (“discrimination”).²⁷ Third, Congress required the Commission to prohibit exclusive contracts between cable operators and cable-affiliated programming vendors that provide satellite-delivered programming subject to certain exceptions in areas served by a cable operator as of October 5, 1992 (the “exclusive contract prohibition”).²⁸ These exceptions are: (i) exclusive contracts entered into prior to June 1, 1990 are not subject to the exclusive contract prohibition;²⁹ (ii) exclusive contracts that the Commission deems to be in the public interest based on the factors set forth in the statute are not subject to the exclusive contract prohibition;³⁰ and (iii) the exclusive contract prohibition will cease to be effective after October 5, 2002 unless the Commission finds that it “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.”³¹

²⁵ See 47 U.S.C. § 548(c)(2).

²⁶ See 47 U.S.C. § 548(c)(2)(A) (requiring the Commission to “establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor”).

²⁷ See 47 U.S.C. § 548(c)(2)(B) (requiring the Commission to “prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from” engaging in certain practices described in Section 628(c)(2)(B)(i)-(iv)).

²⁸ See 47 U.S.C. § 548(c)(2)(D). In areas that were not served by a cable operator as of October 5, 1992, the exclusive contract prohibition is absolute and is not subject to exceptions. See 47 U.S.C. § 548(c)(2)(C).

²⁹ See 47 U.S.C. § 548(h)(1); see also 47 C.F.R. § 76.1002(e)(1).

³⁰ See 47 U.S.C. § 548(c)(4); see also 47 C.F.R. § 76.1002(c)(4). These factors are: (i) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (ii) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable; (iii) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (iv) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and (v) the duration of the exclusive contract. See 47 U.S.C. § 548(c)(4); see also 47 C.F.R. § 76.1002(c)(4).

³¹ 47 U.S.C. § 548(c)(5); see also 47 C.F.R. § 76.1002(c)(6). The Commission on two prior occasions has found that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. See generally *2002 Program Access Order*, 17 FCC Rcd 12124 (extending the exclusive contract prohibition until October 5, 2007); *2007 Program Access Order*, 22 FCC Rcd 17791. Pursuant to the *2007 Program Access Order*, the exclusive contract prohibition will cease to be effective after October 5, 2012 unless the Commission finds that it continues to be necessary to preserve and protect competition (continued....)

13. Section 628 was intended to address Congress' concern that cable operators or their affiliates would engage in unfair acts, including acts involving programming they own, that impede competition in the video distribution market.³² The 1992 Cable Act and its legislative history reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical integration of cable operators and program suppliers, created an imbalance of power between incumbent cable operators and their multichannel competitors.³³ Congress concluded that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, including direct broadcast satellite ("DBS") providers.³⁴ Through Section 628, Congress intended to encourage entry and facilitate competition in the video distribution market by existing or potential competitors to traditional cable systems by, among other things, making available to those entities the programming they need to compete in the video distribution market.³⁵ As discussed above, competitors to incumbent cable operators credit the program access rules promulgated under Sections 628(b) and (c) for the increased competition to incumbent cable operators that has emerged since passage of the 1992 Cable Act.³⁶

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and diversity in the distribution of video programming. See *2007 Program Access Order*, 22 FCC Rcd at 17845-46, ¶¶ 79-81.

³² See H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, reprinted in 1992 U.S.C.C.A.N. 1231, 1275 ("In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."); S. Rep. No. 102-92 (1991), at 26, reprinted in 1992 U.S.C.C.A.N. 1133, 1159 ("[C]able programmers may simply refuse to sell to potential competitors. Small cable operators, satellite dish owners, and wireless cable operators complain that they are denied access to, or charged more for, programming than large, vertically integrated cable operators."); see *id.* ("Restricted access to programming products by a wholesale programmer which is also a retail competitor, reflects the vertically integrated nature of the market and the basic barrier in the development of a competitive market. Without fair and ready access on a consistent, technology-neutral basis, an independent entity . . . cannot sustain itself in the market.").

³³ See 1992 Cable Act § 2(a)(4); *id.* § 2(a)(5); S. Rep. No. 102-92 (1991), at 24-29, reprinted in 1992 U.S.C.C.A.N. 1133, 1157-62; H.R. Rep. No. 102-628 (1992), at 41-43.

³⁴ See 1992 Cable Act § 2(a)(5) ("Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."); S. Rep. No. 102-92 (1991), at 26, reprinted in 1992 U.S.C.C.A.N. 1133, 1159 ("[T]he Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms."); *1993 Program Access Order*, 8 FCC Rcd at 3365-67, ¶ 21.

³⁵ See H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, reprinted in 1992 U.S.C.C.A.N. 1231, 1275 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable."); S. Rep. No. 102-92 (1991), at 28, reprinted in 1992 U.S.C.C.A.N. 1133, 1161 ("To encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in the price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition.").

³⁶ See *supra* ¶ 4.

B. Program Access Rules Applicable to Satellite-Delivered, Cable-Affiliated Programming

14. As required by Section 628(c)(2), the Commission has adopted program access rules which specifically prohibit undue or improper influence,³⁷ discrimination,³⁸ and exclusive contracts³⁹ involving cable operators and cable-affiliated programmers that provide satellite-delivered programming. The Commission has also established a complaint process to address claims that a cable operator or a cable-affiliated programmer that provides satellite-delivered programming has violated the program access rules.⁴⁰ Consistent with the definitions in the 1992 Cable Act,⁴¹ the Commission's rules define the "satellite cable programming" and "satellite broadcast programming" to which the rules apply to include only programming transmitted or retransmitted by satellite for reception by cable operators.⁴² The Commission has previously concluded that terrestrially delivered programming is outside of the direct coverage of Section 628(c)(2) and the Commission's program access rules under Section 628(c)(2).⁴³

C. NPRM

15. In September 2007, the Commission adopted an *NPRM* seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming.⁴⁴ The Commission noted examples of withholding of terrestrially delivered, cable-affiliated RSNs in San Diego and Philadelphia.⁴⁵ The Commission stated its belief that "withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market."⁴⁶ To address this concern, the *NPRM* sought comment on whether it would be appropriate to address the terrestrial loophole in the current program access rules pursuant to provisions other than Section 628(c)(2) of the Act, such as Section 628(b) of the Act.⁴⁷ The *NPRM* also sought comment on whether extension of program access requirements to terrestrially delivered, cable-affiliated programming by way of a general statutory provision such as Section 628(b) would be barred by the more specific provision in Section 628(c)(2) that requires the promulgating of rules relating only to conduct involving satellite-delivered programming.⁴⁸

³⁷ See 47 C.F.R. § 76.1002(a).

³⁸ See 47 C.F.R. § 76.1002(b).

³⁹ See 47 C.F.R. § 76.1002(c)-(e).

⁴⁰ See 47 C.F.R. §§ 76.7, 76.1003.

⁴¹ See *supra* n. 20 (defining "satellite cable programming" and "satellite broadcast programming").

⁴² See 47 C.F.R. § 76.1000(f), (h).

⁴³ See *DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802, 22807, ¶ 12 (2000), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); see also *2007 Program Access Order*, 22 FCC Rcd at 17844, ¶ 78; *2002 Program Access Order*, 17 FCC Rcd at 12158, ¶ 73.

⁴⁴ See *NPRM*, 22 FCC Rcd at 17859-70, ¶¶ 114-138.

⁴⁵ See *id.* at 17859-60, ¶ 115.

⁴⁶ See *id.* at 17860, ¶ 116.

