

years, provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission.”³⁰⁷

93. These conditions are scheduled to expire in July 2012.³⁰⁸ Depending on whether and how we revise the exclusive contract prohibition, and if we do so before these conditions expire, we may need to modify these exclusivity conditions to conform to our revised rules. We envision four alternative scenarios. First, to the extent that we retain the exclusive contract prohibition in its entirety as it exists today, including for RSNs, there will be no need to modify the exclusivity conditions because the program access rules will remain the same. Second, to the extent that we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated “must have” programming only,³⁰⁹ there will be no need to modify the exclusivity conditions because the exclusive contract prohibition will remain the same with respect to RSNs. Third, to the extent we establish 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,³¹⁰ and grant of such a petition includes RSNs,³¹¹ then we would expect to modify the exclusivity conditions to provide that Covered RSNs in markets covered by such a petition (if granted) will no longer be subject to these exclusivity conditions. If the grant of such a petition does not include RSNs, however, there will be no need to modify the exclusivity conditions because the exclusive contract prohibition will remain the same with respect to RSNs.³¹² Fourth, to the extent we sunset the exclusive contract prohibition in its entirety, including for RSNs, then we would expect to modify the exclusivity conditions to provide that Covered RSNs will no longer be subject to these exclusivity conditions; rather, exclusive contracts for Covered RSNs may be assessed on a case-by-case basis in response to a program access complaint alleging a violation of Section 628(b)³¹³ (and, potentially, Section 628(c)(2)(B)³¹⁴). We seek comment on this interpretation.

b. *Liberty Media Order Merger Conditions*

94. Pursuant to merger conditions adopted in the *Liberty Media Order*, certain programmers affiliated with Liberty Media and DIRECTV are subject to the following conditions (the “exclusivity conditions”), among others:

- (i) “Liberty Media shall not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD. Liberty Media shall continue to make such services available to all MVPDs on a non-exclusive basis . . .”,³¹⁵

³⁰⁷ See *id.* at 8336, Appendix B, § B.1.d (emphasis added); see also *id.* at 8274, ¶ 157.

³⁰⁸ See *id.* at 8336, Appendix B, § B.1.d.

³⁰⁹ See *supra* ¶¶ 72-80.

³¹⁰ See *supra* ¶¶ 69-71.

³¹¹ See *supra* ¶ 80.

³¹² See *id.*

³¹³ See *2010 Program Access Order*, 25 FCC Rcd at 792-93, ¶ 69 n.252.

³¹⁴ See *supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

³¹⁵ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, News Corporation, and The DIRECTV Group, Inc., Transferors, to Liberty Media Corporation., Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3340-41, Appendix B, § III.1 (2008) (“*Liberty Media Order*”). The conditions state that the term “Liberty Media” includes “any entity or program rights holder in which Liberty Media or John Malone holds an (continued....)”

(ii) "DIRECTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder."³¹⁶

(iii) "As long as Liberty Media holds an attributable interest in DIRECTV, DIRECTV will deal with any Affiliated Program Rights Holder with respect to programming services the Affiliated Program Rights Holder controls as a vertically integrated programmer subject to the program access rules."³¹⁷

(iv) "These conditions will apply to Liberty Media, DIRECTV, and any Affiliated Program Rights Holder until the later of a determination by the Commission that Liberty Media no longer holds an attributable interest in DIRECTV or the Commission's program access rules no longer remain in effect (provided that *if the program access rules are modified these commitments shall be modified, as the Commission deems appropriate, to conform to any revised rules adopted by the Commission*)."³¹⁸

