

Root Sports Northwest (formerly DIRECTV Sports Net Northwest)
Root Sports Northwest HD
Root Sports Pittsburgh (formerly DIRECTV Sports Net Pittsburgh)
Root Sports Pittsburgh HD
Root Sports Rocky Mountain (formerly DIRECTV Sports Net Rocky Mountain)
Root Sports Rocky Mountain HD
SportSouth
SportSouth HD
Sports Time Ohio
Sports Time Ohio HD
Sun Sports
Sun Sports HD
YES Network
YES Network HD

## APPENDIX D

## Potential Rule Amendments

In the *NPRM*, the Commission seeks comment on alternative approaches to the exclusive contract prohibition -- retaining, sunseting, or relaxing (either through market-based petitions or retaining a prohibition for RSNs). This Appendix lists potential rule amendments based on each of these alternatives.

### I. Retaining the Exclusive Contract Prohibition

For ease of review, Sections 76.1002 and 76.1003 are restated below showing potential amendments in **bold/underline** (for additions) or ~~strike through~~ (for deletions).

#### PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1002 is amended by revising paragraph (c) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

\* \* \* \* \*

(c) Exclusive contracts and practices--

\* \* \*

(3) Specific arrangements: Subdistribution agreements--

(i) **Unservd and s**Served areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with 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, with respect to areas served **or unserved** by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(**ii**)(~~iii~~) of this section.

(ii) Limitations on subdistribution agreements ~~in served areas~~. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such

programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

\* \* \*

(6) Sunset provision. The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, ~~2012~~2017, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

\* \* \* \* \*

3. Section 76.1003 is amended by revising paragraph (e) to read as follows:

§ 76.1003 Program access proceedings.

\* \* \* \* \*

(e) Answer.

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, **provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a) of this part.** To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

\* \* \* \* \*

## II. Sunsetting the Exclusive Contract Prohibition

For ease of review, Sections 76.1002, 76.1003, 76.1004, and 76.1507 are restated below showing potential amendments in **bold/underline** (for additions) or ~~strikethrough~~ (for deletions).

### PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1002 is amended by revising paragraph (c) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

\* \* \* \* \*

(c) Exclusive contracts and practices--

(1) Unserved areas. No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents 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 October 5, 1992.

(2) ~~[Reserved] Served areas. No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with 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, with respect to areas served by a cable operator, unless the Commission determines in accordance with paragraph (e)(4) of this section that such contract, practice, activity or arrangement is in the public interest.~~

(3) Specific arrangements: Subdistribution agreements--

(i) ~~Served~~**Unserved** areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with 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 **for distribution to persons in areas not served by a cable operator as of October 5, 1992,** with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)~~(ii)(iii)~~ of this section.

(ii) Limitations on subdistribution agreements in ~~served~~**unserved** areas. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(5) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(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.

(5) ~~Prior~~ Commission approval required. Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest ~~seeking to enforce or enter into an exclusive contract in an area served by a cable operator~~ must submit a "Petition for Exclusivity" to the Commission ~~for approval~~ **and receive approval from the Commission to preclude the filing of complaints alleging that an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, with respect to areas served by a cable operator violates section 628(b) of the Communications Act of 1934, as amended, and § 76.1001(a) of this part, or section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section.**

(i) The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

(ii) Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

(iii) The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

~~(6) Sunset provision. The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.~~

\* \* \* \* \*

3. Section 76.1003 is amended by revising paragraph (e) to read as follows:

§ 76.1003 Program access proceedings.

\* \* \* \* \*

(e) Answer.

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, **provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a) of this part.** To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

\* \* \* \* \*

4. Section 76.1004 is amended by revising paragraph (b) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this section, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company).