⁴⁷ See *id.*

⁴⁸ See *id.*

16. In their comments filed in response to the *NPRM*, non-incumbent MVPDs contend that the Commission has statutory authority to address the terrestrial loophole in the current rules.⁴⁹ They also argue that applying the program access rules to terrestrially delivered, cable-affiliated programming would promote competition in the video distribution market and broadband deployment.⁵⁰ Conversely, vertically integrated cable operators contend that the Commission does not have the statutory authority to address the terrestrial loophole.⁵¹ Moreover, they argue that the market for video distribution is competitive and that additional regulations are not justified.⁵²

D. Pending Program Access Complaints

17. Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming. First, in September 2008, AT&T filed a program access complaint alleging that Cox is withholding a terrestrially delivered RSN (Cox-4) from AT&T in San Diego.⁵³ In March 2009, the Media Bureau issued a decision denying this complaint without prejudice because (i) there was no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b);⁵⁴ and (ii) the pending *NPRM*, rather than an adjudicatory proceeding, is the correct forum for addressing this issue.⁵⁵ AT&T has filed an Application

⁴⁹ See Comments of AT&T Inc. at 5, 9 (“AT&T Comments”); BSPA Comments at 6; CA2C Comments at 12; Comments of DIRECTV, Inc. at 9-11 (“DIRECTV Comments”); Comments of National Telecommunications Cooperative Association at 5, 11 (“NTCA Comments”); Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies, The Independent Telephone and Telecommunications Alliance, The Western Telecommunications Alliance, and The Rural Independent Competitive Alliance at 5-6 (“OPASTCO *et al* Comments”); Comments of The United States Telecom Association at 8 (“USTelecom Comments”); Comments of Verizon at 8 (“Verizon Comments”); Reply Comments of Broadband Service Providers Association at 4-5 (“BSPA Reply”); Reply Comments of The Coalition for Access to Competitive Content at 7-13 (“CA2C Reply”); Reply Comments of DIRECTV, Inc. at 9-10 (“DIRECTV Reply”); Reply Comments of DISH Network at 4 (“DISH Network Reply”); Reply Comments of Verizon at 4-6 (“Verizon Reply”).

⁵⁰ See BSPA Comments at 5; CA2C Comments at 5, 8-10, 18; *cf.* DIRECTV Comments at 13-14; NTCA Comments at 11-12; OPASTCO *et al* Comments at 5-6; USTelecom Comments at 6; Verizon Comments at 3-7.

⁵¹ See Comments of Cablevision Systems Corp. at 13-17 (“Cablevision Comments”); Comments of Comcast Corp. at 6-13 (“Comcast Comments”); Comments of The National Cable & Telecommunications Association at 12 (“NCTA Comments”); Reply Comments of Advance/Newhouse Communications at 8-10 (“Advance/Newhouse Reply”); Reply Comments of Cablevision Systems Corp. at 11 (“Cablevision Reply”); Reply Comments of Comcast Corp. at 9-15 (“Comcast Reply”); Reply Comments of Cox Communications, Inc. at 7 (“Cox Reply”).

⁵² See Cablevision Comments at 17; NCTA Comments at 3, 7-8; Advance/Newhouse Reply at 5-6; Comcast Reply at 3-9; Cox Reply at 1-2.

⁵³ See *AT&T Services, Inc. et al, Program Access Complaint*, File No. CSR-8066-P (filed Sept. 11, 2008) (“AT&T Complaint v. Cox”); *see also* *CoxCom, Inc., Answer*, File No. CSR-8066-P (filed Oct. 27, 2008) (“Cox Answer”); *AT&T Services, Inc. et al, Reply*, File No. CSR-8066-P (filed Nov. 21, 2008) (“AT&T Reply to Cox”). We note that redacted versions of AT&T’s complaint, Cox’s answer, AT&T’s reply, and Cox’s response to a declaration and survey included in AT&T’s reply were filed in the record of this proceeding. See Letter from Christopher M. Heimann, AT&T, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Dec. 16, 2009) (“AT&T Dec. 16th *Ex Parte* Letter”); Letter from David J. Wittenstein, Counsel for CoxCom, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 13, 2010) (“Cox Jan. 13th *Ex Parte* Letter”). We do not reach a decision in this *Order* on the merits of this complaint, including whether AT&T has demonstrated that the defendant’s conduct violated Section 628(b).

⁵⁴ See *AT&T Services Inc. et al v. Coxcom, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 2859, 2864, ¶ 16 (MB, 2009), *application for review pending*.

⁵⁵ See *id.*

for Review of this decision, which is pending.⁵⁶ In July 2009, Verizon filed a program access complaint alleging that Cablevision is withholding the terrestrially delivered HD feeds of its RSNs (MSG and MSG+) from Verizon in New York.⁵⁷ In August 2009, AT&T filed a program access complaint against Cablevision making a similar claim regarding the withholding of the terrestrially delivered HD feeds of MSG and MSG+ from AT&T in Connecticut.⁵⁸ The latter two complaints are pending.

III. DISCUSSION

18. In Section A below, we begin with a discussion of our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. In Section B, we explain the bases for our conclusion that there is a need for Commission action to address such complaints. In Section C, we explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. In Section D, we set forth the requirements for complaints alleging such unfair acts. In Section E, we discuss how these rules will be applied to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions. In Section F, we establish procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

A. The Commission's Statutory Authority to Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

19. In this Section, we discuss our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming in the circumstances described in that provision. Section 628(b) gives the Commission authority to promulgate rules applicable to unfair acts of cable operators (and certain other entities), including acts involving terrestrially delivered programming that have the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.⁵⁹ Section 628(c)(1) authorizes the Commission to prescribe regulations to specify particular conduct prohibited by Section 628(b).⁶⁰ Our analysis reflects the Commission's interpretation of Section 628(b) in the *MDU Order*, where the Commission held that it has authority pursuant to Section 628(b) to adopt rules prohibiting exclusive contracts between cable operators and owners of multiple dwelling units ("MDUs") because those contracts prevent or significantly hinder the

⁵⁶ See *AT&T Services, Inc. et al*, Application for Review, File No. CSR-8066-P (filed April 3, 2009).

⁵⁷ See *Verizon Telephone Companies et al*, Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009).

⁵⁸ See *AT&T Services, Inc. et al*, Program Access and Section 628(b) Complaint, File No. CSR-8196-P (filed Aug. 13, 2009) ("AT&T Complaint v. MSG/Cablevision"); *Madison Square Garden, L.P. and Cablevision Systems Corp.*, Answer, File No. CSR-8196-P (filed Sept. 27, 2009) ("MSG/Cablevision Answer"); *AT&T Services, Inc. et al*, Reply, File No. CSR-8196-P (filed Oct. 2, 2009) ("AT&T Reply to MSG/Cablevision"). We note that redacted versions of AT&T's complaint, the defendants' answer, and AT&T's reply were filed in the record of this proceeding. See AT&T Dec. 16th *Ex Parte* Letter; Letter from Howard J. Symons, Counsel to MSG and Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 7, 2010) ("Cablevision/MSG Jan. 7th *Ex Parte* Letter"). We do not reach a decision in this *Order* on the merits of this complaint, including whether AT&T has demonstrated that the defendants' conduct violated Section 628(b).

⁵⁹ See 47 U.S.C. § 548(b); see also AT&T Comments at 8-9; BSPA Comments at 6 n.9; CA2C Comments at 12-18; DIRECTV Comments at 8-11.

⁶⁰ See 47 U.S.C. § 548(c)(1).

ability of competing MVPDs to provide all programming, including “satellite cable programming” and “satellite broadcast programming,” in those markets.⁶¹ This interpretation was recently upheld by a federal court of appeals.⁶²

20. Vertically integrated cable operators note that Section 628(c)(2) requires the Commission to prohibit unfair acts involving only satellite-delivered programming and assert that this specific mandate precludes the Commission from addressing terrestrially delivered programming pursuant to the general authority provided in Section 628(b).⁶³ While Section 628(c)(2) lists specific unfair acts that the Commission is required to address as “minimum contents” in its regulations, the United States Court of Appeals for the District of Columbia Circuit has explained that this list does not preclude the Commission from adopting rules to address additional conduct that also is prohibited under Section 628(b).⁶⁴ As the court stated, “Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission’s power solely to that version of the problem.”⁶⁵ The court also held that (i) the title of Section 628(c)(2), “Minimum Contents of Regulations,” demonstrates that the Commission’s rules must at least address the unfair acts listed in Section 628(c)(2), but are not limited to addressing those acts⁶⁶ and (ii) this interpretation of Section 628(b) is confirmed by Section 628(c)(1), which grants the Commission wide latitude to “specify particular conduct that is prohibited by [Section 628(b)].”⁶⁷ The Commission too has explained previously that it is not limited to addressing only the specific unfair acts listed in Section 628(c)(2); rather, “Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action . . . should additional types of conduct emerge as barriers to competition.”⁶⁸ Here, the record reflects evidence that unfair acts involving terrestrially delivered, cable-affiliated programming have occurred;⁶⁹ such conduct is likely to persist absent Commission action;⁷⁰ and this conduct can have the effect in some cases of hindering significantly

⁶¹ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20249, ¶ 27 (2007) (“*MDU Order*”), *aff’d sub nom. Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). Several commenters argue that applying the program access rules to terrestrially delivered, cable-affiliated programming pursuant to Section 628(b) is consistent with the Commission’s analysis in the *MDU Order*. See AT&T Comments at 5; CA2C Comments at 13-15; DIRECTV Comments at 8-10; USTelecom Comments at 8-9; AT&T Complaint v. Cox at 17-18; Letter from Joel Kelsey and Chris Murray, Consumers Union, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 5 (Aug. 12, 2008) (“Consumers Union Aug. 12th *Ex Parte* Letter”).