95. These particular *Liberty Media Order* conditions differ from similar conditions in the *Adelphia Order* in that (i) they apply not only to RSNs, but to both national and regional programming services,³¹⁹ and (ii) they do not expire after the passage of a certain period of time.³²⁰ Depending on whether and how we revise the exclusive contract prohibition of the program access rules, we may need to modify these exclusivity conditions to conform to our revised rules. First, to the extent that we retain the exclusive contract prohibition in its entirety as it exists today, there will be no need to modify the exclusivity conditions because the program access rules will remain the same. Second, to the extent that we retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming only,³²¹ there will be no need to modify the exclusivity conditions with respect to RSNs and other "must have" programming because the exclusive contract prohibition will remain the same with respect to such programming. With respect to non-RSN programming and other programming that is not deemed "must have," however, we would expect to modify the exclusivity conditions to provide that exclusive contracts involving such programming will no longer be prohibited. To the extent any covered non-RSN/non-"must have" programming is cable-affiliated, however, exclusive contracts may be assessed on a case-by-case basis in response to a program

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attributable interest. Thus, the term 'Liberty Media' includes Discovery Communications." *Id.* at 3340-41 n.3. Moreover, the conditions provide that "Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in any non-broadcast national or regional programming service while these conditions are in effect if the programming service is not obligated to abide by such conditions." *Id.*

³¹⁶ *Liberty Media Order*, 23 FCC Rcd at 3341, Appendix B, § III.2. The conditions state that the term "Affiliated Program Rights Holder" includes "(i) any program rights holder in which Liberty Media or DIRECTV holds a non-controlling 'attributable interest' (as determined by the FCC's program access attribution rules) or in which any officer or director of Liberty Media, DIRECTV, or of any other entity controlled by John Malone holds an attributable interest; and (ii) any program rights holder in which an entity or person that holds an attributable interest also holds a non-controlling attributable interest in Liberty Media or DIRECTV, provided that Liberty Media or DIRECTV has actual knowledge of such entity's or person's attributable interest in such program rights holder." *Id.* at 3341 n.5.

³¹⁷ *Id.* at 3341, Appendix B, § III.3.

³¹⁸ *Id.* at 3341, Appendix B, § III.6 (emphasis added).

³¹⁹ Compare *Liberty Media Order*, 23 FCC Rcd at 3340-41, Appendix B, § III with *Adelphia Order*, 21 FCC Rcd at 8336-37, Appendix B, § B.1.

³²⁰ Compare *Liberty Media Order*, 23 FCC Rcd at 3341, Appendix B, § III.6 with *Adelphia Order*, 21 FCC Rcd at 8336, Appendix B, § B.1.d.

³²¹ See *supra* ¶¶ 72-80.

access complaint alleging a violation of Section 628(b)³²² (and, potentially, Section 628(c)(2)(B)³²³). Third, to the extent we establish 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,³²⁴ and grant of such a petition includes satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated “must have” programming,³²⁵ then we would expect to modify the exclusivity conditions to provide that exclusive contracts in markets covered by such a petition (if granted) will not be prohibited under these conditions. If the grant of such a petition does not include satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated “must have” programming, however, there will be no need to modify the exclusivity conditions with respect to RSNs and other “must have” programming because the exclusive contract prohibition will remain the same with respect to such programming.³²⁶ Fourth, to the extent we sunset the exclusive contract prohibition in its entirety, including for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated “must have” programming, then we would expect to modify the exclusivity conditions to provide that exclusive contracts will not be prohibited. Again, however, to the extent any of the covered programming is cable-affiliated, exclusive contracts will be assessed on a case-by-case basis in response to a program access complaint alleging a violation of Section 628(b)³²⁷ (and, potentially, Section 628(c)(2)(B)³²⁸). We seek comment on this interpretation.³²⁹