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers ~~in such a way as follows:~~ **No common carrier**

or its affiliate that provides video programming directly to subscribers shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest, or any satellite broadcasting vendor in which a common carrier or its affiliate has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992 that such common carrier or its affiliate shall be generally restricted from entering into an exclusive arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest or a satellite broadcast programming vendor in which a common carrier or its affiliate has an attributable interest unless the arrangement pertains to an area served by a cable system as of October 5, 1992, and the Commission determines in accordance with Section § 76.1002(c)(4) that such arrangement is in the public interest.

5. Section 76.1507 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.1507 Competitive access to satellite cable programming

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to an operator of an open video system and its affiliate which provides video programming on its open video system, except as limited by paragraph (a) (1)–(3) of this section. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall also apply to any satellite cable programming vendor in which an open video system operator has an attributable interest, except as limited by paragraph (a) (1)–(3) of this section.

(1) Section 76.1002(c)(1) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which an open video system operator has an attributable interest, or any satellite broadcasting vendor in which an open video system operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) ~~[Reserved] Section 76.1002(c)(2) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with § 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.~~

(3) Section 76.1002(c)(3)(i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: ~~(i) Unreserved~~

~~areas.~~ No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992 **unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(ii) of this part.**

~~(ii) Served areas. No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(iii).~~

(b) No open video system programming provider in which a cable operator has an attributable interest shall ~~:(1) E~~ engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents 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 broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

~~(2) Enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.~~

### III. Relaxing the Exclusive Contract Prohibition – Market-Based Petitions

For ease of review, Sections 76.1002, 76.1003, 76.1004, and 76.1507 are restated below showing potential amendments in **bold/underline** (for additions) or ~~strikethrough~~ (for deletions).

#### PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1002 is amended by revising paragraph (c) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

\* \* \* \* \*

(c) Exclusive contracts and practices--

(1) Unserved areas. No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents 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 October 5, 1992.

(2) Served areas. No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with 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, with respect to areas served by a cable operator, unless:

**(i)** the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest; **or**

**(ii)** such contract, practice, activity or arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to paragraph (c)(7) of this section.

(3) Specific arrangements: Subdistribution agreements--

(i) **Unserved and s**Served areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with 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, with respect to areas served **or unserved** by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)**(ii)**~~(iii)~~ of this section.

(ii) Limitations on subdistribution agreements ~~in served areas~~. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a

competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

**(iii) Exceptions. Paragraph (c)(3) of this section shall not apply in a geographic area where a petition for sunset has been granted pursuant to paragraph (c)(7) of this section.**

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(2) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(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.

(5) ~~Prior-Commission approval required.~~ **(i) Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a "Petition for Exclusivity" to the Commission for approval and receive approval from the Commission:**

**(A) prior to enforcing or entering into an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, subject to paragraph (c)(2) of this section that pertains to a geographic area for which a petition for sunset has not been granted pursuant to paragraph (c)(7) of this section; and**

**(B) to preclude the filing of complaints alleging that an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, with respect to areas served by a cable operator violates section 628(b) of the Communications Act of 1934, as amended, and § 76.1001(a) of this part, or section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section.**

(ii) The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

(iii) Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

(iv) The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

(6) ~~**[Reserved] Sunset provision. The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.**~~

**(7) Petition for Sunset. Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to remove the prohibition on exclusive contracts and practices, activities or arrangements tantamount to an exclusive contract set forth in paragraph (c)(2) of this section may submit a "Petition for Sunset" to the Commission.**

**(i) The petition for sunset shall specify the geographic area for which a sunset of the prohibition set forth in paragraph (c)(2) of this section is sought and shall include a statement setting forth the petitioner's reasons to support a finding that such prohibition is not necessary to preserve and protect competition and diversity in the distribution of video programming in the geographic area specified.**

**(ii) Any competing multichannel video programming distributor or other interested party affected by the petition for sunset may file an opposition to the petition within forty-five (45) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. Any such formal opposition must be served on the petitioner on the same day on which it is filed with the Commission.**

**(iii) The petitioner may file a response within fifteen (15) days of receipt of any formal opposition.**

**(iv) If the Commission finds that the prohibition is not necessary to preserve and protect competition and diversity in the distribution of video programming, then the prohibition set forth in paragraph (c)(2) of this section shall no longer apply in the geographic area specified in the decision of the Commission.**

\* \* \* \* \*

3. Section 76.1003 is amended by revising paragraph (e) to read as follows:

§ 76.1003 Program access proceedings.