⁶² See *NCTA*, 567 F.3d 659.

⁶³ See generally Cablevision Comments at 2, 15; Comcast Comments at 6-8; NCTA Comments at 12-13; Advance/Newhouse Reply at 8-9; Comcast Reply at 11; Cox Reply at 7.

⁶⁴ See *NCTA*, 567 F.3d at 664-65.

⁶⁵ *Id.* at 665; see also *MDU Order*, 22 FCC Rcd at 20258, ¶ 48 (“nothing in these provisions indicate that they were intended to establish the outer limits of the Commission’s authority under Section 628(b)”).

⁶⁶ 47 U.S.C. § 548(c)(2); see *NCTA*, 567 F.3d at 665; see also *MDU Order*, 22 FCC Rcd at 20258, ¶ 48; AT&T Comments at 5; CA2C Comments at 13; Consumers Union Aug. 12th *Ex Parte* Letter at 5.

⁶⁷ See *NCTA*, 567 F.3d at 665 (quoting 47 U.S.C. § 548(c)(1)); see also *MDU Order*, 22 FCC Rcd at 20258, ¶ 48.

⁶⁸ See *1993 Program Access Order*, 8 FCC Rcd at 3374, ¶ 41.

⁶⁹ See *infra* Section III.B.2 (providing evidence of unfair acts involving terrestrially delivered, cable-affiliated programming).

⁷⁰ See *infra* Section III.B.1 (discussing the ability and incentive of cable operators to engage in unfair acts involving terrestrially delivered, cable-affiliated programming).

an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers and consumers.⁷¹ Thus, the plain language of Section 628(b), along with the authority provided by Section 628(c)(1) to adopt rules addressing conduct prohibited by Section 628(b), provide us with authority to adopt rules for the consideration of complaints alleging unfair acts with respect to terrestrially delivered, cable-affiliated programming.

21. Moreover, despite the principle of statutory interpretation that, by mentioning one thing, Congress may have implied the exclusion of another,⁷² an explicit congressional directive to ban certain activities does not prevent the agency “from taking similar action with respect to activities that pose a similar danger.”⁷³ The fact that Congress singled out a subset of practices with which it was particularly concerned in Section 628(c)(2) and required the Commission to focus on those practices expeditiously does not limit the broader rulemaking authority expressly granted to the Commission through Sections 628(b) and 628(c)(1). Here, we find that unfair acts involving cable-affiliated programming, regardless of whether that programming is satellite-delivered or terrestrially delivered, pose the danger of significantly hindering MVPDs from providing satellite cable programming or satellite broadcast programming, thereby harming competition in the video distribution market and limiting broadband deployment.⁷⁴ As the Commission recognized in the *Adelphia Order*, competitive harm from withholding of programming can occur regardless of how that programming is delivered to MVPDs.⁷⁵ Thus, we conclude that Congress’ decision to require the Commission to adopt within 180 days program access rules to address unfair acts involving satellite-delivered, cable-affiliated programming does not preclude us from exercising our authority under Section 628(b) to take similar action where appropriate to address unfair acts involving terrestrially delivered, cable-affiliated programming.⁷⁶

⁷¹ See *infra* Section III.B.3.a (assessing the impact of unfair acts involving terrestrially delivered, cable-affiliated programming on competition in the video distribution market).

⁷² See Cablevision Comments at 15-16; Comcast Comments at 7-8. This principle of statutory interpretation is referred to as *expressio unius est exclusio alterius*. See AT&T Comments at 6.

⁷³ See AT&T Comments at 6-7 (citing *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Circ. 1991)); see also *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

⁷⁴ See *infra* ¶¶ 32, 36; see also CA2C Comments at 2 (access to content “is essential to the development and preservation of competition in the [MVPD] market regardless of whether this content is delivered by satellite or any alternate method of terrestrial distribution technology”); *id.* at 17 (“It is simply irrelevant whether the particular programming at issue is delivered by satellite or terrestrially. The touchstone of the violation is the effect of that refusal on the ability of MVPDs to provide satellite programming to consumers.”); NTCA Comments at 8-9 (“An MVPD can be injured by exclusive contract practices, refusals to deal, discriminatory practices and other anticompetitive behavior whether 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.”); USTelecom Comments at 6 (“Rather than focus on *how* programming is delivered, the appropriate Commission analysis should focus on the effect that such delivery has in the MVPD market.” (emphasis in the original)); DISH Network Reply at 1-2 (“There also remains a need for competitive MVPDs to access cable-owned programming regardless of how such programming is delivered, *i.e.*, by satellite or terrestrial fiber.”).

⁷⁵ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8276, ¶ 162 (2006) (“*Adelphia Order*”).

⁷⁶ Section 628(c)(2)(B)(iv) does not conflict with this interpretation. This provision provides that a cable-affiliated programmer that provides satellite-delivered programming does not violate the program access discrimination prohibition by entering into “an exclusive contract that is permitted under [Section 628(c)(2)(D)].” See 47 U.S.C. § (continued...)

22. We are aware that the former Cable Services Bureau stated that Section 628(b) may not be used categorically to preclude programming practices that are related to practices prohibited under Section 628(c)(2), but not themselves reached by Section 628(c)(2).⁷⁷ The Cable Services Bureau qualified these statements, however, by explaining that Section 628(b) may not be used “without more,” “standing alone,” or “on a *per se* basis” against conduct that is permitted under Section 628(c).⁷⁸ In other words, complainants under Section 628(b) are required to show that a covered entity has engaged in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent an MVPD from providing satellite programming to consumers. Our holding today is consistent with that understanding. Moreover, staff-level decisions are not binding on the Commission.⁷⁹ The Commission itself has specifically held that unfair acts involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b).⁸⁰ In any event, to the extent prior decisions could be read as precluding the consideration of program access complaints involving terrestrially delivered, cable-affiliated programming under Section 628(b), we reject that view. Section 628(b), by its plain language, allows the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis where the other elements of Section 628(b) are satisfied.

23. The legislative history of the 1992 Cable Act also is consistent with our decision to adopt rules addressing unfair acts involving terrestrially delivered, cable-affiliated programming. For example, the Conference Report on Section 628 specifically states an expectation that the Commission will “address and resolve the problems of unreasonable cable industry practices, including restricting the

(Continued from previous page)

548(c)(2)(B)(iv). The Commission has interpreted the phrase “an exclusive contract that is permitted under [Section 628(c)(2)(D)]” to mean an exclusive contract for which the Commission has granted an exception pursuant to the public interest factors listed in Section 628(c)(4). See *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, 18319, ¶ 185 n.428 (1996) (“1996 OVS Order”); see also 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4); *supra* n.30; *infra* ¶ 44. The Commission has declined to interpret this phrase more broadly to mean any exclusive contract that is not expressly prohibited by Section 628(c)(2)(D). See *1996 OVS Order*, 11 FCC Rcd at 18319, n.428.

⁷⁷ See *Everest Midwest Licensee v. Kansas City Cable Partners*, 18 FCC Rcd 26679, 26683-84, ¶ 10 (CSB, 2003); *RCN Telecom Servs. v. Cablevision Sys. Corp.*, 14 FCC Rcd 17093, 17105-06, ¶ 25 (CSB, 1999); *EchoStar Commc'ns Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, 2102, ¶ 28 (CSB, 1999); *Dakota Telecom, Inc. v. CBS Broad., Inc.*, 14 FCC Rcd 10500, 10507-08, ¶¶ 21-22 (CSB, 1999); *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822, 21837, ¶ 32 (CSB, 1998).

