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

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FCC Mail Room

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

NOTICE OF PROPOSED RULEMAKING

Adopted: March 20, 2012 **Released: March 20, 2012**

Comment Date: [60 days after date of publication in the Federal Register]
Reply Comment Date: [90 days after date of publication in the Federal Register]

By the Commission:

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I. INTRODUCTION

1. We issue this Notice of Proposed Rulemaking ("*NPRM*") to seek comment on (i) whether to retain, sunset, or relax one of the several protections afforded to multichannel video programming distributors ("MVPDs") by the program access rules – the prohibition on exclusive contracts involving

satellite-delivered, cable-affiliated programming; and (ii) potential revisions to our program access rules to better address alleged violations, including potentially discriminatory volume discounts and uniform price increases. This *NPRM* promotes the goals of Executive Order 13579 and the Commission's plan adopted thereto, whereby the Commission analyzes rules that may be outmoded, ineffective, insufficient, or excessively burdensome and determines whether any such regulations should be modified, streamlined, expanded, or repealed.[1]

2. In areas served by a cable operator, Section 628(c)(2)(D) of the Communications Act of 1934, as amended (the "Act"), generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor (the "exclusive contract prohibition").[2] The exclusive contract prohibition applies to all satellite-delivered, cable-affiliated programming and presumes that an exclusive contract will cause competitive harm in every case, regardless of the type of programming at issue.[3] The exclusive contract prohibition applies only to programming which is delivered via satellite; it does not apply to programming which is delivered via terrestrial facilities.[4] In January 2010, the Commission adopted rules providing for the processing of complaints alleging that an "unfair act" involving terrestrially delivered, cable-affiliated programming violates Section 628(b) of the Act.[5] Thus, while an exclusive contract involving satellite-delivered, cable-affiliated programming is generally prohibited, an exclusive contract involving terrestrially delivered, cable-affiliated programming is permitted unless the Commission finds in response to a complaint that it violates Section 628(b) of the Act.[6]

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[1] *See* Executive Order No. 13579, § 2, 76 FR 41587 (July 11, 2011); *Preliminary Plan for Retrospective Analysis of Existing Rules*, 2011 WL 5387696 (Nov. 7, 2011).

[2] *See* 47 U.S.C. § 548(c)(2)(D). An exclusive contract for satellite cable programming or satellite broadcast programming between a cable operator and a cable-affiliated programming vendor that provides satellite-delivered programming would violate Section 628(c)(2)(D) even if the cable operator that is a party to the contract is not affiliated with the cable-affiliated programming vendor that is a party to the contract. *See 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, 22 FCC Rcd 17791, 17840-41, ¶¶ 70-72 (2007) ("*2007 Extension Order*"), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010) ("*Cablevision I*"); *see also Cable Horizontal and Vertical Ownership Limits*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2195-96, ¶ 145 (2008).

[3] *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, 3377-78, ¶¶ 47-49 (1993) ("*1993 Program Access Order*"); *see also 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*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1930, ¶ 62 (1994) ("*1994 Program Access Order*").

[4] Section 628(c)(2)(D) pertains only to "satellite cable programming" and "satellite broadcast programming." *See* 47 U.S.C. § 548(c)(2)(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). In this *NPRM*, we refer to "satellite cable programming" and "satellite broadcast programming" collectively as "satellite-delivered programming."

[5] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 (2010) ("*2010 Program Access Order*"), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) ("*Cablevision II*").

[6] Among other things, a complainant must demonstrate that the exclusive contract involving terrestrially delivered, cable-affiliated programming is an "unfair act" and that it has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming to (continued….)

3. In Section 628(c)(5) of the Act, Congress provided that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[7] In June 2002, the Commission found that the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity and retained the exclusive contract prohibition for five years, until October 5, 2007.[8] The Commission provided that, during the year before the expiration of the five-year extension, it would conduct a second review to determine whether the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity in the distribution of video programming.[9] After conducting such a review, the Commission in September 2007 concluded that the exclusive contract prohibition was still necessary, and it retained the prohibition for five more years, until October 5, 2012.[10] The Commission again provided that, during the year before the expiration of the five-year extension, it would conduct a third review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[11]

4. Accordingly, in this *NPRM*, we initiate the third review of the necessity of the exclusive contract prohibition. Below, we present certain data on the current state of competition in the video distribution market and the video programming market, and we invite commenters to submit more recent data or empirical analyses. We seek comment on whether current conditions in the video marketplace support retaining, sunsetting, or relaxing the exclusive contract prohibition. To the extent that the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment on whether we can preserve and protect competition in the video distribution market by either:

- Sunsetting the exclusive contract prohibition in its entirety and instead relying solely on existing protections provided by the program access rules that will not sunset: (i) the case-by-case consideration of exclusive contracts pursuant to Section 628(b) of the Act; (ii) the prohibition on discrimination in Section 628(c)(2)(B) of the Act; and (iii) the prohibition on undue or improper influence in Section 628(c)(2)(A) of the Act; or
- Relaxing the exclusive contract prohibition by (i) establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the prohibition on a market-by-market basis based on the extent of competition in the market; (ii) retaining the

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subscribers or consumers, as required by Section 628(b). *See id.* at 780-82, ¶¶ 50-51; *see also Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011) (concluding that withholding the MSG HD and MSG+ HD Regional Sports Networks from Verizon is an "unfair act" that has the "effect" of "significantly hindering" Verizon from providing satellite cable programming and satellite broadcast programming to subscribers and consumers in New York and Buffalo), *affirmed*, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); *AT&T Servs. Inc. et al.*, Order, 26 FCC Rcd 13206 (MB 2011) (reaching the same conclusion with respect to AT&T in the State of Connecticut), *affirmed*, *AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.).

[7] 47 U.S.C. § 548(c)(5).

[8] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 (2002) ("*2002 Extension Order*").

[9] *See id.* at 12161, ¶ 80.

[10] *See generally 2007 Extension Order*. We discuss in further detail below the decision of the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") in *Cablevision I* affirming the *2007 Extension Order*. *See infra* ¶¶ 15-16.

[11] *See 2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

prohibition only for satellite-delivered, cable-affiliated Regional Sports Networks ("RSNs") and any other satellite-delivered, cable-affiliated programming that the record here establishes as being important for competition and non-replicable and having no good substitutes; and/or (iii) other ways commenters propose.

We seek comment also on (i) how to implement a sunset (complete or partial) to minimize any potential disruption to consumers; (ii) the First Amendment implications of the alternatives discussed herein; (iii) the costs and benefits of the alternatives discussed herein; and (iv) the impact of a sunset on existing merger conditions.

5. In addition, we seek comment below on potential improvements to the program access rules to better address potential violations. With the exception of certain procedural revisions and the previous extensions of the exclusive contract prohibition, the program access rules have remained largely unchanged in the almost two decades since the Commission originally adopted them in 1993.[12] We seek comment on, among other things, whether our rules adequately address potentially discriminatory volume discounts and uniform price increases and, if not, how these rules should be revised to address these concerns.

II. BACKGROUND

A. Program Access Protections

6. Congress adopted the program access provisions as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[13] Congress was concerned that, in order to compete effectively, new market entrants would need access to satellite-delivered, cable-affiliated programming.[14] At that time, Congress found that increased horizontal concentration of cable operators and extensive vertical integration[15] created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors.[16] As a result of this imbalance of power, Congress determined that the development of competition among MVPDs was limited and consumer choice was restricted.[17] Congress concluded that cable-affiliated programmers had the incentive and ability to favor their affiliated cable operators over other, unaffiliated, MVPDs with the effect that competition and diversity in the distribution of video programming would not be preserved and protected.[18]

7. The program access provisions afford several protections to MVPDs in their efforts to compete in the video distribution market. Sections 628(b), 628(c)(1), and 628(d) of the Act grant the Commission broad authority to prohibit "unfair acts" of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors that have the "purpose or effect" of "hinder[ing] significantly or prevent[ing]" any MVPD from providing "satellite cable programming or satellite broadcast programming to subscribers or consumers."[19] In addition to this broad grant of authority, Congress in Section 628(c)(2) of the Act

[12] *See generally 1993 Program Access Order*.

[13] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[14] *See* S. Rep. No. 102-92 at 28 (1992).

[15] Vertical integration means the combined ownership of cable systems and suppliers of cable programming.

[16] *See* 1992 Cable Act § 2(a)(2).

[17] *See id.*

[18] *See 1993 Program Access Order*, 8 FCC Rcd at 3366, ¶ 21.