\* \* \* \* \*

(e) Answer.

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, **provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a) of this part.** To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

\* \* \* \* \*

4. Section 76.1004 is amended by revising paragraph (b) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this section, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company).

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers in such a way that such common carrier or its affiliate shall be generally restricted from entering into an exclusive arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest or a satellite broadcast programming vendor in which a common carrier or its affiliate has an attributable interest, unless the arrangement pertains to an area served by a cable system as of October 5, 1992, and:

**(1) the Commission determines in accordance with Section § 76.1002(c)(4) that such arrangement is in the public interest; or**

**(2) such arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to § 76.1002(c)(7) of this part.**

5. Section 76.1507 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.1507 Competitive access to satellite cable programming.

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to an operator of an open video system and its affiliate which provides video programming on its open video system, except as limited by paragraph (a)(1)–(3) of this section. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall also apply to any satellite cable programming vendor in which an open video system operator has an attributable interest, except as limited by paragraph (a) (1)–(3) of this section.

(1) Section 76.1002(c)(1) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which an open video system operator has an attributable interest, or any satellite broadcasting vendor in which an open video system operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) Section 76.1002(c)(2) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor, unless:

(i) the Commission determines in accordance with § 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest; or

(ii) such a contract, practice, activity or arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to § 76.1002(c)(7) of this part.

(3) Section 76.1002(c)(3)(i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows:

~~(i) Unserved areas. No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.~~

~~(ii) Served areas. No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest, with~~

respect to areas served **or unserved** by a cable operator, unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(~~ii~~), **except as provided in § 76.1002(c)(3)(iii)**.

(b) No open video system programming provider in which a cable operator has an attributable interest shall:

(1) Engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents 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 broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) Enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor, unless:

(i) the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest; or

(ii) such a contract, practice, activity or arrangement pertains to a geographic area for which a petition for sunset has been granted pursuant to § 76.1002(c)(7) of this part.

#### IV. Relaxing the Exclusive Contract Prohibition – Retaining the Prohibition for RSNs Only

For ease of review, Sections 76.1000, 76.1002, 76.1003, 76.1004, and 76.1507 are restated below showing potential amendments in **bold/underline** (for additions) or ~~strike through~~ (for deletions).

#### PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1000 is amended by adding new paragraph (n) to read as follows:

§ 76.1000 Definitions.

\* \* \* \* \*

**(n) Regional Sports Network. The term “Regional Sports Network” means video programming 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 paragraph (n)(1) of this section, or 10 percent of the regular season games of at least one sports team that meets the criteria of paragraph (n)(1) of this section.**

3. Section 76.1002 is amended by revising paragraph (c) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

\* \* \* \* \*

(c) Exclusive contracts and practices--

(1) Unserved areas. No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents 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 October 5, 1992.

(2) Served areas. No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming **that meets the definition of a Regional Sports Network as defined in §**

**76.1000(n) of this part** with 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, with respect to areas served by a cable operator, unless the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest.

(3) Specific arrangements: Subdistribution agreements--

(i) **Unserved areas.** No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with 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, ~~with respect to areas served by a cable operator~~ **for distribution to persons in areas not served by a cable operator as of October 5, 1992**, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.

**(ii) Served areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part with 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, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.**

(iii) Limitations on subdistribution agreements ~~in served areas~~. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(2) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(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.