⁷⁸ See *Everest Midwest Licensee*, 18 FCC Rcd at 26683-84, ¶ 10; *RCN*, 14 FCC Rcd at 17105-06, ¶ 25; *EchoStar*, 14 FCC Rcd at 2103, ¶ 29; *Dakota Telecom*, 14 FCC Rcd at 10507-08, ¶ 21; *DIRECTV*, 13 FCC Rcd at 21838, ¶ 33; see also *American Cable Co. v. TeleCable of Columbus, Inc.*, 11 FCC Rcd 10090, 10117, ¶ 61 (CSB, 1996); AT&T Reply to Cox at 7; AT&T Reply to MSG/Cablevision at 12-13.

⁷⁹ See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

⁸⁰ See *RCN Telecom Servs. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048, 12053, ¶ 15 (2001) (“[T]here may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming. However, we agree with the Bureau that the facts alleged are not sufficient to constitute such a violation here.”); *DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802, 22807, ¶ 13 (2000) (same), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *1996 OVS Order*, 11 FCC Rcd at 18325, ¶ 197 n.451 (“[W]e do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs.”); see also CA2C Comments at 15 n.33; *DIRECTV Comments* at 10-11; *DIRECTV Reply* at 9.

availability of programming and charging discriminatory prices to non-cable technologies.”⁸¹ The Conference Report further indicates “that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.”⁸² The action we take today fulfills this Congressional mandate by providing a process by which unfair acts involving terrestrially delivered, cable-affiliated programming may be addressed, thereby fostering competition in the video distribution market.

24. We recognize that the Senate version of what became Section 628(c)(2) would have pertained to all programmers, including those that provide terrestrially delivered programming, but that language was, without explanation, removed in the final version of the bill.⁸³ Contrary to the claims of cable operators,⁸⁴ however, we do not find this unexplained change in Section 628(c)(2) relevant in determining Congress’ intent with respect to Section 628(b)’s broadly worded prohibition.⁸⁵ The change related specifically to the minimum contents of the program access rules that were required to be issued under Section 628(c)(2). Congress did not make any similar limiting amendment to Section 628(b) during its deliberations in 1992, and the inclusive language of Section 628(b) therefore is controlling here, just as it was in the *MDU Order*. Removal of the references to all “national and regional cable programmers” in the final version of the bill relate to Section 628(c)(2), which is thus expressly limited to satellite-delivered programming. We do not believe that this change to Section 628(c)(2) indicates a Congressional intent to limit the broad statutory language of Section 628(b), which contains no such limitation. We find no significance in earlier characterizations of the legislative history, such as that presented in the *2002 Program Access Order*, which viewed the removal of terrestrially delivered programming from the final version of the bill as an “express decision by Congress to limit the scope of

⁸¹ H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273; *see also MDU Order*, 22 FCC Rcd at 20256-57, ¶ 45.

⁸² H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273.

⁸³ The Senate version of the legislation that became Section 628(c)(2) would have applied the program access provisions to all “national and regional cable programmers who are affiliated with cable operators.” H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 91-93, *reprinted in* 1992 U.S.C.C.A.N. at 1273-75; *see also* S. Rep. No. 102-92 (1991), at 64, 77-78, 121-22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1197, 1210-11. The House amendment, by contrast, expressly limited the provisions to “satellite cable programming vendor[s] affiliated with a cable operator.” *See* H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 91-93, *reprinted in* 1992 U.S.C.C.A.N. at 1273-75. The Conference agreement adopted the House version with amendments. *See id.*

⁸⁴ *See* Comcast Comments at 7-8; Cablevision Reply at 11; Comcast Reply at 11-12; Cox Answer at 14-15; MSG/Cablevision Answer at 25.

⁸⁵ *See, e.g., Drummond Coal Co. v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984) (“Unexplained changes made in committee are not reliable indicators of congressional intent.”), *quoted in Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1548 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 911 (1993); *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) (“The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.” (citation omitted)); *see also Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). AT&T contends that Congress chose the term “satellite cable programming” because Congress was unaware of, and thus had no reason to consider, unfair acts involving terrestrially delivered programming. *See* AT&T Comments at 5-6; *see also* CA2C Reply at 10-11. While Comcast notes some examples of terrestrially delivered programming that existed at the time the 1992 Cable Act was drafted (*see* Comcast Reply at 12 n.43 (citing Warren Publishing, TELEVISION AND CABLE FACTBOOK: CABLE AND SERVICES, Vol. 60, at F-2, -4, -8, -9, -10, -12 (1992))), we agree with AT&T’s broader point that “there is nothing to suggest that the phrase ‘satellite cable programming’ was anything other than a statement of the nature of the specific problem to be addressed at that time,” and that Congress could not be expected to predict future trends in programming delivery. *See* AT&T Comments at 8 n.31; AT&T Reply to Cox at 12.

the program access provisions to satellite delivered programming.”⁸⁶ Those discussions were considering the scope of Section 628(c)(2), not Section 628(b), and thus did not address the issue we address here.

B. The Need for Commission Action to Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

25. Having established that we possess authority to address unfair acts involving terrestrially delivered, cable-affiliated programming, in this Section we discuss whether there is a need for such action. As discussed below, we find three reasons for taking action in this area: (i) cable operators continue to have an incentive and ability to engage in unfair acts or practices involving their affiliated programming, regardless of whether this programming is satellite-delivered or terrestrially delivered; (ii) our judgment regarding this incentive and ability is supported by real-world evidence that vertically integrated cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors; and (iii) there is evidence that, in some cases, this withholding may significantly hinder MVPDs from providing satellite cable programming and satellite broadcast programming to subscribers.

1. Incentive and Ability to Engage in Unfair Acts

26. Cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market.⁸⁷ This incentive and ability do not vary based on whether the cable-affiliated programming is delivered to cable operators by satellite or by terrestrial means.⁸⁸ A vertically integrated cable operator may raise the costs of its MVPD competitors by increasing the price of its affiliated programming or may choose not to

⁸⁶ See *2002 Program Access Order*, 17 FCC Rcd at 12157-58, ¶ 73; see also *2007 Program Access Order*, 22 FCC Rcd at 17844-45, ¶ 78; Cablevision Comments at 14 n.36; Comcast Comments at 7-8; Cablevision Reply at 11 n.26; Comcast Reply at 12.

⁸⁷ See *2007 Program Access Order*, 22 FCC Rcd at 17811-20, ¶¶ 30-42 (concluding that vertically integrated cable operators continue to have the ability to withhold affiliated programming from competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent extension of the ban on exclusive contracts); see also *id.* at 17820-53, ¶¶ 43-63 (concluding that vertically integrated cable operators continue to have the incentive to withhold affiliated programming from competitive MVPDs); *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 151; *2002 Program Access Order*, 17 FCC Rcd at 12124, ¶ 45; AT&T Comments at 1, 3 (“there can be no doubt that cable operators have the incentive and ability to withhold vertically integrated programming that is delivered terrestrially (they already have done so)”); BSPA Comments at 5 (“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.”); CA2C Comments at ii, 8 (“Vertically integrated cable operators . . . still have the incentive and ability to withhold such programming if allowed.”); OPASTCO *et al* Comments at 4 (“vertically integrated cable programmers retain the incentive to withhold programming from their competitors” (citation omitted)); USTelecom Comments at 3 (in extending the exclusive contract prohibition in the *2007 Program Access Order*, the Commission “appropriately concluded that vertically integrated programmers continue to have both the incentive and ability to favor their affiliated cable operators over competitive MVPDs” (citation omitted)); DISH Network Reply at 1 (“Dominant cable companies still have the incentive and ability to withhold access to programming from both new and existing competitive MVPDs.”); Verizon Reply at 13 (until there is a “competitive situation,” “incumbent cable operators have an incentive to withhold programming because it is one of their strongest weapons against competition”).