[19] 47 U.S.C. § 548(b) ("[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 to engage in unfair methods (continued....)

required the Commission to adopt specific regulations to specify particular conduct that is prohibited by Section 628(b), *i.e.*, certain unfair acts involving satellite-delivered, cable-affiliated programming.[20] In contrast to Section 628(b), the unfair acts listed in Section 628(c)(2) pertaining to satellite-delivered programming are presumed to harm competition in every case, and MVPDs alleging such unfair acts are not required to demonstrate harm.[21] First, Section 628(c)(2)(A) requires 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 influence").[22] Second, Section 628(c)(2)(B) requires the Commission to prohibit discrimination among MVPDs by cable-affiliated programming vendors that provide satellite-delivered programming in the prices, terms, and conditions for sale of programming ("discrimination").[23] Third, Sections 628(c)(2)(C)-(D) require the Commission to prohibit exclusive contracts between cable operators and cable-affiliated programming vendors that provide satellite-delivered programming, subject to certain exceptions.[24] In this proceeding, our focus is on the protection provided under Section 628(c)(2)(D), although we discuss the other statutory protections to the extent they bear on our consideration of whether to allow the exclusive contract provision to sunset.

B. Enactment of the Exclusive Contract Prohibition with a Sunset Provision

8. In the 1992 Cable Act, Congress drew a distinction between exclusive contracts for satellite-delivered, cable-affiliated programming in areas not served by a cable operator as of October 5, 1992 ("unserved areas") and areas served by a cable operator as of that date ("served areas"). In unserved areas, Congress adopted a *per se* prohibition on exclusive contracts between cable operators and satellite-

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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."); 47 U.S.C. § 548(c)(1); 47 U.S.C. § 548(d); *see also* 47 C.F.R. § 76.1001. Throughout this *NPRM*, we use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices." 47 U.S.C. § 548(b); *see* 47 C.F.R. § 76.1001.

[20] *See* 47 U.S.C. § 548(c)(2). As discussed above, Section 628(c)(2) pertains only to "satellite cable programming" and "satellite broadcast programming"; it does not apply to terrestrially delivered programming. *See supra* ¶ 2.

[21] *See 1993 Program Access Order*, 8 FCC Rcd at 3377-78, ¶¶ 47-49 ("[W]e believe that if behavior meets the definitions of the activities proscribed in [Section 628(c)], such practices are implicitly harmful. . . . In each case, a legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited. Therefore, we will not impose a threshold burden of demonstrating some form of anticompetitive harm on a complainant alleging a violation of Section 628(c).") (citations omitted); *see also 1994 Program Access Order*, 10 FCC Rcd at 1930, ¶ 62 ("We affirm our prior determination that there is no requirement to show harm in a complaint alleging violations of conduct prohibited under Section 628(c). Instead, Congress presumed that the conduct enumerated in Section 628(c) injured competition.").

[22] *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"); *see also* 47 C.F.R. § 76.1002(a).

[23] *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)); *see also* 47 C.F.R. § 76.1002(b).

[24] *See* 47 U.S.C. § 548(c)(2)(C)-(D); *see also* 47 C.F.R. § 76.1002(c).

delivered, cable-affiliated programmers.[25] In served areas, however, the prohibition on exclusive contracts is not absolute; rather, an exclusive contract is permissible if the Commission determines that it "is in the public interest."[26] Congress thus recognized that, in served areas, some exclusive contracts may serve the public interest by providing offsetting benefits to the video programming market or assisting in the development of competition among MVPDs.[27] To enforce or enter into an exclusive contract in a served area, a cable operator or a satellite-delivered, cable-affiliated programmer must submit a "Petition for Exclusivity" to the Commission for approval.[28]

9. In addition to this prior approval process, Congress also recognized that exclusivity can be a legitimate business practice where there is sufficient competition.[29] Accordingly, in Section 628(c)(5), Congress provided that the exclusive contract prohibition in served areas:

> shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[30]

[25] 47 U.S.C. § 548(c)(2)(C) (prohibiting "practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section"). The Commission has implemented this provision through Section 76.1002(c)(1) of the rules. *See* 47 C.F.R. § 76.1002(c)(1).

[26] 47 U.S.C. § 548(c)(2)(D) (prohibiting "with respect to distribution to persons in areas served by a cable operator, . . . exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with [Section 628(c)(4)]) that such contract is in the public interest"). The Commission has implemented this provision through Section 76.1002(c)(2) of the rules. *See* 47 C.F.R. § 76.1002(c)(2).

[27] In determining whether an exclusive contract is in the public interest, Congress directed the Commission to consider each of the following factors: (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. 47 U.S.C. § 548(c)(4); *see also* 47 C.F.R. § 76.1002(c)(4).

[28] *See* 47 C.F.R. § 76.1002(c)(5). Ten Petitions for Exclusivity have been filed since enactment of the 1992 Cable Act. Of these petitions, two were granted, three were denied, and five were dismissed at the request of the parties. *See New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231 (1994) (granting exclusivity petition); *Time Warner Cable*, Memorandum Opinion and Order, 9 FCC Rcd 3221 (1994) (denying exclusivity petition for Courtroom Television ("Court TV")); *Outdoor Life Network and Speedvision Network*, Memorandum Opinion and Order, 13 FCC Rcd 12226 (CSB 1998) (denying exclusivity petition for the Outdoor Life Network ("OLN") and Speedvision Network ("Speedvision")); *Cablevision Industries Corp. and Sci-Fi Channel*, Memorandum Opinion and Order, 10 FCC Rcd 9786 (CSB 1995) (denying exclusivity petition for the Sci-Fi Channel); *NewsChannel,* Memorandum Opinion and Order, 10 FCC Rcd 691 (CSB 1994) (granting exclusivity petition).

[29] *See* S. Rep. No. 102-92 at 28.

[30] 47 U.S.C. § 548(c)(5).

The 1992 Cable Act was enacted on October 5, 1992. Accordingly, the "sunset provision" of Section 628(c)(5) would have triggered the expiration of the exclusive contract prohibition on October 5, 2002, absent a Commission finding that the prohibition remained necessary to preserve and protect competition and diversity in the distribution of video programming.

C. 2002 Extension of the Exclusive Contract Prohibition

10. In October 2001, approximately a year before the initial expiration of the exclusive contract prohibition, the Commission sought comment on whether the exclusive contract prohibition remained necessary to preserve and protect competition and diversity in the distribution of video programming.[31] Ultimately, the Commission concluded that the prohibition remained "necessary."[32] The Commission explained that, based on marketplace conditions at the time, cable-affiliated programmers retained the incentive and ability to withhold programming from unaffiliated MVPDs with the effect that competition and diversity in the distribution of video programming would be impaired without the prohibition.[33] The Commission found as follows:

> The competitive landscape of the market for the distribution of multichannel video programming has changed for the better since 1992. The number of MVPDs that compete with cable and the number of subscribers served by those MVPDs have increased significantly. We find, however, that the concern on which Congress based the program access provisions – that in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected – persists in the current marketplace.[34]

11. Accordingly, the Commission extended the exclusive contract prohibition for five years (*i.e.*, through October 5, 2007).[35] The Commission provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity in distribution of video programming.[36]

D. 2007 Extension of the Exclusive Contract Prohibition and D.C. Circuit Decision

12. In February 2007, the Commission again sought comment on whether the prohibition remained necessary to preserve and protect competition and diversity in the distribution of video

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[31] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074 (2001).

[32] *See 2002 Extension Order*, 17 FCC Rcd at 12153-54, ¶ 65 ("Given these findings, we conclude that, were the prohibition on exclusive contracts permitted to sunset in the current market conditions, competition and diversity in the distribution of video programming would not be preserved and protected.") (footnote omitted).

[33] *See id.* at 12125, ¶ 3.

[34] *Id.* at 12153, ¶ 65.

[35] *See id.* at 12124, ¶ 1.

[36] *See id.* at 12161, ¶ 80.

programming.[37] For a second time, the Commission concluded that the prohibition remained "necessary."[38]

13. The Commission conducted its analysis of the exclusive contract prohibition in five parts.[39] First, in considering the applicable standard of review, the Commission determined that it may use its predictive judgment, economic theory, and specific factual evidence in determining whether, "in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected."[40] If such an inquiry is answered in the affirmative, then the Commission concluded that it must extend the exclusive contract prohibition.[41] Second, the Commission examined the changes that had occurred in the video programming and distribution markets since 2002, and it found that, while there had been some procompetitive trends, the concerns on which Congress based the program access provisions persisted in the marketplace.[42] Third, the Commission examined the incentive and ability of cable-affiliated programmers to favor their affiliated cable operators over competitive MVPDs with the effect that competition and diversity in the distribution of video programming would not be preserved and protected.[43] The Commission determined that this incentive and ability existed with the effect that the exclusive contract prohibition remained necessary to preserve and protect competition and diversity in the distribution of video programming.[44] The Commission recognized, however, "that Congress intended for the exclusive contract prohibition to sunset at a point when market conditions warrant" and specifically "caution[ed] competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition, including further investments in their own programming."[45] Fourth, the Commission considered commenters' arguments that the exclusive contract prohibition is both overinclusive and underinclusive with respect to the types of programming and MVPDs it covers, and the Commission declined either to narrow or broaden the prohibition.[46] Fifth, the Commission considered the appropriate length of time for an extension of the exclusive contract prohibition, and it again concluded that the prohibition should be extended for five years.[47]

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[37] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252 (2007).