(5) ~~Prior~~ Commission approval required. **(i)** Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest ~~seeking to enforce or enter into an exclusive contract in an area served by a cable operator~~ must submit a "Petition for Exclusivity" to the Commission ~~for approval~~ **and receive approval from the Commission:**

**(A) prior to enforcing or entering into an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, subject to paragraph (c)(2) of this section; and**

**(B) to preclude the filing of complaints alleging that an exclusive contract, or practice, activity or arrangement tantamount to an exclusive contract, with respect to areas served by a cable operator violates section 628(b) of the Communications Act of 1934, as amended, and § 76.1001(a) of this part, or section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section.**

**(ii)** The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

**(iii)** Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

**(iv)** The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

(6) Sunset provision. The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, ~~2012~~**2017**, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

\* \* \* \* \*

4. Section 76.1003 is amended by revising paragraph (e) to read as follows:

§ 76.1003 Program access proceedings.

\* \* \* \* \*

(e) Answer.

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, **provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a) of this part.** To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

\* \* \* \* \*

5. Section 76.1004 is amended by revising paragraph (b) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this section, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company).

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers in such a way that such common carrier or its affiliate shall be generally restricted from entering into an exclusive arrangement for satellite cable programming or satellite broadcast programming **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** with a satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest or a satellite broadcast programming vendor in which a common carrier or its affiliate has an attributable interest, unless the arrangement pertains to an area served by a cable system as of October 5, 1992, and the Commission determines in accordance with Section § 76.1002(c)(4) that such arrangement is in the public interest.

6. Section 76.1507 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.1507 Competitive access to satellite cable programming.

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to an operator of an open video system and its affiliate which provides video programming on its open video system, except as limited by paragraph (a)(1)–(3) of this section. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall also apply to any satellite cable programming vendor in which an open video system operator has an attributable interest, except as limited by paragraph (a) (1)–(3) of this section.

(1) Section 76.1002(c)(1) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which an open video system operator has an attributable interest, or any satellite broadcasting vendor in which an open video system operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) Section 76.1002(c)(2) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with § 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

(3) Section 76.1002(c)(3)(i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows:

(i) Unserved areas. No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992 **unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(iii) of this part.**

(ii) Served areas. No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(iii).

(b) No open video system programming provider in which a cable operator has an attributable interest shall:

(1) Engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents 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 broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) Enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming **that meets the definition of a Regional Sports Network as defined in § 76.1000(n) of this part** with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

## APPENDIX E

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking* (“NPRM”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rule Changes**

2. We issue the *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.

3. 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”).<sup>4</sup> 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.<sup>5</sup> The exclusive contract prohibition applies only to programming which is delivered via satellite; it does not apply to programming which is

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> 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).

<sup>5</sup> 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”).

delivered via terrestrial facilities.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

4. 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.”<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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

---

<sup>6</sup> 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 the *NPRM*, we refer to “satellite cable programming” and “satellite broadcast programming” collectively as “satellite-delivered programming.”

<sup>7</sup> 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 I*”).

<sup>8</sup> 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 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Cir.).

<sup>9</sup> 47 U.S.C. § 548(c)(5).

<sup>10</sup> 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”).

<sup>11</sup> See *id.* at 12161, ¶ 80.

<sup>12</sup> See generally *2007 Extension Order*. We discuss in further detail in the *NPRM* 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 *NPRM* ¶¶ 15-16.

prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.<sup>13</sup>

5. Accordingly, in this *NPRM*, we initiate the third review of the necessity of the exclusive contract prohibition. In the *NPRM*, 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, sunseting, 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:

- Sunseting 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 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.

6. In addition, we seek comment in the *NPRM* 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.<sup>14</sup> 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.

## **B. Legal Basis**

7. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 548.

<sup>13</sup> See *2007 Extension Order*, 22 FCC Rcd at 17846, ¶ 81.

<sup>14</sup> See generally *1993 Program Access Order*.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

8. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>15</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>16</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>17</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>18</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

9. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>19</sup> The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”<sup>20</sup> Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>21</sup> Census Bureau data for 2007, which now supersedes data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>22</sup>

10. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is

---

<sup>15</sup> 5 U.S.C. § 603(b)(3).

<sup>16</sup> 5 U.S.C. § 601(6).