⁸⁸ See OPASTCO *et al* Comments at ii, 4 (“Programmers retain the incentive to restrict or deny access to content regardless of whether the delivery system is satellite or terrestrially based.”); see also AT&T Comments at 3; CA2C Comments at 3.

sell its affiliated programming to rival MVPDs.⁸⁹ As the Commission noted in the *Adelphia Order*, “the integrated firm may be able to harm its rivals’ competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete.”⁹⁰ Unfair acts involving cable-affiliated programming may harm the ability of MVPDs to compete with incumbent cable operators, thereby resulting in less competition in the marketplace to the detriment of consumers.⁹¹

27. In the *2007 Program Access Order*, the Commission analyzed the incentive and ability of cable operators and their affiliates to engage in one type of unfair act – withholding of affiliated programming from rival MVPDs.⁹² If the vertically integrated cable operator engages in withholding, it can recoup profits lost at the upstream level (*i.e.*, by licensing programming) by increasing the number of subscribers of its downstream MVPD division.⁹³ The Commission explained that, particularly “where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy.”⁹⁴ Although the cable industry’s share of MVPD subscribers nationwide has decreased since the 1992 Cable Act was passed, the Commission in the *2007 Program Access Order* concluded that the cable industry’s 67 percent market share remained sufficient to enable vertically integrated cable firms to make withholding a profitable strategy.⁹⁵ There is no evidence in this proceeding that market shares have changed materially since that time. To the contrary, the cable industry has elsewhere stated that its share

⁸⁹ This strategy is commonly referred to as the “raising rivals’ costs” theory. See *Adelphia Order*, 21 FCC Rcd at 8256, ¶ 117 (citing Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 *Antitrust L.J.* 513, 523-27 (1995)); see also Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 *Yale L.J.* 209, 234-38 (1986).

⁹⁰ *Adelphia Order*, 21 FCC Rcd at 8256, ¶ 117.

⁹¹ For example, the Commission has noted previously that, although competitors have entered the video distribution market, there is evidence that cable prices have risen in excess of inflation. See *2007 Program Access Order*, 22 FCC Rcd at 17826-27, ¶ 50 (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15087-88, ¶ 2 (2006)); see also *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 24 FCC Rcd 259, 260, ¶ 2 (MB, 2009) (“*Cable Price Report*”) (concluding that from 1995 to 2008, the price of expanded basic service has grown from \$22.35 to \$49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period); USTelecom Comments at 4; CA2C Reply at 5.

⁹² See *2007 Program Access Order*, 22 FCC Rcd at 17827-29, ¶ 53.

⁹³ See *Adelphia Order*, 21 FCC Rcd at 8256, ¶ 117; see also *2007 Program Access Order*, 22 FCC Rcd at 17827-29, ¶ 53; *2002 Program Access Order*, 17 FCC Rcd at 12140, ¶ 36.

⁹⁴ *2007 Program Access Order*, 22 FCC Rcd at 17827-29, ¶ 53.

⁹⁵ See *id.*; see also *id.* at 17832-33, ¶ 60 (“[V]ertically integrated programmers are likely to have the incentive to withhold programming only when their affiliated cable operators have a sufficient share of the distribution market to minimize the impact of foregone subscription and advertising revenues from denying access to other distributors. At this time, we conclude that vertically integrated programmers are likely to retain this incentive given the 67 percent share of the video distribution market held by cable operators.”). In the *2007 Program Access Order*, the Commission relied on data indicating that the cable industry’s share of MVPD subscribers nationwide was approximately 67 percent. See *id.* at 17827-28, ¶ 53 and 17832-33, ¶ 60; see also NCTA Comment at 12 (stating that competitors to traditional cable operators have captured 33 percent of MVPD subscribers); USTelecom Comments at 4 (stating that incumbent cable operators continue to control nearly 70 percent of MVPD subscribers).

of MVPD subscribers nationwide has declined only slightly since the *2007 Program Access Order*, to approximately 63.5 percent at the end of 2008.⁹⁶ Moreover, the Commission observed that the regional market shares of cable operators sometimes exceed the national average.⁹⁷ This makes withholding of

⁹⁶ See Comments of The National Cable and Telecommunications Association, MB Docket No. 07-269 (May 20, 2009), at 8.

⁹⁷ See *2007 Program Access Order*, 22 FCC Rcd at 17827-29, ¶ 53. NCTA and Comcast state that cable operators are losing subscribers to competitors. See NCTA Comments at 4-5; Comcast Reply at 5-7. CA2C disagrees, noting that “major cable operators dominate” the MVPD market, with regional market shares of 65 percent to 90 percent. See CA2C Reply at 5-6; see also CA2C Comments at 11, 21; Letter from Stacy Fuller, Vice President, Regulatory Affairs, DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment at 1 (Dec. 16, 2009) (“DIRECTV Dec. 16th Ex Parte Letter”); cf. DIRECTV Reply at 7-8 (noting that regulation of cable is warranted due to cable’s “overwhelming market share”). Based on data from Nielsen Media Research, as of July 2009, the share of MVPD subscribers held by wired cable operators exceeds 70 percent in 78 out of 210 DMAs. See DMA Household Universe Estimates July 2009: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow “Research Central” hyperlink; then follow “Market Track” hyperlink; then follow “Cable and ADS Penetration by DMA” hyperlink). These include 27 of the Top 50 most-populated DMAs and the following 13 of the Top 20 most-populated DMAs: New York (No. 1; 88.5 percent cable market share); Chicago (No. 3; 77.1 percent cable market share); Philadelphia (No. 4; 83 percent cable market share); San Francisco-Oakland-San Jose (No. 6; 72.9 percent cable market share); Boston (No. 7; 87.5 percent cable market share); Washington, DC (No. 9; 72.2 percent cable market share); Detroit (No. 11; 76.3 percent cable market share); Tampa-St. Pete (No. 13; 84.2 percent cable market share); Seattle (No. 14; 78.9 percent cable market share); Minneapolis-St. Paul (No. 15; 70.3 percent cable market share); Miami-Ft. Lauderdale (No. 16; 70.4 percent cable market share); Cleveland-Akron (No. 17; 77.1 percent cable market share); Orlando (No. 19; 76.7 percent cable market share). We note that the data refer to the market share held by “wired cable operators,” and thus reflect market share data for incumbent cable operators as well as cable overbuilders. Given the minimal market share held by overbuilders, however, we believe the data provide a useful estimate of the market share held by incumbent cable operators. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 591, ¶ 100 and 684, Table B-1 (2009) (“13th Annual Report”) (concluding that broadband service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers); see also USTelecom Comments at 5 (stating that fewer than two percent of the nation’s households reside in markets with direct wireline competition); CA2C Reply at 6 (estimating that wireline competitors to incumbent cable operators reach five to six percent of the MVPD market). While Cox notes that it has met the “effective competition” test in certain markets, that test is not relevant here. See Cox Reply at 5-6; Cox Answer at 58-61; but see AT&T Reply to Cox at 3-4, 25; AT&T Reply to MSG/Cablevision at 31. The Media Bureau’s review of data from Cox’s effective competition petitions indicated that the DBS penetration rates in nine out of 54 San Diego franchise areas served by Cox exceeded 15 percent, and that a local exchange carrier (“LEC”) offered service in other franchise areas. See *Cox Communications San Diego: Petition for Determination of Effective Competition in 27 Communities in California*, 23 FCC Rcd 7106, 7110-11, App. A, B (MB, 2008). These numbers do not demonstrate that the entire San Diego DMA is competitive nor that this level of competition deprives cable operators of the incentive to withhold or to take other anticompetitive actions with their affiliated programming.

local and regional programming, which is often terrestrially delivered⁹⁸ and therefore beyond the reach of the program access rules, potentially an even more profitable strategy.⁹⁹

28. The Commission has also found that the grouping of commonly owned cable systems into regional clusters enhances the ability and incentive of vertically integrated cable firms to engage in unfair acts with their affiliated programming.¹⁰⁰ Recent data indicates that over 77 percent of cable subscribers are served by systems that are part of regional clusters.¹⁰¹ Commenters explain that clustering of a cable operator's systems makes terrestrial delivery of affiliated regional programming more feasible.¹⁰² And the Commission has previously demonstrated through empirical analyses that clustering enhances the potential profitability of withholding regional programming from rival distributors.¹⁰³

29. The Commission has also concluded that the recent emergence of new wireline entrants in the video distribution market enhances the incentive of incumbent cable operators to engage in unfair acts with their affiliated programming.¹⁰⁴ Data indicate that DBS operators do not constrain the price of cable service to the extent that wireline MVPDs do, thereby implying that incumbent cable operators

⁹⁸ See *Advance/Newhouse Reply* at 2 (noting that local, community-oriented programming does not require satellite transmission); see also *BSPA Comments* at 6 (“The use of terrestrial distribution will grow and will potentially become a preferred distribution vehicle for local and regional programming.”); *CA2C Comments* at 7, 10, 21 (“Today’s reality is that there can be many circumstances where terrestrial networks are a preferred distribution resource This happens most frequently when content has regional as compared to national distribution or where the content will have any form of on-demand delivery to consumers. Regional and on-demand content are now expected to be some of the highest growth programming segments.”); *USTelecom Comments* at 6; *CA2C Reply* at 6.