³²² See *Liberty Media Order*, 23 FCC Rcd at 3300-02, ¶¶ 78-80 (explaining that Discovery is a cable-affiliated programmer due to its affiliation with Advance-Newhouse, which holds an attributable interest in a cable system). Moreover, regardless of whether the programming is cable-affiliated, the Commission has not foreclosed a challenge under Section 628(b) to an exclusive contract with a cable operator involving non-cable-affiliated programming. See *1996 OVS Order*, 11 FCC Rcd at 18319, ¶ 184 (“[C]able operators, common carriers providing video programming directly to subscribers and open video system operators are not generally restricted from entering into exclusive contracts with non-vertically integrated programmers. Nonetheless, as we found in the [1994 DBS Order], our finding herein does not preclude an aggrieved party from seeking relief in an appropriate case under other provisions of Section 628 and the Commission’s rules thereunder.”) (citing *1994 DBS Order*, 10 FCC Rcd at 3121, 3126-27 (citing *1993 Program Access Order*, 8 FCC Rcd at 3374 (discussing Section 628(b))); *2010 Program Access Order*, 25 FCC Rcd at 779, ¶ 49 n.191 (“We do not reach any conclusions in this *Order*, nor do we foreclose potential complaints, regarding other acts that may be ‘unfair methods of competition or unfair acts or practices’ under Section 628(b). For example, the rules established by this *Order* do not address exclusive contracts between a cable operator and a non-cable-affiliated programmer.”)).

³²³ See *supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

³²⁴ See *supra* ¶ 69-71.

³²⁵ See *supra* ¶ 80.

³²⁶ See *id.*

³²⁷ See *supra* n.322.

³²⁸ See *supra* ¶¶ 59-63 (seeking comment on whether an MVPD can challenge post-sunset an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer as an unreasonable refusal to license in violation of Section 628(c)(2)(B)).

³²⁹ In contrast to the *Adelphia Order* and the *Liberty Media Order*, there is no provision in the *Comcast/NBCU Order* requiring the conditions adopted therein to be modified to conform to changes the Commission makes to the program access rules. See *Comcast/NBCU Order*, 26 FCC Rcd at 4381, Appendix A, Condition XX (stating that the conditions will remain in effect for seven years, provided that the Commission will consider a petition from Comcast/NBCU for modification of a condition if they can demonstrate that there has been a material change in circumstances, or that the condition has proven unduly burdensome, such that the Condition is no longer necessary in the public interest). Accordingly, the conditions adopted in the *Comcast/NBCU Order* will not be affected by the rule changes adopted in this proceeding.

B. Potential Revisions to the Program Access Rules to Better Address Alleged Violations

96. The Commission initially adopted its program access rules in 1993.³³⁰ Other than the previous extensions of the exclusive contract prohibition and certain procedural changes, including the adoption of a process for the award of damages, establishing aspirational deadlines for the processing of complaints, and implementing party-to-party discovery, these rules have remained largely unchanged since this time.³³¹ We seek comment on how our rules can be improved, especially in light of marketplace developments and commenters' experience with these rules over the past two decades.

1. Procedural Rules

97. As an initial matter, while our program access procedural rules provide a defendant with 20 days after service of a complaint to file an answer,³³² the Commission has provided defendants with 45 days from the date of service to file an answer to a Section 628(b) complaint alleging an "unfair act" involving terrestrially delivered, cable-affiliated programming to ensure that the defendant has adequate time to develop a response.³³³ The Commission explained that additional time was appropriate because, unlike complaints alleging a violation of the prohibitions in Section 628(c), a complaint alleging a violation of Section 628(b) entails additional factual inquiries, including whether the allegedly "unfair act" at issue has the purpose or effect set forth in Section 628(b).³³⁴ To the extent the exclusive contract prohibition were to sunset (wholly or partially), we propose to adopt the same 45-day answer period in complaint proceedings alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates Section 628(b). We seek comment on this proposal. Because all complaints alleging a violation of Section 628(b) will involve the claim that the conduct at issue has the purpose or effect set forth in Section 628(b), we propose to amend our rules to provide for a 45-day answer period for all complaints alleging a violation of Section 628(b). We seek comment on this proposal. Are there any other changes we should make to our program access procedural rules to accommodate the case-by-case consideration of exclusive contracts involving satellite-delivered, cable-affiliated programming under Section 628(b)?