[38] *See 2007 Extension Order*, 22 FCC Rcd at 17792-93, ¶1 and 17800, ¶ 12.

[39] *See id.* at 17800, ¶ 12.

[40] *Id.* at 17801, ¶¶ 13-14 (footnote omitted).

[41] *See id.* at 17801, ¶ 13.

[42] *See id.* at 17802, ¶ 16.

[43] For purposes of this *NPRM*, the term "competitive MVPD" refers to MVPDs that compete with incumbent cable operators in the video distribution market, such as DBS operators and wireline video providers.

[44] *See id.* at 17810, ¶ 29.

[45] *Id.*; *see id.* at 17832-33, ¶ 60 ("If competition in the MVPD market continues to develop and cable market share continues to decline, however, the incentive of vertically integrated programmers to engage in withholding will presumably diminish to the extent that we may be able to relax the exclusive contract prohibition.").

[46] *See id.* at 17839, ¶¶ 67. Some cable multiple system operators ("MSOs") had argued that the exclusive contract prohibition is overinclusive in that it includes new and unpopular networks that are not essential to an MVPD's ability to compete, and it also applies to all cable operators and benefits all competitive MVPDs, regardless of their size or the extent of competition in a given market. *See id.* at 17839-41, ¶¶ 68, 70, 73. Some cable MSOs and competitive MVPDs had argued that the prohibition is underinclusive because it does not apply to certain unaffiliated programming that is necessary for MVPDs to compete. *See id.* at 17843-44, ¶¶ 75, 78.

[47] *See id.* at 17845, ¶ 79.

14. Accordingly, the Commission extended the exclusive contract prohibition for five years (*i.e.*, until October 5, 2012).[48] As in 2002, the Commission provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition (*i.e.*, between October 2011 and October 2012), it would conduct a third review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[49]

15. Cablevision Systems Corporation ("Cablevision") and Comcast Corporation ("Comcast") (Cablevision and Comcast, collectively, the "Petitioners") filed petitions for review of the *2007 Extension Order* with the D.C. Circuit.[50] The D.C. Circuit addressed Petitioners' objections to three conclusions that the Commission reached in the *2007 Extension Order*. First, Petitioners objected to the Commission's interpretation of the term "necessary" as used in the sunset provision as requiring the exclusive contract prohibition to continue "'if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.'"[51] The D.C. Circuit found that the term "necessary" is "not language of plain meaning" and that the Commission's interpretation was "well within the Commission's discretion" under *Chevron*.[52] Second, Petitioners contended that "the Commission did not rely on substantial evidence when it concluded that vertically integrated cable companies would enter into competition-harming exclusive contracts if the exclusivity prohibition were allowed to lapse."[53] The D.C. Circuit disagreed, finding that the Commission relied on substantial evidence and stating that "conclusions based on [the Commission's] predictive judgment and technical analysis are just the type of conclusions that warrant deference from this Court."[54] While there had been substantial changes in the MVPD market since 1992, the court described the transformation as a "mixed picture" and deferred to the Commission's analysis, which concluded that vertically integrated cable companies retained a substantial ability and incentive to withhold "must have" programming.[55] Finally, Petitioners objected to the Commission's failure to narrow the exclusive contract prohibition to apply only to certain types of cable companies or certain types of programming.[56] The D.C. Circuit found that the Commission's decision to refrain from narrowing the exclusive contract prohibition was not arbitrary and capricious, but rather was a reasonable decision "to adhere to Congress's statutory design."[57]

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[48] *See id.* at 17792, ¶ 1 and 17846, ¶ 81.

[49] *See id.*

[50] *See Cablevision I*, 597 F.3d at 1307. Citing *Time Warner*, the D.C. Circuit determined that a First Amendment challenge to the exclusive contract prohibition would be reviewed under the intermediate scrutiny standard because the prohibition is content-neutral on its face. *See id.* at 1311; *see also Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (considering a facial challenge to the constitutionality of the exclusive contract prohibition, but leaving open the possibility of a future as-applied challenge). Because Petitioners failed to present an as-applied First Amendment challenge, however, the D.C. Circuit found "it unnecessary to evaluate the [*2007 Extension Order*] under the intermediate scrutiny standard." *See Cablevision I*, 597 F.3d at 1311-12. In his dissenting opinion, Judge Kavanaugh expressed his view that Petitioners had presented an as-applied First Amendment challenge and that the exclusive contract prohibition violates the First Amendment and the 1992 Cable Act, as construed to conform to the First Amendment. *See id.* at 1315-29 (Kavanaugh, J., dissenting).

[51] *Cablevision I*, 597 F.3d at 1313 (quoting *2007 Extension Order*, 22 FCC Rcd at 17800-01, ¶ 13).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See id.* at 1313-14.

[56] *See id.* at 1314.

[57] *Id.* at 1315.

16. While the D.C. Circuit affirmed the *2007 Extension Order*, it also provided some comment on the Commission's subsequent review of the exclusive contract prohibition. Specifically, the D.C. Circuit stated as follows:

> We anticipate that cable's dominance in the MVPD market will have diminished still more by the time the Commission next reviews the prohibition, and expect that at that time the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset. Petitioners are correct in pointing out that the MVPD market has changed drastically since 1992. We expect that if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the [exclusive contract] prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming.[58]

E. TWC/Time Warner and Comcast/NBCU Transactions

17. Since the *2007 Extension Order*, two transactions have had a particular impact on the video distribution market and the video programming market: (i) the separation of Time Warner Cable Inc. ("TWC"; a cable operator) from Time Warner Inc. ("Time Warner"; an owner of satellite-delivered, national programming networks);[59] and (ii) the joint venture between Comcast (a vertically integrated cable operator) and NBC Universal, Inc. ("NBCU"; an owner of broadcast stations and satellite-delivered, national programming networks).[60]

18. In the *Time Warner Order*, the Media, Wireline Competition, Wireless Telecommunications, and International Bureaus (the "Bureaus") granted the applications for the assignment and transfer of control of certain Commission licenses and authorizations from Time Warner to TWC.[61] Before the transaction, Time Warner controlled TWC, but after their separation, Time Warner no longer has an ownership interest in TWC or its subsidiary licensees.[62] As a result of the transaction, Time Warner's programming networks are no longer affiliated with TWC, thus reducing the number of satellite-delivered, national programming networks that are cable-affiliated. The Bureaus found that the transaction would benefit the public interest by lessening the extent to which TWC is vertically integrated and by eliminating Time Warner's vertical integration.[63] In declining to adopt a condition applying the program access rules to Time Warner post-transaction, the Commission explained that the underlying premise of the program access rules would no longer apply because Time Warner and TWC would no longer have the incentive and ability to discriminate in favor of each other.[64] If an MVPD believed that

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[58] *Id.* at 1314.

[59] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Time Warner Inc., Assignor/Transferor, and Time Warner Cable Inc., Assignee/Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 879 (MB, WCB, WTB, IB, 2009) ("*Time Warner Order*").

[60] *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast/NBCU Order*").

[61] *See Time Warner Order*, 24 FCC Rcd at 879, ¶ 1.

[62] *See id.* at 880, ¶ 1.

[63] *See id.* at 890, ¶ 20.

[64] *See id.* at 890, ¶ 21.

Time Warner or TWC violated the program access rules while they were vertically integrated, however, the Commission stated that the program access complaint process would provide an avenue for relief.[65]

19. In contrast, another recent transaction has led to an increased number of satellite-delivered, national programming networks that are cable-affiliated. In the *Comcast/NBCU Order*, the Commission granted the application of Comcast, General Electric Company ("GE"), and NBCU to assign and transfer control of broadcast, satellite, and other radio licenses from GE to Comcast.[66] The transaction created a joint venture ("Comcast-NBCU") combining NBCU's broadcast, cable programming, online content, movie studio, and other businesses with some of Comcast's cable programming and online content businesses.[67] Before the transaction, both Comcast and NBCU either wholly or partly owned a number of satellite-delivered, national programming networks.[68] As a result of the transaction, programming networks that were previously affiliated with NBCU became affiliated with the joint venture, thus increasing the number of satellite-delivered, national programming networks that are cable-affiliated.

20. In evaluating post-transaction MVPD access to Comcast-NBCU programming, the Commission concluded that the transaction "creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the [joint venture] would come to control or raise programming costs to its video distribution rivals."[69] The Commission found the joint venture would "have the power to implement an exclusionary strategy," and that "successful exclusion . . . of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power."[70] Additionally, the Commission concluded that an "anticompetitive exclusionary program access strategy would often be profitable for Comcast."[71] Accordingly, the Commission imposed conditions designed to ameliorate the potential harms, including a baseball-style arbitration condition that allows an aggrieved MVPD to submit a dispute with Comcast-NBCU over the terms and conditions of carriage of programming to commercial arbitration.[72]

III. DISCUSSION

A. Exclusive Contract Prohibition

21. We seek comment on whether to retain, sunset, or relax the exclusive contract prohibition. Our discussion of this issue below proceeds in ten main parts. First, we present relevant data for assessing whether to retain, sunset, or relax the exclusive contract prohibition, and we invite commenters to submit more recent data or empirical analyses. Second, we ask commenters to assess whether these data, as updated and supplemented by commenters, support either retaining, sunsetting, or

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[65] *See id.* at 891, ¶ 21. The Commission also explained that program access conditions previously imposed through the *Adelphia Order* would continue to apply to TWC. *See id.* at 893, ¶ 26; *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 (2006) ("*Adelphia Order*").