⁹⁹ See *2007 Program Access Order*, 22 FCC Rcd at 17830, ¶ 55 (“the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming”).

¹⁰⁰ See *id.* at 17830-32, ¶¶ 55-59.

¹⁰¹ See *13th Annual Report*, 24 FCC Rcd at 684 (Table B-1) and 686 (Table B-2). In the *2007 Program Access Order*, the Commission relied on data indicating that the percentage of cable subscribers that are served by systems that are part of regional clusters was between 85 and 90 percent. See *2007 Program Access Order*, 22 FCC Rcd at 17810, n.136; see also *USTelecom Comments* at 6; *CA2C Reply* at 5.

¹⁰² See *BSPA Comments* at 6 (“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”); *USTelecom Comments* at 6 (“[I]ncumbent cable operators are significantly expanding their regional clusters throughout the country. These clusters now extend over major population regions and entire states, and provide incumbent cable operators with both the incentive and opportunity to deliver local and regional programming terrestrially to thwart video competition and evade the program access rules.” (citation omitted)); see also *CA2C Comments* at ii, 3, 8, 10-12; *CA2C Reply* at 5-6, 21.

¹⁰³ See *2007 Program Access Order*, 22 FCC Rcd at 17830, ¶ 55 (“[I]n many cities where cable [multiple system operators (“MSOs”)] have clusters, the market penetration of competitive MVPDs is much lower and cable market penetration is much higher than their nationwide penetration rates. . . . As a result, the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming. Moreover, the affiliated cable operator will obtain a substantial share of the benefits of a withholding strategy because its share of subscribers within the cluster is likely to be inordinately high.”); see *id.* at 17831-32, ¶¶ 56-59, and 17883-91, Appendix C (concluding that withholding of an RSN would be profitable in a significant range of cases).

¹⁰⁴ See *2007 Program Access Order*, 22 FCC Rcd at 17832-34, ¶¶ 60-61; see also *BSPA Comments* at 2-3; *CA2C Comments* at 12; *USTelecom Comments* at 3, 6; *AT&T Complaint v. Cox* at 27.

perceive wireline MVPDs as a more significant competitive threat.¹⁰⁵ In addition, unlike DBS operators, wireline MVPDs can offer combinations of video, voice, and data services similar to those that incumbent cable operators offer to customers (the “triple play”), thus posing a greater competitive threat than DBS to cable operators.¹⁰⁶ Moreover, because recent wireline entrants have relatively small subscriber bases in most areas at this time, withholding affiliated programming from these new entrants would not cause programmers to lose a significant current source of revenue.¹⁰⁷

2. Evidence of Unfair Acts

30. Our judgment that cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming, including terrestrially delivered programming, is supported by real-world evidence. Because the program access rules currently apply only to satellite-delivered programming, terrestrial distribution allows a cable-affiliated programmer to bypass the

¹⁰⁵ See *Cable Price Report*, 24 FCC Rcd at 261, ¶ 3; see also BSPA Comments at 2-3; CA2C Comments at 12; USTelecom Comments at 4-5; AT&T Complaint v. Cox at 27; AT&T Complaint v. MSG/Cablevision at 4.

¹⁰⁶ The Commission has noted a “shift from competition between stand-alone services to that between service bundles.” See *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385, 5388-89, ¶ 9 (2008). Although DBS operators offer triple play packages to their customers, they partner with outside vendors to do so. For example, DISH Network partners with voice and data providers to offer a triple play to its customers. See DISH Network, *Internet and Home Phone Packages*, <http://www.dishconnectioncenter.com/>. In a report to the U.S. Securities and Exchange Commission, DIRECTV noted that the emergence of wireline video has impacted its ability to bundle its video service with voice and data service provided by wireline partners. See The DIRECTV Group, Inc., *SEC Form 10-K for the Year Ended Dec. 31, 2008*, at 23 (“[V]arious telcos and broadband service providers have deployed fiber optic lines directly to customers’ homes or neighborhoods to deliver video services, which compete with the DIRECTV service. . . . Some of these various telcos and broadband service providers also sell the DIRECTV service as part of a bundle with their voice and data services. A new broadly-deployed network with the capability of providing video, voice and data services could present a significant competitive challenge and, in the case of the telcos companies currently selling the DIRECTV service, could result in such companies focusing less effort and resources selling the DIRECTV service or declining to sell it at all.”).

¹⁰⁷ See *2007 Program Access Order*, 22 FCC Rcd at 17832-33, ¶ 60 (“Because recent entrants have minimal subscriber bases at this time, the costs that a cable-affiliated programmer would incur from withholding programming from recent entrants are negligible.”); USTelecom Comments at 5 (stating that fewer than 2 percent of the nation’s households reside in markets with direct wireline competition); AT&T Complaint v. Cox at 28; AT&T Reply to MSG/Cablevision at 4; see also *13th Annual Report*, 24 FCC Rcd at 591, ¶ 100 and 684, Table B-1 (concluding that broadband service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers). In the *2007 Program Access Order*, the Commission noted the argument that, because of the non-discrimination provision of the program access rules, a vertically integrated programmer that withholds programming from one competitive MVPD in a market (such as a new entrant with a minimal subscriber base) would generally need to withhold the programming from all other competitive MVPDs in the market (such as an established competitor with a significant number of subscribers), thereby increasing the foregone revenues resulting from a withholding strategy. See *2007 Program Access Order*, 22 FCC Rcd at 17832-33, ¶ 60. This condition does not apply in the case of terrestrially delivered, cable-affiliated programming, however, because the program access rules do not currently apply to this programming. Thus, the non-discrimination provision of the program access rules applicable to satellite-delivered, cable-affiliated programming does not preclude a vertically integrated programmer from withholding its terrestrially delivered programming from a new entrant in a market but providing the same programming to established competitors in the market. Moreover, even if the non-discrimination rule applied to terrestrially delivered, cable-affiliated programming, the Commission nonetheless found in the *2007 Program Access Order* that this rule would not deter withholding because the long-term benefits to the vertically integrated cable operator would outweigh any short-term costs. See *id.* at 17832, ¶ 60 and 17834, n.320.

program access rules. The record here, as well as our discussion in the *2007 Program Access Order*, reflects substantial evidence that cable firms withhold affiliated programming from competitors when not barred from doing so.¹⁰⁸ Moreover, the record reflects that terrestrial distribution is becoming more cost effective, and that its use is likely to continue and possibly increase in the future.¹⁰⁹ Below, we provide several examples of withholding of terrestrially delivered, cable-affiliated programming:¹¹⁰

- *HD Feeds of MSG and MSG+*. Cablevision has withheld the terrestrially delivered HD feeds of its affiliated MSG and MSG+ RSNs from certain competitors in New York City, Buffalo, and Connecticut.¹¹¹
- *Cox-4 San Diego*. Cox has withheld the terrestrially delivered Cox-4 channel, which has exclusive rights to the San Diego Padres baseball games, from DIRECTV, EchoStar, and AT&T.¹¹²
- *Comcast SportsNet Philadelphia*. Comcast has withheld this terrestrially delivered RSN, which carries regional professional sports programming in Philadelphia, from DBS firms.¹¹³ This RSN was the subject of previous program access complaints, which were denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) there were not sufficient facts alleged to find that Comcast delivered the programming terrestrially to evade the program access rules.¹¹⁴ As a result of merger conditions adopted in the *Adelphia Order*, Comcast SportsNet Philadelphia is

¹⁰⁸ See *2007 Program Access Order*, 22 FCC Rcd at 17826, ¶ 49.