<sup>17</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>18</sup> 15 U.S.C. § 632.

<sup>19</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>20</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>21</sup> *See id.*

<sup>22</sup> *See* <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.<sup>23</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>24</sup>

11. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.<sup>25</sup> Industry data indicate that all but ten cable operators nationwide are small under this size standard.<sup>26</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>27</sup> Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000-19,999 subscribers.<sup>28</sup> Thus, under this standard, most cable systems are small.

12. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>29</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>30</sup> Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.<sup>31</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>32</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

<sup>23</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>24</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>25</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>26</sup> See BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

<sup>27</sup> 47 C.F.R. § 76.901(c).

<sup>28</sup> See TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

<sup>29</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>30</sup> 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>31</sup> See BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

<sup>32</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.901(f).

13. *Direct Broadcast Satellite (“DBS”) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS, by exception, is now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”<sup>33</sup> which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>34</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>35</sup> Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (“EchoStar”) (marketed as the DISH Network).<sup>36</sup> Each currently offers subscription services. DIRECTV<sup>37</sup> and EchoStar<sup>38</sup> each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

14. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”<sup>39</sup> which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.<sup>40</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had

<sup>33</sup> See 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of “Wired Telecommunications Carriers” is in paragraph 9, above.

<sup>34</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>35</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>36</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) (“13th Annual Report”). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (“Dominion”) (marketed as Sky Angel). See Public Notice, “Policy Branch Information; Actions Taken,” Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

<sup>37</sup> As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. See *13th Annual Report*, 24 FCC Rcd at 687, Table B-3. Currently, DIRECTV serves approximately 19.87% of MVPD subscribers nationwide. See *supra* App. A at n. 9.

<sup>38</sup> As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. See *13th Annual Report*, 24 FCC Rcd at 687, Table B-3. Currently, DISH Network serves approximately 13.99% of MVPD subscribers nationwide. See *supra* App. A at n.9.

<sup>39</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>40</sup> See *id.*

employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>41</sup>

15. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.<sup>42</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>43</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>44</sup>

16. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).<sup>45</sup> In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>46</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>47</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted

<sup>41</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>42</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>43</sup> See *id.*

<sup>44</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>45</sup> *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

<sup>46</sup> 47 C.F.R. § 21.961(b)(1).

<sup>47</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

Auction 86, the sale of 78 licenses in the BRS areas.<sup>48</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>49</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>50</sup> Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

17. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.<sup>51</sup> Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."<sup>52</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>53</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>54</sup>

18. *Fixed Microwave Services.* Microwave services include common carrier,<sup>55</sup> private-operational fixed,<sup>56</sup> and broadcast auxiliary radio services.<sup>57</sup> They also include the Local Multipoint

<sup>48</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

<sup>49</sup> *Id.* at 8296.

<sup>50</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

<sup>51</sup> The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

<sup>52</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), [www.census.gov/naics/2007/def/ND517110.HTM#N517110](http://www.census.gov/naics/2007/def/ND517110.HTM#N517110).

<sup>53</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>54</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>55</sup> See 47 C.F.R. Part 101, Subparts C and I.

<sup>56</sup> See 47 C.F.R. Part 101, Subparts C and H.

Distribution Service (LMDS),<sup>58</sup> the Digital Electronic Message Service (DEMS),<sup>59</sup> and the 24 GHz Service,<sup>60</sup> where licensees can choose between common carrier and non-common carrier status.<sup>61</sup> At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.<sup>62</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>63</sup> For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>64</sup> Of those 1,383, 1,368 had fewer than 1000 employees, and 15 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

19. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>65</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>66</sup> OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."<sup>67</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>68</sup> Census Bureau data for 2007,

(Continued from previous page)

<sup>57</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

<sup>58</sup> See 47 C.F.R. Part 101, Subpart L.

<sup>59</sup> See 47 C.F.R. Part 101, Subpart G.

<sup>60</sup> See *id.*

<sup>61</sup> See 47 C.F.R. §§ 101.533, 101.1017.