[66] *Comcast/NBCU Order*, 26 FCC Rcd at 4239-40, ¶ 1.

[67] *See id.* at 4240, ¶ 1.

[68] *See id.* at 4243-44, ¶¶ 10, 14.

[69] *Id.* at 4250, ¶ 29.

[70] *Id.* at 4255, ¶¶ 38-39.

[71] *Id.* at 4257, ¶ 44.

[72] *See id.* at 4259, ¶¶ 49-50.

relaxing the exclusive contract prohibition. Third, we seek comment on how each of these three options (*i.e.*, retaining, sunsetting, or relaxing the exclusive contract prohibition) will impact the creation of new national, regional, and local programming. Fourth, to the extent that the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment on whether we can nonetheless preserve and protect competition in the video distribution market by either (i) sunsetting the prohibition in its entirety and relying solely on existing protections provided by the program access rules that will not sunset; or (ii) relaxing the exclusive contract prohibition, such as through removal of the prohibition on a market-by-market basis based on the extent of competition in the market or by retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming. Fifth, we seek input on how a sunset (complete or partial) of the exclusive contract prohibition will impact consumers, and how to implement a sunset to minimize any potential disruption to consumers. Sixth, we ask commenters to assess whether and how each of the three options comports with the First Amendment. Seventh, we ask commenters to consider the costs and benefits associated with each of the three options. Eighth, to the extent the exclusive contract prohibition sunsets (wholly or partially), we propose to eliminate existing restrictions on exclusive subdistribution agreements between cable operators and satellite-delivered, cable-affiliated programmers. Ninth, we propose that any amendments we adopt herein to our rules pertaining to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas will apply equally to existing rules pertaining to exclusive contracts involving common carriers and Open Video Systems ("OVS") in served areas. Finally, we seek comment on how conditions adopted in previous merger orders may be impacted if the exclusive contract prohibition were to sunset (wholly or partially).

1. Relevant Data in Considering a Sunset of the Exclusive Contract Prohibition

22. In evaluating whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming,"[73] the Commission has previously examined data on the status of competition in the video programming market and the video distribution market. Specifically, in the *2007 Extension Order*, the Commission examined "the changes that [had] occurred in the programming and distribution markets since 2002 when the Commission last reviewed whether the exclusive contract prohibition continued to be necessary to preserve and protect competition."[74] The Commission examined data relating to (i) the number of MVPD subscribers nationwide and in regional markets attributable to each category of MVPD, including cable operators, as well as the extent of regional clustering by cable operators;[75] (ii) the number of satellite-delivered, national programming networks and the percentage of such networks that are cable-affiliated; and (iii) the number of regional programming networks and the percentage of such networks that are cable-affiliated.[76] We believe it is appropriate to consider similar data in determining whether the exclusive contract prohibition remains necessary today. We also seek comment on whether our assessment of the exclusivity prohibition should consider data concerning other types of "satellite cable programming."[77]

23. In an effort to aid such an evaluation, we have prepared the tables attached at Appendices A through C, which contain data from previously released Commission documents as well as other sources. The first column of data, entitled "1st Annual Report," focuses on data from the *1st Annual*

[73] 47 U.S.C. § 548(c)(5).

[74] *2007 Extension* Order, 22 FCC Rcd at 17802, ¶ 16.

[75] "Clustering" refers to "an increase over time in the number of cable subscribers and homes passed by a single MSO in particular markets (accomplished via internal growth as well as by acquisitions)." *Id.* at 17831, ¶ 56.

[76] *See id.* at 17802-10, ¶¶ 17-28.

[77] *See infra* ¶ 30.

Report on video competition.[78] The second column of data, entitled "2002 Extension," focuses on data from the *2002 Extension Order*.[79] The third column of data, entitled "2007 Extension," focuses on data from the *2007 Extension Order*.[80] The fourth and final column of data, entitled "Most Recent," focuses on the most recent data available. We believe that considering data from these four time periods will enable us to view the evolution of the video distribution and video programming markets over time. We invite commenters to submit more recent data in each of the categories identified, as well as data regarding the extent of regional clustering of cable operators,[81] and any additional data the Commission should consider in its review.

a. Nationwide and Regional MVPD Subscribership

24. In past reviews of the exclusive contract prohibition, the Commission has assessed the percentage of MVPD subscribers nationwide that are attributable to each category of MVPD, including cable operators.[82] The data in Appendix A indicate that the percentage of MVPD subscribers nationwide attributable to cable operators has declined over time, with the current percentage at approximately 58.5 percent, a decrease of 8.5 percentage points since the *2007 Extension Order*. On a regional basis, the market share held by cable operators in Designated Market Areas ("DMAs") varies considerably, from a high in the 80 percent range to a low in the 20 percent range.[83]

25. We seek comment on the extent to which we should consider online distributors of video programming in our analysis. The Commission recently stated that online distributors of video programming "offer a tangible opportunity to bring customers substantial benefits" and that they "can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices."[84] While the Commission concluded that consumers today do not perceive online distributors as a substitute for traditional MVPD service, it stated that online distributors are a "potential competitive threat" and that they "must have a similar array of programming" if they are to "fully compete against a traditional MVPD."[85] In addition, in connection with the Commission's forthcoming *14th Annual Report*

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[78] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442 (1994) ("*1st Annual Report*") (containing data as of 1994).

[79] *2002 Extension Order*, 17 FCC Rcd 12124 (citing data from the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244 (2002) (containing data as of June 2001) ("*8th Annual Report*")).

[80] *See 2007 Extension Order*, 22 FCC Rcd 17791 (citing data from the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006) (containing data as of June 2005) ("*12th Annual Report*")).

[81] *See infra* ¶¶ 41-42.

[82] *See, e.g., 2007 Extension Order*, 22 FCC Rcd at 17806-07, ¶¶ 23-24.

[83] *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[84] *Comcast/NBCU Order*, 26 FCC Rcd at 4268-69, ¶ 78.

[85] *Id.* at 4269, ¶ 79 and 4272-73, ¶ 86; *see also id.* at 4256, ¶ 41 ("We do not determine at this time whether online video competes with MVPD services. . . . [W]e conclude that regardless of whether online video is a complement or substitute to MVPD service today, it is potentially a substitute product. When identifying market participants, therefore, we will include online video distributors as potential competitors into MVPD services markets."); *id.* at 4266, ¶ 70 ("Without access to online content on competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers."); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17975-76, ¶ 129 (2010) ("online transmission of programming by DBS operators or stand-alone online video programming aggregators [] may function as competitive alternatives to traditional MVPDs").

on video competition, the Commission sought comment on the emergence of online video distributors.[86] In light of possible cord-cutting and cord-shaving trends, we ask commenters to provide information regarding the effect that online distributors have had, or may have, on nationwide and regional MVPD subscription rates. Our task under Section 628(c)(5) is to determine whether the exclusive contract prohibition is necessary to preserve and protect "competition," not competitors.[87] Thus, to the extent that we conclude that competition in the video distribution market and the video programming market is currently sufficient to warrant sunsetting or relaxing the exclusive contract prohibition, how, if at all, should the emergence of a new category of potential competitor that could benefit from the exclusive contract prohibition impact our analysis?

b. Satellite-Delivered, Cable-Affiliated, National Programming Networks

26. In past reviews of the exclusive contract prohibition, the Commission has assessed the percentage of satellite-delivered, national programming networks that are cable-affiliated and the number of cable-affiliated networks that are among the Top 20 satellite-delivered, national programming networks as ranked by either subscribership or prime time ratings.[88] The data in Appendix B indicate that, since the *2007 Extension Order*, (i) the percentage of satellite-delivered, national programming networks that are cable-affiliated has declined from 22 percent to approximately 14.4 percent; (ii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has increased from six to seven; and (iii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by average prime time ratings has remained at seven. We note that the calculation of the percentage of satellite-delivered, national programming networks that are cable-affiliated is based on our estimate of a total of 800 satellite-delivered, national programming networks available to MVPDs today.[89] We seek comment on the reasonableness of this estimate and how, if at all, it should be revised. We also note that these data include satellite-delivered, national programming networks affiliated with Comcast, many of which (*i.e.*, the "Comcast-controlled networks") are subject to program access conditions adopted in the

[86] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, 26 FCC Rcd 14091, 14112-13, ¶¶ 52-55 (2011) ("*Further Notice for the 14th Report*").