¹⁰⁹ See *infra* n.128.

¹¹⁰ This list provides examples of terrestrially delivered, cable-affiliated programming networks that have been withheld from competitive MVPDs. We do not conclude in this *Order* that the withholding of any of these networks is currently significantly hindering or preventing any MVPD from providing satellite cable programming or satellite broadcast programming in violation of Section 628(b). Rather, that would be a point of fact to be proven or rebutted in each case. As discussed in Section III.D, we will consider on a case-by-case basis whether an unfair act involving terrestrially delivered, cable-affiliated programming is significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming.

¹¹¹ See *2007 Program Access Order*, 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9; USTelecom Comments at 7; Verizon Comments at 8; Verizon Reply at 8; Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 2 (July 17, 2008) (“Verizon July 17th Ex Parte Letter”); see also Verizon Telephone Companies *et al*, Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009); AT&T Complaint v. MSG/Cablevision. Consumers Union states that, even though Cablevision does not provide cable service in Buffalo, Cablevision has “chosen to make this content available only to select MVPDs and has denied access to Verizon.” See Consumers Union Aug. 12th Ex Parte Letter at 4.

¹¹² See *2007 Program Access Order*, 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9; DIRECTV Comments at 13; USTelecom Comments at 7; AT&T Complaint v. Cox. As discussed above, the Media Bureau has denied without prejudice a program access complaint regarding access to this programming because (i) there is no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b); and (ii) the pending rulemaking, rather than an adjudicatory proceeding, is the correct forum for addressing this issue. See *AT&T v. Coxcom*, 24 FCC Rcd at 2864, ¶ 16.

¹¹³ See *Adelphia Order*, 21 FCC Rcd at 8276, ¶ 163; see also *2007 Program Access Order*, 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9; DIRECTV Comments at 13; USTelecom Comments at 7.

¹¹⁴ See *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822 (CSB, 1998) and *EchoStar Commc'ns Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (CSB, 1999), *aff'd.*, *DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802 (2000), *aff'd EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

currently subject to the program access rules applicable to satellite-delivered programming with respect to some but not all of the competing MVPDs in Philadelphia.¹¹⁵

- *Sports Programming in New York City*. The Commission previously noted evidence that Cablevision withheld certain sports programming from RCN after Cablevision revised its distribution system from satellite to terrestrial delivery.¹¹⁶ RCN's program access complaint regarding this dispute was denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) Cablevision did not change its distribution system from satellite to terrestrial delivery to evade the Commission's rules.¹¹⁷
- *New England Cable News*. The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated regional news network had been withheld temporarily from RCN.¹¹⁸
- *CN8 – The Comcast Network*. The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated local news and information channel is available only to Comcast and Cablevision subscribers and is withheld from competitors to incumbent cable operators.¹¹⁹
- *iN DEMAND*. The Commission previously noted claims that this terrestrially delivered, cable-affiliated network has been withheld from certain MVPD competitors.¹²⁰

3. Evidence of the Impact of Unfair Acts

31. As discussed below, Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming is also needed because (i) there is evidence suggesting that such conduct has significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming in some cases and (ii) by significantly hindering MVPDs from providing video programming to subscribers, such conduct may significantly hinder the ability of competitive MVPDs to provide broadband services, particularly in rural areas.

a. Impact on Competition in the Video Distribution Market

32. Our previous decisions, as well as the record here, demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming may "hinder significantly"¹²¹ MVPDs from providing satellite cable programming and satellite broadcast programming in some cases, thereby

¹¹⁵ See *Adelphia Order*, 21 FCC Rcd at 8276, ¶ 163 ("[W]e do not require that Comcast SportsNet Philadelphia be subject to [the program access] conditions to the extent it is not currently available to MVPDs. With regard to MVPDs that currently have contracts for SportsNet Philadelphia, both the program access and arbitration conditions will apply as set forth above."); see also *infra* Section III.E.3.

¹¹⁶ See *2007 Program Access Order*, 22 FCC Rcd at 17823, ¶ 49; see also CA2C Comments at 9.

¹¹⁷ See *RCN Telecom Servs. v. Cablevision Sys. Corp.*, 14 FCC Rcd 17093 (CSB, 1999), *aff'd* *RCN Telecom Servs. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048 (2001).

¹¹⁸ See *2007 Program Access Order*, 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9.

¹¹⁹ See *2007 Program Access Order*, 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9.

¹²⁰ See *2007 Program Access Order*, 22 FCC Rcd at 17823, ¶ 49; CA2C Comments at 9.

¹²¹ 47 U.S.C. § 548(b) (providing that it shall be unlawful for a cable operator to engage in an unfair act "the purpose or effect of which is to hinder significantly or to prevent" any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers).

harming competition in the video distribution market.¹²² In 2006, the Commission performed a regression analysis which concluded that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been.¹²³ The analysis also concluded that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than it otherwise would have been.¹²⁴ This provides evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming.¹²⁵

¹²² See *2007 Program Access Order*, 22 FCC Rcd at 17817-18, ¶¶ 39-41; *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 149; see also AT&T Comments at 3; CA2C Comments at 10-12; DIRECTV Comments at 13-14; NTCA Comments at 8; OPASTCO *et al* Comments at 4-5; CA2C Reply at 4, 19-21; DIRECTV Reply at 10; DISH Network Reply at 3; Letter from Stephen Pastorkovich, Business Development Director and Sr. Policy Analyst, OPASTCO, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment at 7 (Dec. 10, 2007) ("OPASTCO Dec. 10th Letter"). We note that AT&T and Verizon have submitted studies (some of which contain redacted information) and other evidence in the record of this proceeding to support their view that withholding of the MSG HD and Cox-4 networks has had the purpose or effect that triggers Section 628(b). See AT&T Dec. 16th *Ex Parte* Letter (attaching AT&T Complaint v. Cox, AT&T Reply to Cox, AT&T Complaint v. MSG/Cablevision, AT&T Reply to MSG/Cablevision); Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 6, 2010), Attachment 1 ("Verizon Jan. 6th *Ex Parte* Letter"); but see Cablevision/MSG Jan. 7th *Ex Parte* Letter (attaching MSG/Cablevision Answer); Letter from Howard J. Symons, Counsel to MSG/Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Jan. 13, 2010) (attaching reply to Verizon study attached to Verizon Jan. 6th *Ex Parte* Letter); Cox Jan. 13th *Ex Parte* Letter (attaching Cox Answer and response to AT&T declaration and survey). These studies and other evidence were submitted previously in pending complaint proceedings. See *supra* ¶ 17. We will assess the merits of those studies and other evidence in addressing the relevant complaints.

¹²³ See *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 149; see also *2007 Program Access Order*, 22 FCC Rcd at 17817-18, ¶ 39. The empirical model was based on the Wise and Duwadi model, which examines DBS penetration and the variables that affect it. See Andrew S. Wise and Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. COMPETITION L. & ECON. 679 (2005). The data used in the analysis came from the Commission's 2005 Cable Price Survey, Nielsen Media Research, and Comcast and Time Warner filings. See *Adelphia Order*, 21 FCC Rcd at 8344-47, App. D, ¶¶ 14, 18-23. In the *2007 Program Access Order*, the Commission responded to and refuted criticisms of the Commission's regression analysis. See *2007 Program Access Order*, 22 FCC Rcd at 17818-19, ¶ 40 and 17876-82, Appendix B ("The new results, in fact, support the Commission's analysis in the *Adelphia Order*, and in some respects strengthen the conclusions reached in that decision.").

¹²⁴ See *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 149; *2007 Program Access Order*, 22 FCC Rcd at 17817-18, ¶ 39.