<sup>62</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517210.

<sup>63</sup> See *id.* The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>64</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009); <http://www.census.gov/econ/industry/ec07/a517210.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>65</sup> 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

<sup>66</sup> See 47 U.S.C. § 573.

<sup>67</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>68</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>69</sup> In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>70</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>71</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

20. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”<sup>72</sup> The SBA has developed a small business size standard for this category, which is: all such firms having \$15 million dollars or less in annual revenues.<sup>73</sup> To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year.<sup>74</sup> Of that number, 325 operated with annual revenues of \$ 9,999,999 million dollars or less.<sup>75</sup> Seventy-one (71) operated with annual revenues of between \$10 million and \$100 million or more.<sup>76</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

21. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>77</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>78</sup> We have therefore included small

---

<sup>69</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>70</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsccr.html>.

<sup>71</sup> See *13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>72</sup> U.S. Census Bureau, 2007 NAICS Definitions, “515210 Cable and Other Subscription Programming”; <http://www.census.gov/naics/2007/def/ND515210.HTM#N515210>.

<sup>73</sup> 13 C.F.R. § 121.201, 2007 NAICS code 515210.

<sup>74</sup> See <http://www.census.gov/econ/industry/ec07/a515210.htm> (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 15 U.S.C. § 632.

incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

22. *Incumbent Local Exchange Carriers (“LECs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>79</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>80</sup>

23. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>81</sup> Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.<sup>82</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

24. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”<sup>83</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues.<sup>84</sup> To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from

(Continued from previous page) \_\_\_\_\_

<sup>78</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>79</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>80</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>81</sup> 13 C.F.R. § 121.201, 2007 NAICS code 517110.

<sup>82</sup> See <http://www.census.gov/econ/industry/ec07/a517110.htm> (Subject Series: Establishment and Firm Size (national) – Table 5: Employment Size of Firms for the U.S).

<sup>83</sup> U.S. Census Bureau, 2007 NAICS Definitions, “51211 Motion Picture and Video Production”; <http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211>.

<sup>84</sup> 13 C.F.R. § 121.201, 2007 NAICS code 512110.

the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.<sup>85</sup> Of these, 8995 had annual receipts of \$24,999,999 or less, and 100 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.<sup>86</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

25. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”<sup>87</sup> We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues.<sup>88</sup> To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.<sup>89</sup> Of these, 434 had annual receipts of \$24,999,999 or less, and 16 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.<sup>90</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

26. Certain proposed rule changes discussed in the *NPRM* would affect reporting, recordkeeping, or other compliance requirements. First, even if the exclusive contract prohibition were to sunset (wholly or partially), the Commission recognizes that other existing protections will remain in effect.<sup>91</sup> Namely, an MVPD would still have the option to file a complaint with the Commission alleging that an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer involving satellite-delivered, cable-affiliated programming is an unfair act in violation of Section 628(b) of the Act and Section 76.1001(a) of the Commission’s rules.<sup>92</sup> An MVPD may also have the option of filing a discrimination complaint under Section 628(c)(2)(B) of the Act, which would provide some protection for competitive MVPDs should the exclusive contract prohibition sunset (wholly or partially).<sup>93</sup> Further, the *NPRM* seeks comment on the extent to which undue influence complaints under Section 628(c)(2)(A) may also provide some protection for competitive MVPDs should the exclusive contract

<sup>85</sup> See <http://www.census.gov/econ/industry/ec07/a51211.htm> (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

<sup>86</sup> *Id.*

<sup>87</sup> See U.S. Census Bureau, 2007 NAICS Definitions, “51212 Motion Picture and Video Distribution”; <http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212>.

<sup>88</sup> 13 C.F.R. § 121.201, 2007 NAICS code 512120.

<sup>89</sup> See <http://www.census.gov/econ/industry/ec07/a51212.htm> (Subject Series: Establishment and Firm Size (national) – Table 4: Revenue Size of Firms for the U.S).