[87] *See Cablevision I*, 597 F.3d at 1313; *2007 Extension Order*, 22 FCC Rcd at 17833-34, ¶ 61 ("In considering whether to allow the exclusive contract prohibition to sunset, our primary focus is on the impact that sunset would have on competition and diversity in the distribution of video programming generally, not on individual competitors and not on programming diversity. Thus, the more salient point for our analysis is not whether individual competitors will remain in the market if the exclusive contract prohibition were to sunset, but how competition in the video distribution market will be impacted if the exclusive contract prohibition were to sunset.").

[88] *See, e.g., 2007 Extension Order*, 22 FCC Rcd at 17802-03, ¶ 18.

[89] In the *2007 Extension Order*, the Commission found that 22 percent of satellite-delivered, national programming networks were affiliated with cable operators. *See id.* This percentage was based on a total of 531 satellite-delivered, national programming networks, as stated in the *12th Annual Report*. *See 12th Annual Report*, 21 FCC Rcd at 2509-10, ¶ 21 and 2575, ¶ 157 (containing data as of June 2005). For purposes of the analysis in this *NPRM*, we increase this figure to 800 based on two factors. First, since 2005, we estimate that approximately 150 high-definition versions of networks previously provided only in standard definition have been launched. *See* SNL Kagan, *High-Definition Cable Networks Getting More Carriage*, Feb. 17, 2009; NCTA, Cable Networks, available at http://www.ncta.com/Organizations.aspx? type=orgtyp2&contentId=2907. Second, we estimate a net addition of approximately 100 networks, reflecting the increase over time in the number of national programming networks. *See 2007 Extension Order*, 22 FCC Rcd at 17836-37, ¶ 64 (noting the increase in national programming networks over time); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 550, ¶ 20 (2009) ("*13th Annual Report*") (noting an increase of 34 programming networks between June 2005 and June 2006); *id.* at 731-36, Table C-4 (listing planned networks); SNL Kagan, Economics of Basic Cable Networks (2011 Edition), at 27 (listing cable networks launched after 2005).

Comcast/NBCU Order and will continue to be subject to these conditions for six more years (until January 2018, assuming they are not modified earlier in response to a petition[90]) even if the exclusive contract prohibition were to sunset.[91] If the Comcast-controlled networks are excluded, the data in Appendix B indicate that, since the *2007 Extension Order*, (i) the percentage of satellite-delivered, national programming networks that are cable-affiliated has declined from 22 percent to approximately 11 percent; (ii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has remained at six; and (iii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by average prime time ratings has fallen from seven to five. We seek comment on whether and how to account for different versions of the same network in our analysis. For example, to the extent a particular network is available in standard definition ("SD"), high definition ("HD"), 3D, and video-on-demand ("VOD"), should this be counted as four different networks for purposes of our analysis?[92] If so, and if both cable-affiliated and unaffiliated networks are treated similarly, how will this impact the percentage of networks that are cable-affiliated?

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[90] *See Comcast/NBCU Order*, 26 FCC Rcd at 4381, Appendix A, Condition XX (stating that the conditions will remain in effect for seven years (until January 2018), provided that the Commission will consider a petition from Comcast/NBCU for modification of a condition if they can demonstrate that there has been a material change in circumstances, or that the condition has proven unduly burdensome, such that the Condition is no longer necessary in the public interest).

[91] *See Comcast/NBCU Order*, 26 FCC Rcd at 4358, Appendix A, Condition II. The program access conditions reflected in Condition II apply to "C-NBCU Programmers," which are defined as "Comcast, C-NBCU, their Affiliates and any entity for which Comcast or C-NBCU manages or controls the licensing of Video Programming and/or any local broadcast television station on whose behalf Comcast or NBCU negotiates retransmission consent." *Id.* at 4356, Appendix A, Definitions. An "Affiliate" of any person means "any person directly or indirectly controlling, controlled by, or under common control with, such person at the time at which the determination of affiliation is being made." *Id.* at 4355, Appendix A, Definitions. The issue of whether a particular cable network qualifies as a "C-NBCU Programmer" subject to these conditions is a fact-specific determination. For purposes of the estimates in this *NPRM*, and with the exception of the iN DEMAND networks discussed below, we assume that any network in which Comcast or NBCU holds a 50 percent or greater interest is a "C-NBCU Programmer" subject to these conditions. *See infra* Appendix B, Table 2 and Appendix C, Table 2. We refer to these networks as "Comcast-controlled networks." We refer to other networks in which Comcast or NBCU holds a less than 50 percent interest as "Comcast-affiliated networks," which we assume for purposes of the estimates in this *NPRM* are not "C-NBCU Programmers" subject to the program access conditions adopted in the *Comcast/NBCU Order*, but are subject to the program access rules, including the exclusive contract prohibition. *See id.* Although Comcast has stated that it has a 53.7 percent interest in iN DEMAND, it has also stated that it "cannot control decisionmaking at iN DEMAND." *See* Application of General Electric and Comcast, MB Docket No. 10-56 (Jan. 28, 2010), at 20 (stating that Comcast has a 53.7 percent interest in iN DEMAND) ("*GE/Comcast/NBCU Application*"); Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, FCC, MB Docket No. 10-56 (Oct. 22, 2010), at 2 n.5. Accordingly, for purposes of the estimates in this *NPRM*, we consider the iN DEMAND networks to be "Comcast-affiliated" networks, and not "Comcast-controlled" networks subject to the program access conditions adopted in the *Comcast/NBCU Order*. Nothing in this *NPRM* should be read to state or imply any position as to whether any particular network qualifies or does not qualify as a "C-NBCU Programmer."

[92] *See infra* Appendices B and C (treating the HD version of a network separately from the SD version); *2010 Program Access Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55 (concluding that HD programming is growing in significance to consumers and that consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content; thus, the Commission will analyze the HD version of a network separately from the SD version with similar content for purposes of determining whether an "unfair act" has the purpose or effect set forth in Section 628(b)).

c. Satellite-Delivered, Cable-Affiliated, Regional Programming Networks

27. In addition to national programming networks, the Commission in past reviews of the exclusive contract prohibition has assessed the extent to which regional programming networks are cable-affiliated.[93] As an initial matter, we note that some regional networks may be terrestrially delivered and therefore not subject to the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming.[94] The data in Appendix C pertaining to regional networks do not distinguish between terrestrially delivered and satellite-delivered networks. We ask commenters to provide data regarding which cable-affiliated, regional programming networks, including RSNs, are satellite-delivered and which are terrestrially delivered.

28. For purposes of our analysis, we distinguish between RSNs and other regional networks. The Commission has previously held that RSNs have no good substitutes,[95] are important for competition,[96] and are non-replicable.[97] As set forth in Appendix C, recent data indicate that the number of RSNs that are cable-affiliated has increased from 18 to 31 (not including HD versions)[98] since the *2007 Extension Order*, and the percentage of all RSNs that are cable-affiliated has increased from 46 percent to approximately 52.3 percent. Are there networks that satisfy the Commission's definition of an RSN that are not included in the list of RSNs in Appendix C, such as certain local and regional networks that show NCAA Division I college football and basketball games?[99] Should we include these and other similar networks, including unaffiliated networks, in our list of RSNs in Appendix C? In addition, are there networks included in the list of RSNs in Appendix C that do not satisfy the Commission's definition of an RSN? For example, do networks such as the Big Ten Network, PAC-12 Network, and The Mtn. –

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[93] *See, e.g., 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22.

[94] *See supra* ¶ 2 (explaining that an exclusive contract involving terrestrially delivered, cable-affiliated programming is permitted unless the Commission finds in response to a complaint that it violates Section 628(b) of the Act).

[95] The Commission has stated that RSNs "purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game." *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 535, ¶ 133 (2004) ("*News/Hughes Order*").

[96] *See 2010 Program Access Order*, 25 FCC Rcd at 750, ¶ 8 and 782-83, ¶ 52. The Media Bureau recently issued a Report on the RSN marketplace and noted that several commenters asserted that ensuring access to RSNs remains a critical component of fostering a competitive MVPD marketplace. *See The Regional Sports Marketplace*, Report, DA 12-18 (MB Jan. 6, 2012), at ¶ 8 ("*Media Bureau RSN Report*").

[97] *See 2010 Program Access Order*, 25 FCC Rcd at 750, ¶ 8 and 782-83, ¶ 52.

[98] In the *2007 Extension Order*, the Commission noted 18 cable-affiliated RSNs, based on data in the *12th Annual Report*. *See 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22 (citing *12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2586, ¶ 183). The *12th Annual Report* did not consider the HD versions of RSNs separately from the SD versions. *See 12th Annual Report*, 21 FCC Rcd at 2644-49, Table C-3. As indicated in Appendix C, we estimate 57 cable-affiliated RSNs when the SD and HD versions are considered separately. *See infra*, Appendix C.

[99] The Commission has defined an RSN in the same way the Commission has defined that term in previous merger proceedings for purposes of adopting program access conditions: "any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball, Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." *2010 Program Access Order*, 25 FCC Rcd at 783-84, ¶ 53.