¹²⁵ We note that more than three years have passed since the Commission performed its regression analysis in the *Adelphia Order* regarding the impact of withholding of Comcast SportsNet Philadelphia and Cox-4 on the market shares of DBS operators in Philadelphia and San Diego, respectively. Commenters claim that there have been important developments in the video distribution markets in Philadelphia and San Diego since this time. See Cox Reply at 5-7 (noting that the DBS penetration rate in San Diego increased from 9.5 percent in 2004-2005 to 13.2 percent in 2007); see also Cablevision Reply at 15; Comcast Reply at 11 n.41; Cox Answer at 40, 58; Letter from Ryan G. Wallach, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, at 3 (Jan. 13, 2010) ("Comcast Jan. 13th *Ex Parte* Letter") (stating that DBS penetration rate in Philadelphia has increased to 14.4 percent as of September 2009 and is higher than in some other markets where DBS operators have access to all RSNs); but see AT&T Reply to Cox at 24-25 (explaining that DBS market share in San Diego is far below the national average); Letter from Linda Kinney, Vice President, Law and Regulation, DISH Network, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198, Attachment (Jan. 14, 2010) (providing data indicating that DISH Network's penetration rate in Philadelphia and San Diego remains well below the rate achieved in comparable cities (continued....))

33. While the Commission concluded in the *1998 Program Access Order* that the record developed in that proceeding did not demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming were having a “significant anticompetitive effect,” that conclusion was based on the limited data that were available more than ten years ago.¹²⁶ We now have evidence that unfair acts involving terrestrially delivered, cable-affiliated programming may well have the effect in some cases of significantly hindering MVPDs from providing all programming to subscribers and consumers. Moreover, while the Commission concluded in the *1998 Program Access Order* that the record developed in that proceeding did not demonstrate that programming was being shifted from satellite to terrestrial delivery,¹²⁷ the record here demonstrates that the MVPD marketplace has evolved, such that terrestrial distribution is becoming more cost effective and its use is likely to increase for new as well as established programming networks.¹²⁸ Indeed, the record reflects that competitively significant networks, such as RSNs, are being delivered terrestrially today.¹²⁹

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and its average national penetration rate). Our reliance here on the Commission’s analysis in the *Adelphia Order* to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming can significantly hinder MVPDs from providing video service in some cases should not be read to imply that withholding of Comcast SportsNet Philadelphia or Cox-4 is currently significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming in Philadelphia or San Diego, respectively. Rather, as discussed in Section III.D.2 below, we establish a rebuttable presumption that an unfair act involving certain terrestrially delivered, cable-affiliated RSNs has the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. A defendant to a program access complaint alleging an unfair act involving an RSN will have the opportunity to rebut this presumption.

¹²⁶ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, 15856-57, ¶ 71 (1998) (“*1998 Program Access Order*”); see also DIRECTV Comments at 11-12. In that decision, the Commission also noted that Congress was considering legislation at the time which, if enacted, would “introduce important changes to the program access provisions, including clarification of the Commission’s jurisdiction over terrestrially-delivered programming.” See *1998 Program Access Order*, 13 FCC Rcd at 15856-57, ¶ 71. The Commission, however, never stated or implied that it did not have jurisdiction over such programming absent such clarification.

¹²⁷ See *1998 Program Access Order*, 13 FCC Rcd at 15856-57, ¶ 71.

¹²⁸ See BSPA Comments at 6 (“The use of terrestrial distribution will grow and will potentially become a preferred distribution vehicle for local and regional programming.”); CA2C Comments at 4-7 (“[T]he use of terrestrial distribution is expected to expand as we continue to move toward all digital networks with expanded regional and on-demand content. . . . High capacity terrestrial networks did not exist as they do today when the program access rules were first enacted in 1992 The dot-com boom and the continuing development of digital technology have now created terrestrial networks as a significant new resource and alternative to satellite distribution. In addition to the extensive networks that have been built during the past ten years, we continue to increase the capacity of these fiber networks through improved transmission technologies. . . . The result is a new transport capability that can efficiently transport any or all of the content that had been historically limited to satellite distribution as the only cost effective alternative, and the use of terrestrial distribution is only expected to grow.”); Verizon Comments at 12 (“[A]s a technological matter, the distinction suggested by Section 628 between programming that is ‘satellite’ delivered and programming that is terrestrially delivered has largely gone away. Since Section 628 was adopted in 1992, the availability of fiber over which programming can be delivered terrestrially has increased dramatically. Programming can often be delivered now on a cost-effective, terrestrial basis” (internal citation omitted)); Verizon Reply at 5.

¹²⁹ See *supra* ¶ 30.

34. Vertically integrated cable operators argue that MVPDs are not dependent on vertically integrated cable programming because multiple programming options exist.¹³⁰ But that is not always the case. As the Commission concluded in the *2007 Program Access Order*, cable operators own programming for which there may be no good substitutes, and this “must-have” programming is necessary for viable competition in the video distribution market.¹³¹ The Commission explained that this includes both satellite-delivered and terrestrially delivered programming.¹³² As the Commission stated in the *2002 Program Access Order*, “cable programming – be it news, drama, sports, music, or children’s programming – is not akin to so many widgets.”¹³³ The salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators, but rather the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service.¹³⁴

35. While cable operators claim that unfair acts involving terrestrially delivered, cable-affiliated programming have not significantly hindered their competitors from providing satellite cable programming or satellite broadcast programming,¹³⁵ we believe that these general, sweeping claims are refuted by the Commission’s conclusion in the *Adelphia Order* that DBS market penetration was significantly reduced as a result of the denial of access to certain terrestrially delivered, cable-affiliated

¹³⁰ See NCTA Comments at 5; Comcast Reply at 7. Comcast argues that the percentage of vertically integrated programming networks affiliated with a cable operator has dropped from 57 percent in 1992 to less than 15 percent today and contends that no program owner has market power. See Comcast Reply at 4, 13 (“no party offered specific, credible evidence that MVPDs are not getting the programming they need to compete”); see also 13th Annual Report, 24 FCC Rcd at 550, ¶ 21 (finding that 14.9 percent of programming networks are affiliated with a cable operator). Moreover, cable operators contend that the digital transition will likely foster the development of more programming and that Internet programming is starting to develop as a competitive alternative. See NCTA Comments at 5-6; Comcast Reply at 6. In addition, NCTA notes that competitors to incumbent cable operators market themselves as offering superior programming, and contends that such marketing undermines any justification for “retention of the existing regulation of cable-affiliated programming, let alone expansion of those regulations.” See NCTA Comments at 5; see also Comcast Reply at 7-9.

¹³¹ See *2007 Program Access Order*, 22 FCC Rcd at 17811, ¶ 30 and 17814-16, ¶¶ 37-38; see also AT&T Comments at 1 (noting that cable firms control “must have” programming that their MVPD competitors need to compete); cf. BSPA Comments at 9 (contending that several markets are not competitive and that incumbents have “extensive control” over critical programming); see also CA2C Comments at 2-3; DIRECTV Comments at 2.

¹³² See *2007 Program Access Order*, 22 FCC Rcd at 17817, ¶ 39 (discussing withholding of terrestrially delivered, cable-affiliated RSNs in Philadelphia and San Diego).

¹³³ *2002 Program Access Order*, 17 FCC Rcd at 12139, ¶ 33.

¹³⁴ See *2007 Program Access Order*, 22 FCC Rcd at 12140, ¶ 38.

¹³⁵ For example, some commenters note that DBS operators continue to attract subscribers in San Diego and Philadelphia, despite the fact that cable operators in those markets have withheld the local RSN from the DBS operators. See Cox Reply at 5-6; Cablevision Reply at 15; Comcast Reply at 11 n.41. Cox and Cablevision also note that competitors to incumbent cable operators have entered the video distribution market despite the terrestrial loophole. See Cox Reply at 6-7; Cablevision Reply at 15. Other commenters contend that withholding of certain terrestrially delivered, cable-affiliated programming, such as local news and community programming, does not raise competitive concerns. See NCTA Comments at 7-9; Advance/Newhouse Reply at 2, 6-8. One new entrant MVPD urged the Commission to extend the program access rules only to (i) terrestrially delivered RSNs; and (ii) terrestrially delivered HD feeds of programming that is otherwise satellite-delivered. See Verizon Comments at 4-8; see also Verizon July 17th Ex Parte Letter at 1-2.