2. Volume Discounts

98. We also seek comment on whether our program access rules adequately address potentially discriminatory volume discounts and, if not, how these rules should be revised to address these concerns. Some MVPDs have expressed concern that cable-affiliated programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs due to volume discounts, which are based on the number of subscribers the MVPD serves.³³⁵ As a result, smaller MVPDs claim that they are

³³⁰ See generally 1993 Program Access Order.

³³¹ See generally 1994 Program Access Order; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822 (1998); 2007 Extension Order, 22 FCC Rcd at 17847-59, ¶¶ 83-113.

³³² See 47 C.F.R. § 76.1003(e).

³³³ See 47 C.F.R. § 76.1001(b)(2)(i); 2010 Program Access Order, 25 FCC Rcd at 779-80, ¶ 49.

³³⁴ See 2010 Program Access Order, 25 FCC Rcd at 779-80, ¶ 49.

³³⁵ See, e.g., Comments of the American Cable Association, MB Docket No. 11-128 (Sept. 9, 2011), at 7-10 ("ACA Comments on RSN Report"); Comments of the American Cable Association, MB Docket No. 07-269 (June 8, 2011), at 9-10 ("ACA Comments on Video Competition Report"); Comments of Hiawatha Broadband Corporation, Inc., National Rural Telecommunications Cooperative, Rural Broadband Alliance, Rural Independent Competitive Alliance, MB Docket No. 07-269 (June 8, 2011), at 17 ("Hiawatha et al. Comments"); Reply of the Fair Access to Content and Telecommunications Coalition, the National Telecommunications Cooperative Association, and the (continued....)

placed at a significant cost disadvantage relative to larger MVPDs.³³⁶ Some commenters have claimed that this price differential is not cost-based because program production and acquisition costs are sunk; delivery costs do not vary; and administrative costs are not different.³³⁷ According to some commenters, without a basis in cost, this wholesale practice amounts to price discrimination.³³⁸

99. The anti-discrimination provision in Section 628(c)(2)(B) of the Act provides that it is not impermissibly discriminatory for a satellite-delivered, cable-affiliated programmer to “establish[] different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor.”³³⁹ The Commission’s rules provide that:

Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.³⁴⁰

Thus, the Commission’s rules contemplate that an MVPD may file a program access complaint challenging volume-based pricing in certain circumstances. In the *Comcast/NBCU Order*, the Commission declined to adopt a condition that would prohibit Comcast-NBCU from offering volume-based discounts for its video programming, finding such a prohibition to be unnecessary because “the
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Western Telecommunications Alliance, MB Docket No. 10-56 (Aug. 19, 2010), at 8 (“FACT/NTCA/WTA Reply on Comcast/NBCU”); Comments of the American Cable Association, MB Docket No. 10-56 (June 21, 2010), at 38-40 (“ACA Comments on Comcast/NBCU”). We note that some commenters also raised this concern in response to the *2007 Program Access NPRM*. See Comments of the American Cable Association, MB Docket No. 07-198 (Jan. 3, 2008), at 17-18 (“ACA Comments on 2007 NPRM”); Reply Comments of the National Telecommunications Cooperative Association, MB Docket No. 07-198 (Feb. 12, 2008), Attachment A at 1-3 (“NTCA Reply Comments on 2007 NPRM”).

³³⁶ See ACA Comments on Video Competition Report at 9 (“small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs”); see also ACA Comments on RSN Report at 8; Hiawatha et al. Comments at 17; FACT/NTCA/WTA Reply on Comcast/NBCU at 8; ACA Comments on Comcast/NBCU at 38-39; ACA Comments on 2007 NPRM at 19; NTCA Reply Comments on 2007 NPRM, Attachment A at 2.

³³⁷ See ACA Comments on Video Competition Report at 10; ACA Comments on 2007 NPRM at 17; NTCA Reply Comments on 2007 NPRM, Attachment A at 1-2.