Mountain West Sports Network, which show NCAA Division I college football and basketball games of a particular college conference but not necessarily those of a particular team, satisfy the Commission's definition of an RSN? As required by this definition, do these and similar networks (i) distribute programming in "a limited geographic region"[100] and (ii) carry the minimum amount of covered programming for an individual sports team.[101]

29. We note that the figures in Appendix C include RSNs that are affiliated with Comcast, many of which are subject to program access conditions adopted in the *Comcast/NBCU Order* and which will continue to be subject to these conditions for six more years (until January 2018, assuming they are not modified earlier in response to a petition[102]) even if the exclusive contract prohibition were to sunset.[103] If the Comcast-controlled RSNs are excluded, the data in Appendix C indicate that the number of RSNs that are cable-affiliated has increased from 18 to 22 (not including HD versions)[104] since the *2007 Extension Order*, and the percentage of RSNs that are cable-affiliated has decreased slightly from 46 percent to approximately 44.1 percent. With respect to non-RSN regional programming, we ask commenters to provide recent data on the number of these networks and the percentage of them that are cable-affiliated.[105]

d. Other Types of Cable-Affiliated "Satellite Cable Programming"

30. While the Commission in past reviews of the exclusive contract prohibition has considered linear and VOD programming networks, we also seek comment on whether there are other types of "satellite cable programming" or "satellite broadcast programming" that we should consider in assessing the exclusive contract prohibition.[106] The Act defines "satellite cable programming" as (i) "video programming" (ii) which is "transmitted via satellite" and (iii) which is "primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."[107] The Act defines "video

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[100] *See Adelphia Order*, 21 FCC Rcd at 8275, ¶ 158 n.529 (stating that the definition of RSN does not include "networks [that] are distributed nationally, as opposed to within a limited geographic region"); *Comcast Corporation Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, File No. CSR-7108, Order, 22 FCC Rcd 17938, 17941-42, ¶ 10 (2007) (holding that a network that offers "its sports programming to a limited number of DMAs, on a limited regional basis" satisfies "the regional prong of the definition of RSN").

[101] *See supra* n.99 (providing Commission's definition of RSN).

[102] *See supra* n.90.

[103] *See supra* n.91.

[104] *See supra* n.98.

[105] In the *2007 Extension Order*, the Commission found that there were 96 regional programming networks, of which 44 (46 percent) were cable-affiliated. *See 2007 Extension Order*, 22 FCC Rcd at 17804, ¶ 21 (citing *12th Annual Report*, 21 FCC Rcd at 2510, ¶ 22 and 2579-80, ¶ 166). We note that Comcast and TWC currently own a number of regional networks. *See GE/Comcast/NBCU Application* at 20 ("Comcast also has interests in a variety of regional and local programming networks, including the following (with the percentage interest shown in parentheses): The Comcast Network (100 percent), New England Cable News (100 percent), Comcast Entertainment Television (100 percent), Comcast Hometown Television (100 percent), C2 (100 percent), CN100 (100 percent), Comcast Television Network (100 percent), Pittsburgh Cable News (30 percent), and certain local origination channels."); Application of Time Warner Cable Inc. and Insight Communications Company, Inc., WC Docket No. 11-148 (Sept. 6, 2011), at 3-4 and Exhibit F (listing regional programming services affiliated with TWC) ("*TWC/Insight Application*").

[106] *See* 47 U.S.C. § 548(c)(2)(D).

[107] 47 U.S.C. § 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. § 605); 47 U.S.C. § 605(d)(1) (defining "satellite cable programming" as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable (continued….)

programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[108] Are cable operators affiliated with forms of "video programming" that meet the other two requirements of the definition of "satellite cable programming," but that are not necessarily considered programming "networks"? For example, to the extent that cable operators own or are affiliated with film libraries and other content, to what extent does this content qualify as "satellite cable programming"? If so, how should this factor into our consideration of the exclusive contract prohibition?

2. Assessing Whether the Data Support Retaining, Sunsetting, or Relaxing the Exclusive Contract Prohibition

31. We seek comment on whether the data set forth herein, as updated and supplemented by commenters, support retaining, sunsetting, or relaxing the exclusive contract prohibition. In addition to the specific questions stated herein, we seek comment on any new trends in the industry or any other issues that are relevant to our determination of whether the status of the MVPD marketplace today supports the sunset of the exclusive contract prohibition. We specifically seek comment on the effect of the development of online video on the marketplace. We also request information on the impact of the Comcast/NBCU and TWC/Time Warner transactions on the MVPD marketplace.[109] To what extent, if any, should these transactions inform our analysis of whether to retain, sunset, or relax the exclusive contract prohibition? What other recent developments in the MVPD market since our 2007 review should we consider in deciding whether to retain, sunset, or relax the exclusive contract prohibition?

32. In analyzing whether the exclusive contract prohibition remains necessary, the Commission has stated that it will "assess whether, in the absence of the exclusive contract prohibition, vertically integrated programmers would have the ability and incentive to favor their affiliated cable operators over nonaffiliated competitive MVPDs and, if so, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming."[110] Accordingly, in light of the data noted above and as updated and supplemented by commenters, we seek comment on whether cable-affiliated programmers would have the ability and incentive to favor their affiliated cable operators absent the exclusive contract prohibition in today's marketplace with the effect that competition and diversity in the distribution of video programming would not be preserved and protected. How has the exclusive contract prohibition impacted the general state of competition among MVPDs in the video distribution market? How would a sunset or relaxation of the exclusive contract prohibition affect consumers and competition in the video distribution market, and how would a sunset or relaxation affect the potential entry of new competitors in the market? Is there any basis for treating satellite-delivered, cable-affiliated programming and terrestrially delivered, cable-affiliated programming differently with respect to the exclusive contract prohibition?[111] Are there differences between satellite-delivered programming and terrestrially delivered programming that would result in cable operators

(Continued from previous page)

subscribers"); 47 C.F.R. § 76.1000(h). The exclusive contract prohibition also applies to cable-affiliated "satellite broadcast programming." *See* 47 U.S.C. § 548(i)(3) (defining "satellite broadcast programming" as "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 C.F.R. § 76.1000(f).

[108] 47 U.S.C. § 522(20).

[109] *See supra* Section II.E.

[110] *2007 Extension Order*, 22 FCC Rcd at 17810, ¶ 29 (citing *2002 Extension Order*, 17 FCC Rcd at 12130-31, ¶ 16).

[111] *See supra* ¶ 2 (explaining that the Commission currently considers allegedly "unfair acts" involving terrestrially delivered, cable-affiliated programming on a case-by-case basis pursuant to Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules).

having a greater ability and incentive to favor affiliates providing satellite-delivered programming that warrants extension of the exclusive contract prohibition? To the extent the data support retaining the exclusive contract prohibition as it exists today, we seek comment on the appropriate length of an extension. Should the sunset date be five years from the current sunset date (*i.e.*, until October 5, 2017), consistent with the two prior five-year extensions?[112]

a. Ability

33. In assessing whether cable-affiliated programmers have the "ability" to favor their affiliated cable operators with the effect that competition and diversity in the distribution of video programming would not be preserved and protected, the Commission has explained that it considers whether satellite-delivered, cable-affiliated programming remains programming that is necessary for competition and for which there are no good substitutes.[113] In the *2007 Extension Order*, the Commission found that there were no good substitutes for certain satellite-delivered, cable-affiliated programming, and that such programming remained necessary for viable competition in the video distribution market.[114] Accordingly, the Commission concluded that cable-affiliated programmers retained "the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule."[115] In reaching this conclusion, the Commission explained that "[w]hat is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace."[116] Moreover, the Commission acknowledged that "there exists a continuum of vertically integrated programming, 'ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact).'"[117]

34. We seek comment on whether competitive MVPDs' access to satellite-delivered, cable-affiliated programming remains necessary today to preserve and protect competition in the video distribution marketplace. Is there any basis to depart from the Commission's conclusion in the *2007 Extension Order* that satellite-delivered, cable-affiliated programming remains necessary for viable competition in the video distribution market? We seek comment on whether and how the continued decline in the number and percentage of national programming networks that are cable-affiliated should impact our analysis, if at all.[118] Despite a similar decline between the *2002 Extension Order* and the *2007 Extension Order*, the Commission in the *2007 Extension Order* nonetheless found that "cable-affiliated programming continues to represent some of the most popular and significant programming available today" and that "vertically integrated programming, if denied to cable's competitors, would adversely affect competition in the video distribution market."[119] Is this also true today, considering that the data in

[112] *See 2002 Extension Order*, 17 FCC Rcd at 12160-61, ¶¶ 79-80; *2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

[113] *See 2007 Extension Order*, 22 FCC Rcd at 17811, ¶ 30 (citing *2002 Extension Order*, 17 FCC Rcd at 12135, ¶ 24).

[114] *See id.* at 17810, ¶ 29.

[115] *Id.*

[116] *Id.* at 17814-15, ¶ 37.

[117] *Id.* at 17816, ¶ 38 (quoting *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33).

[118] *See infra*, Appendix B, Table 1.