<sup>90</sup> *Id.*

<sup>91</sup> *NPRM* at ¶ 47.

<sup>92</sup> *Id.* at ¶¶ 48-57.

<sup>93</sup> *Id.* at ¶¶ 58-66.

prohibition sunset (wholly or partially).<sup>94</sup> Second, rather than sunsetting the exclusive contract prohibition in its entirety, the Commission seeks comment on whether it should instead relax the exclusivity prohibition, such as by establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can seek to remove the exclusive contract prohibition on a market-by-market basis based on the extent of competition in the market.<sup>95</sup> The Commission seeks comment on the details of any such process for removing the exclusive contract prohibition on a market-by-market basis.<sup>96</sup> Third, the Commission proposes to adopt a 45-day answer period in complaint proceedings alleging a violation of Section 628(b).<sup>97</sup> Fourth, the *NPRM* seeks comment on how the Commission might improve its rules and procedures to avoid impeding the filing of legitimate complaints alleging that particular volume discounts violate Section 628(c)(2)(B) of the Act.<sup>98</sup> Specifically, the Commission asks whether satellite-delivered, cable-affiliated programmers should be required to demonstrate in response to a complaint the increase in advertising revenues resulting from licensing programming to a larger MVPD and how this increase justifies the volume discount provided to the larger MVPD relative to the complaint.<sup>99</sup>

**E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered**

27. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>100</sup>

28. First, regarding the potential sunset or relaxation of the exclusive contract prohibition, the *NPRM* seeks comment on what impact the retention of the exclusive contract prohibition has had on the general state of competition among MVPDs in the video distribution market.<sup>101</sup> More specifically, the *NPRM* asks how a sunset or relaxation of the exclusive contract prohibition would affect competition in the video distribution market, and how a sunset or relaxation would affect the potential entry of new competitors in the market.<sup>102</sup> The *NPRM* also seeks comment on how the current state of cable system clustering and cable market share in regional markets should affect the Commission's decision on whether to retain, sunset, or relax the exclusive contract prohibition.<sup>103</sup> Further, it asks whether the current state of horizontal consolidation in the cable industry has increased or decreased incentives for

---

<sup>94</sup> *Id.* at ¶ 67.

<sup>95</sup> *Id.* at ¶¶ 69-71.

<sup>96</sup> *Id.* at ¶ 70.

<sup>97</sup> *Id.* at ¶ 97.

<sup>98</sup> *Id.* at ¶ 100.

<sup>99</sup> *Id.*

<sup>100</sup> 5 U.S.C. § 603(c).

<sup>101</sup> *NPRM* at ¶ 32.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at ¶ 41.

anticompetitive foreclosure of access to vertically integrated programming.<sup>104</sup> The *NPRM* asks whether competitive MVPDs have the resources to invest in creating their own video programming.<sup>105</sup> Overall, the Commission's analysis is focused on whether the exclusive contract prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."<sup>106</sup>

29. Second, to the extent the exclusive contract prohibition were to sunset (wholly or partially), the *NPRM* seeks comment on ways to reduce burdens on both complainants and defendants in connection with complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b) (or Section 628(c)(2)(B)) of the Act.<sup>107</sup>

30. Third, regarding the potential changes to our procedural rules governing program access complaints, we find that the changes would benefit regulated entities, including those that are small entities. Specifically, small entities may benefit from the proposed lengthier 45-day period within which to file an answer.<sup>108</sup> They may also benefit from rules addressing potentially discriminatory volume discounts and uniform price increases.<sup>109</sup>

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

31. None

---

<sup>104</sup> *Id.* at ¶ 43.

<sup>105</sup> *Id.* at ¶ 45.

<sup>106</sup> 47 U.S.C. § 548(c)(5).

<sup>107</sup> *NPRM* at ¶¶ 55-57.

<sup>108</sup> *Id.* at ¶ 97.

<sup>109</sup> *Id.* at ¶¶ 98-102.