³³⁸ See ACA Comments on Video Competition Report at 10; ACA Comments on 2007 NPRM at 17; see also ACA Comments on Comcast/NBCU at 39.

³³⁹ 47 U.S.C. § 548(c)(2)(B)(iii); see H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, reprinted in 1992 U.S.C.C.A.N. 1231, 1275 (“In lieu of permitting volume discounts, the conference agreement amends the House provision regarding discrimination by satellite cable programming vendors affiliated with cable operators to permit such vendors to establish different prices, terms and conditions which take into account economies of scale, cost savings, or other direct and economic benefits reasonably attributable to the number of subscribers served by the distributor.”) (emphasis added).

³⁴⁰ 47 C.F.R. § 76.1002(b)(3) note; see *1993 Program Access Order*, 8 FCC Rcd at 3407-08, ¶ 108 (“we will not require the vendor to provide a strict cost justification for the structure of such standard volume factors, but will also recognize non-cost economic benefits related to increased viewership as identified by the vendor”).

specific matter of volume-based discounts is adequately addressed by the Commission's program access rules."³⁴¹

100. Despite the concerns expressed by some MVPDs regarding allegedly discriminatory volume discounts and the availability of the existing complaint process, the Commission has not received program access complaints alleging that particular volume discounts violate Section 628(c)(2)(B) of the Act. We seek information about specific instances of perceived volume discount discrimination, along with explanations of why the alleged conduct amounts to a violation of the Commission's rules. We seek comment on the reasons for the lack of program access complaints alleging discriminatory volume discounts, despite the apparent concern among some MVPDs regarding this issue. Do our current program access rules and procedures prevent or discourage the filing of legitimate complaints pertaining to this issue? Is the complaint process too costly and time-consuming with respect to complaints alleging price discrimination? If so, we seek comment on how we might improve our rules and procedures to avoid impeding the filing of legitimate complaints. Are there procedural tools we might use, such as establishing rebuttable presumptions, that will expedite the complaint process while ensuring fairness to all parties? While the Commission has stated that satellite-delivered, cable-affiliated programmers may justify volume discounts based on "non-cost economic benefits" related to increased viewership, it has not defined these benefits in the rules.³⁴² Should we continue to consider "non-cost economic benefits" on a case-by-case basis due to the various factors, such as advertising and online and VOD offerings, that can be considered in setting prices? Should our rules specifically list those "non-cost economic benefits" related to increased viewership that might justify volume discounts? If so, what non-cost economic benefits should be identified? Should these benefits be limited to increased advertising revenues resulting from increased viewership?³⁴³ Should satellite-delivered, cable-affiliated programmers 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 complainant?

3. Uniform Price Increases

101. We also seek comment on whether and how we should revise our rules to address uniform price increases imposed by satellite-delivered, cable-affiliated programmers. In previous merger decisions, the Commission has discussed the possibility that a vertically integrated cable operator could disadvantage its competitors in the video distribution market by raising the price of a network to all distributors (including itself) to a level greater than that which would be charged by a non-vertically integrated supplier.³⁴⁴ The Commission explained that a vertically integrated cable operator might employ such a strategy to raise its rivals' costs.³⁴⁵ Because rival MVPDs would have to pay more for the programming, they would likely respond either by raising their prices to subscribers, not purchasing the programming, or reducing marketing activities.³⁴⁶ The vertically integrated cable operator could then

³⁴¹ *Comcast/NBCU Order*, 26 FCC Rcd at 4261-62, ¶ 56.

³⁴² *See supra* ¶ 99.