[119] *2007 Extension Order*, 22 FCC Rcd at 17816, ¶ 38 (quoting *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33).

Appendices B and C indicate that, since the *2007 Extension Order*, (i) the percentage of satellite-delivered, national programming networks that are cable-affiliated has declined from 22 percent to approximately 14.4 percent; (ii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has increased from six to seven; (iii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by average prime time ratings has remained at seven; and (iv) the number of cable-affiliated RSNs has increased from 18 to 31 (not including HD versions)?[120]

35. To what extent should we consider Comcast-controlled networks in our review of the exclusive contract prohibition? Because these networks will continue to be subject to program access conditions adopted in the *Comcast/NBCU Order* for six more years (until January 2018, assuming they are not modified earlier in response to a petition[121]) even if the exclusive contract prohibition were to sunset, is there any basis to consider them in assessing whether to retain, sunset, or relax the exclusive contract prohibition? With the Comcast-controlled networks excluded, the data in Appendices B and C indicate that, since the *2007 Extension Order*, (i) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by subscribership has remained at six; (ii) the number of cable-affiliated networks among the Top 20 satellite-delivered, national programming networks as ranked by average prime time ratings has fallen from seven to five; and (iii) the number of cable-affiliated RSNs has increased from 18 to 21 (not including HD versions).[122] With the Comcast-controlled networks excluded from the analysis, is it still accurate to characterize cable-affiliated programming as "some of the most popular and significant programming available today," the absence of which from an MVPD's offering would "adversely affect competition in the video distribution market."[123] Rather than focusing on the number and percentage of networks that are cable-affiliated, is it more critical to assess the extent to which cable-affiliated programming remains popular and without substitutes? We note that, in the *Comcast-NBCU Order*, the Commission found that the "the loss of Comcast-NBCU programming . . . would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers" and that "[t]his is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes from other sources."[124] Is there any basis to reach a different conclusion with respect to satellite-delivered programming affiliated with other cable operators?

36. We ask commenters contending that access to certain satellite-delivered, cable-affiliated programming remains necessary to preserve and protect competition in the video distribution market to present reliable, empirical data supporting their positions, rather than merely labeling such programming as "must have." While the Commission has recognized that some satellite-delivered, cable-affiliated programming has substitutes and that exclusive contracts involving such programming are unlikely to impact competition,[125] are there certain categories of programming, such as RSNs, that we can presume have no close substitutes and that are necessary for competition?[126] Does the wide variation in the

[120] *See infra*, Appendix B, Table 1 and Appendix C, Table 1.

[121] *See supra* n.90.

[122] *See infra*, Appendix B, Table 1 and Appendix C, Table 1.

[123] *2007 Extension Order*, 22 FCC Rcd at 17816, ¶ 38 (quoting *2002 Extension Order*, 17 FCC Rcd at 12139, ¶ 33).

[124] *Comcast/NBCU Order*, 26 FCC Rcd at 4254, ¶ 36.

[125] *See 2007 Extension Order*, 22 FCC Rcd at 17816, ¶ 38; *see also Adelphia Order*, 21 FCC Rcd at 8279, ¶ 169 (concluding that the record did not indicate that an MVPD's lack of access to terrestrially delivered non-sports regional programming would harm competition or consumers).

[126] *See infra* ¶¶ 72-80 (seeking comment on whether to retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming).

importance and substitutability of satellite-delivered, cable-affiliated programming call for a case-by-case or categorical assessment of programming, rather than a broad rule that applies to all programming equally?

37. We also seek comment on whether a sunset of the exclusive contract prohibition would result in increased vertical integration in the video marketplace. If cable operators are permitted to enter into exclusive contracts with satellite-delivered, cable-affiliated programmers, will this result in the acquisition of existing programming networks by cable operators, thereby increasing vertical integration? How can we accurately predict any such expected increase as we assess whether to retain, sunset, or relax the exclusive contract prohibition? Are cable operators more likely to acquire established networks that provide popular and non-substitutable programming, rather than creating new networks or investing in fledgling networks? Are there certain categories of programming networks that are more likely to be acquired or launched by cable operators? For example, we note that TWC recently announced that it will launch two RSNs in 2012 featuring the games of the Los Angeles Lakers, including the first Spanish-language RSN.[127] Are cable operators expected to make further investments in RSNs in the future, especially if the exclusive contract prohibition were to sunset?

b. Incentive

38. In evaluating whether vertically integrated programmers retain the incentive to favor their affiliated cable operators over competitive MVPDs, the Commission analyzes "whether there continues to be an economic rationale for vertically integrated programmers to engage in exclusive agreements with cable operators that will cause [] anticompetitive harms."[128] The Commission has explained that, if a vertically integrated cable operator withholds programming from competitors, it can recoup profits lost at the upstream level (*i.e.*, lost licensing fees and advertising revenues) by increasing the number of subscribers of its downstream MVPD division.[129] 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."[130] Moreover, in the *2007 Extension Order*, the Commission provided an empirical analysis demonstrating that the profitability of withholding increases as the number of television households passed by a vertically integrated cable operator increases in a given market area, such as through clustering.[131]

39. The Commission concluded in the *2007 Extension Order* that market developments since 2002 did not yet support the lifting of the exclusive contract prohibition, but "there nevertheless may come a point when these developments will be sufficient to allow the prohibition to sunset."[132] Similarly, in upholding the *2007 Extension Order*, the D.C. Circuit stated its expectation that, if the market continued evolving rapidly, the Commission could soon allow the exclusive contract prohibition to sunset, which Congress intended to occur at some point.[133] We seek comment on whether now, almost

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[127] *See Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season* (Feb. 14, 2011), available at: http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight.

[128] *2007 Extension Order*, 22 FCC Rcd at 17820, ¶ 43 (citing *2002 Extension Order*, 17 FCC Rcd at 12139-40, ¶ 35).

[129] *See Adelphia Order*, 21 FCC Rcd at 8256, ¶ 117*; see also 2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53; *2002 Extension Order*, 17 FCC Rcd at 12140, ¶ 36.

[130] *2007 Extension Order*, 22 FCC Rcd at 17827-29, ¶ 53.

[131] *See id.* at 17831-32, ¶¶ 56-59 and 17883-91, Appendix C.

[132] *Id.* at 17810, ¶ 29.

[133] *See Cablevision I*, 597 F.3d at 1314.

five years since the most recent extension of the exclusive contract prohibition, we have reached such a point.

40. As set forth in Appendix A, the percentage of MVPD subscribers nationwide attributable to cable operators has fallen since 2007, from an estimated 67 percent to approximately 58.5 percent today.[134] Is there a certain market share threshold that, if reached, will render it unlikely for satellite-delivered, cable-affiliated programmers to withhold national networks from competitive MVPDs? We ask commenters to provide empirical analyses to support their positions. Has the decline in cable market share benefited consumers, such as through lower prices, or in some other way?[135] If not, does that suggest that the level of competition in the video distribution market has not reached a point where the exclusive contract prohibition should sunset, or is the price of cable offerings determined by other factors?

41. We also seek comment on how the current state of cable system clusters and cable market share in regional markets should affect our decision on whether to retain, sunset, or relax the exclusive contract prohibition. On a regional basis, the market share held by cable operators in DMAs varies considerably, from a high in the 80 percent range to a low in the 20 percent range.[136] In some major markets, such as New York, Philadelphia, and Boston, the share of MVPD subscribers attributable to cable operators far exceeds the national cable market share of 67 percent deemed significant in the *2007 Extension Order*.[137] In other DMAs, such as Dallas, Denver, and Phoenix, data indicate that the share of MVPD subscribers attributable to cable operators is below 50 percent.[138] How should this variation in regional market shares impact our analysis? Does this wide variation in cable market share on a regional and local basis call for a more granular assessment of the continued need for an exclusive contract prohibition in individual markets, rather than a broad rule that applies to all markets equally?[139]

42. The Commission stated in the *2002 Extension Order* that "clustering, accompanied by an increase in vertically integrated regional programming networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."[140] We seek comment on whether this conclusion remains valid today. In the *2007 Extension Order*, the Commission found that the cable industry had continued to form regional clusters since the *2002 Extension Order*.[141] We note that a decrease in the amount of regional clustering could decrease the market share of individual cable operators within the footprints of regional programming, which would create fewer opportunities to implement exclusive arrangements.

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[134] *See infra*, Appendix A.

[135] *See 2010 Program Access Order*, 25 FCC Rcd at 762-63, ¶ 26 n.91 (noting that, although competitors have entered the video distribution market, there is evidence that cable prices have risen in excess of inflation) (citing *2007 Extension Order,* 22 FCC Rcd at 17826-27, ¶ 50).

[136] *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[137] *See 2007 Extension Order,* 22 FCC Rcd at 17827-29, ¶ 53; ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[138] *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma.

[139] *See infra* ¶¶ 69-71 (seeking comment on relaxing the exclusive contract prohibition by establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the prohibition on a market-by-market basis based on the extent of competition in the market).

[140] *2002 Extension Order*, 17 FCC Rcd at 12145, ¶ 47.

[141] *See 2007 Extension Order*, 22 FCC Rcd at 17830, ¶ 55.

Has the amount of regional clustering increased or decreased since the *2007 Extension Order*?[142] We seek comment on whether events since the *2007 Extension Order* mitigate or exacerbate the impact of clustering. In the *2007 Extension Order*, the Commission provided an empirical analysis demonstrating that the profitability of withholding increases as the number of television households passed by a vertically integrated cable operator increases in a given market area, such as through clustering.[143] The analysis examined two vertically integrated cable operators on a DMA-by-DMA basis.[144] Taking account of various factors, including the characteristics of the affiliated RSN and the profitability figures of the vertically integrated cable operator examined, the analysis identified multiple DMAs in which withholding would be profitable.[145] In those DMAs, the homes passed by the vertically integrated cable operator as a percentage of television households ranged from 60-80 percent.[146] We seek comment on this analysis and whether, based on current data, it continues to support retaining an exclusive contract prohibition, particularly in those markets where a vertically integrated cable operator passes a significant number of television households. We also note that the Commission in the *2007 Extension Order* performed an analysis that concluded that withholding of some nationally distributed programming networks could be profitable if as little as 1.9 percent of non-cable subscribers were to switch to cable as a result of the withholding.[147] We seek comment on this analysis and whether, based on current data, it continues to support retaining an exclusive contract prohibition for national programming networks.

43. Has the current state of horizontal consolidation in the cable industry increased or decreased incentives for anticompetitive foreclosure of access to vertically integrated programming? We note that the data in Appendix A indicate that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs has decreased from between 54 and 56.75 percent as stated in the *2007 Extension Order*[148] to approximately 42.8 percent today. What impact, if any, does this have on our review of the exclusive contract prohibition?

3. Impact on the Video Programming Market

44. We seek comment on how retaining, sunsetting, or relaxing the exclusive contract prohibition would impact the creation of new national, regional, and local programming and which of these options is most likely to increase programming diversity. What effect has the exclusive contract prohibition had on the incentives of incumbent cable operators to develop and produce video programming? Are incumbent cable operators less willing to invest in programming because they cannot enter into exclusive contracts and therefore must share their programming investment with their competitors?[149] In the *2007 Extension Order*, the Commission concluded that the extension of the

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[142] *See id.*

[143] *See id.* at 17831, ¶ 56 ("[T]he larger the share of television households in the market that is served by the [vertically integrated satellite cable programmer's ("VISCP")] cable affiliate (*i.e.*, the larger the ratio of homes passed by the VISCP's cable affiliate to total television households), the larger is the total number of switching subscribers that switch to the VISCP's cable affiliate (as opposed to switching to another cable operator), and the greater is the potential compensating gain to the VISCP and its cable affiliate."); *see also id.* at 17831-32, ¶¶ 57-59 and 17883-91, Appendix C.

[144] *See id.* at 17832, ¶¶ 56-59 and 17883-90, ¶¶ 1-20, Appendix C.

[145] *See id.* at 17832, ¶ 59 and 17890, ¶¶ 18-20, Appendix C.

[146] *See id.* at 17832, ¶ 59.

[147] *See id.* at 17827-29, ¶ 53 and 17890-91, ¶ 21, Appendix C.

[148] *See id.* at 17829, ¶ 54.

[149] *See Cablevision II*, 649 F.3d at 721 (stating that Congress "recogni[zed] that vertical integration and exclusive dealing arrangements are not always pernicious and, depending on market conditions, may actually be procompetitive").

exclusive contract prohibition would not create a disincentive for the creation of new programming.[150] In support of this finding, the Commission noted that, despite the exclusive contract prohibition, the number of programming networks, including cable-affiliated networks, had increased since 1994.[151] Is there any basis to conclude that the number of video programming networks, including cable-affiliated networks, would be even greater today if the exclusive contract prohibition had sunset earlier? Since the 2007 extension of the exclusive contract prohibition, has there been an increase or decrease in the development, promotion, and launch of new video programming services by incumbent cable operators? Would a sunset of the exclusive contract prohibition entice incumbent cable operators to invest in and launch new programming networks to compete with established networks, leading to greater diversity in the video programming market, or are incumbent cable operators more likely to acquire these established networks?

45. What effect has the exclusive contract prohibition had on the incentives of competitive MVPDs and non-MVPD-affiliated programmers to develop and produce video programming? In the *2007 Extension Order*, the Commission noted evidence that some competitive MVPDs had begun to invest in their own video programming, despite their ability to access satellite-delivered, cable-affiliated programming as a result of the exclusive contract prohibition.[152] To what extent have competitive MVPDs invested in their own video programming? In the *2007 Extension Order*, the Commission "caution[ed] competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition, including further investments in their own programming."[153] Have competitive MVPDs made further investments in their own programming since that time? If the exclusive contract prohibition were to sunset (wholly or partially), would competitive MVPDs be likely to increase their investment in video programming in order to ensure that they have a robust offering of programming to counteract any exclusive deals that incumbent cable operators might enter into with their affiliated programmers? We note that certain competitive MVPDs are currently subject to the exclusive contract prohibition, such as those that are cable operators or common carriers that provide video programming directly to subscribers.[154] Has the exclusive contract prohibition caused these competitive MVPDs to be less willing to invest in programming because they must share their programming investment with their competitors? Would a sunset of the exclusive contract prohibition entice these competitive MVPDs to invest in and launch new programming networks? Do competitive MVPDs have the resources to invest in creating their own video programming? If not, to the extent that certain satellite-delivered, cable-affiliated programming is withheld from competitive MVPDs, is it likely that non-MVPD-affiliated programming vendors will fill the void by creating competing programming to license to competitive MVPDs, thereby leading to even greater diversity in the video programming market? Are there certain categories of programming that cannot be replicated by either competitive MVPDs or non-MVPD-affiliated programming vendors? In the *2010 Program Access Order*, the Commission stated:

> 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

[150] *See 2007 Extension Order*, 22 FCC Rcd at 17836-37, ¶ 64.

[151] *See id.* ("[T]he number of vertically integrated satellite-delivered national programming networks has more than doubled since 1994 when the rule implementing the exclusive contract prohibition took effect and has continued to increase since 2002 when the Commission last examined the exclusive contract prohibition. Moreover, the number of national programming networks has increased by almost 400 percent since 1994 and by 80 percent since 2002.") (citations omitted).

[152] *See id.*

[153] *Id.* at 17810, ¶ 29.

[154] *See* 47 U.S.C. § 548(j).

> 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.[155]

While the Commission found that RSNs are non-replicable,[156] it concluded that local news and local community or educational programming is "readily replicable programming."[157] We seek comment on how the distinction between replicable and non-replicable content should impact our review of the exclusive contract prohibition.

4. Alternatives to Retaining the Exclusive Contract Prohibition as it Exists Today

46. As discussed in further detail below, to the extent the data do not support retaining the exclusive contract prohibition as it exists today, we seek comment on whether we can nonetheless preserve and protect competition in the video distribution market either by (i) sunsetting the prohibition in its entirety and relying solely on existing protections provided by the program access rules that will not sunset; or (ii) relaxing the exclusive contract prohibition, such as through removal of the prohibition on a market-by-market basis based on the extent of competition in the market or by retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming.

a. Sunsetting the Exclusive Contract Prohibition in its Entirety and Relying Solely on Existing Protections

47. As discussed above, the exclusive contract prohibition is just one of several protections that the program access rules afford to competitive MVPDs in their efforts to compete in the video distribution market.[158] Even if the exclusive contract prohibition were to sunset (wholly or partially[159]), these other existing protections will remain in effect. We seek comment on whether these existing protections are sufficient to preserve and protect competition in the video distribution market if the exclusive contract prohibition were to sunset and whether any additional safeguards should be adopted.

(i) Section 628(b) Complaints

48. The Act and the Commission's existing rules allow for the filing of complaints alleging a violation of Section 628(b) of the Act and Section 76.1001(a) of the Commission's rules.[160] These provisions require a complainant to establish three elements in order to demonstrate a violation: (i) the defendant is one of the three entities covered by these provisions (*i.e.*, a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor); (ii) the defendant has engaged in an "unfair act"; and (iii) the "purpose or effect" of the unfair act is to "significantly hinder or prevent" an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[161] Even if the exclusive

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[155] *2010 Program Access Order*, 25 FCC Rcd at 750-51, ¶ 9.

[156] *See id.* at 750, ¶ 8 and 782-83, ¶ 52.

[157] *Id.* at 750, ¶ 8 and 781-82, ¶ 51 n.200.

[158] *See supra* ¶ 7.

[159] *See infra* ¶¶ 69-71 (seeking comment on relaxing the exclusive contract prohibition by establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the prohibition on a market-by-market basis based on the extent of competition in the market).

[160] *See* 47 U.S.C. §§ 548(b), (d); 47 C.F.R. §§ 76.1001(a), 76.1003(a), (c)(7).

[161] *See* 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a).