³⁴³ *See 1993 Program Access Order*, 8 FCC Rcd at 3407-08, ¶ 108 ("[O]ther parties have argued that in addition to cost economies, a larger number of subscribers confers direct non-cost 'economic benefits' by delivering more viewers, thus increasing revenue from advertising more than proportionally, and providing a larger base for amortizing the costs of the programming service. We believe that this interpretation most closely follows the language of Section 628 regarding 'direct and legitimate economic benefits,' which distinguishes 'volume differences' from the 'cost differences' considered in the first permissible factor.") (citations omitted).

³⁴⁴ *See Comcast/NBCU Order*, 26 FCC Rcd at 4259, ¶ 49; *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; *see also News/Hughes Order*, 19 FCC Rcd at 510-11, ¶ 78 and 512-13, ¶¶ 82-83.

³⁴⁵ *See Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; *see also News/Hughes Order*, 19 FCC Rcd at 510-11, ¶ 78.

³⁴⁶ *See Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119.

enjoy a competitive advantage, because the higher price for the programming that it would pay would be an internal transfer that it could disregard when it sets its own prices.³⁴⁷ By forcing its competitors either to pay more for the programming and increase their retail rates, or forgo purchasing the programming, the vertically integrated cable operator could raise its prices to some extent without losing subscribers.³⁴⁸ The Commission has also stated that this strategy of uniform price increases does not necessarily violate the anti-discrimination provision of the program access rules because the price increases would be applied to all distributors equally and thus does not involve discriminatory conduct.³⁴⁹ In previous merger orders, the Commission has sought to address this issue by adopting a baseball-style arbitration remedy to maintain the pre-integration balance of bargaining power between vertically integrated programming networks and rival MVPDs.³⁵⁰

102. We seek comment on whether and how we should revise our rules to address uniform price increases imposed by satellite-delivered, cable-affiliated programmers.³⁵¹ We also seek comment on actual experiences of discriminatory uniform price increases. Is there any basis to interpret the anti-discrimination provision in Section 628(c)(2)(B) as applying to uniform price increases? We note that, in employment law, a practice that appears facially neutral may nonetheless be discriminatory if it has a disparate impact on a certain class.³⁵² While a uniform price increase appears facially neutral in that it applies to all MVPDs equally, it has a disparate impact on MVPDs that are not affiliated with the cable-affiliated programmer because the price increase is not merely an internal transfer for unaffiliated MVPDs. To the extent that a uniform price increase is not covered by the anti-discrimination provision in Section 628(c)(2)(B), can it be addressed on a case-by-case basis in a Section 628(b) complaint alleging that a uniform price increase is an “unfair act” that has the “purpose or effect” of “significantly hindering or preventing” an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers? To the extent that a uniform price increase is actionable under Section 628(c)(2)(B) or Section 628(b), how can we distinguish an anticompetitive uniform price increase intended to raise rivals’ costs from a price increase dictated by the market?

³⁴⁷ See *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; see also *News/Hughes Order*, 19 FCC Rcd at 512-13, ¶¶ 82-83.

³⁴⁸ See *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119. The Commission explained that the profitability of a uniform price increase would depend on the market share of the MVPD within the distribution footprint of the affiliated programming network. See *id.*

³⁴⁹ See *Comcast/NBCU Order*, 26 FCC Rcd at 4259, ¶ 49; *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119; *News/Hughes Order*, 19 FCC Rcd at 513, ¶ 84 and 547-58, ¶ 162.

³⁵⁰ See *Comcast/NBCU Order*, 26 FCC Rcd at 4259, ¶ 50; *Liberty Media Order*, 23 FCC Rcd at 3306-07, ¶ 90; *Adelphia Order*, 21 FCC Rcd at 8274, ¶ 156; *News/Hughes Order*, 19 FCC Rcd at 552, ¶¶ 173-75. In this baseball-style arbitration, each party submits a “final offer” for carriage of the programming at issue. See *Comcast/NBCU Order*, 26 FCC Rcd at 4364-65, Condition VII.A; *Liberty Media Order*, 23 FCC Rcd at 3346-47, Condition IV.A; *Adelphia Order*, 21 FCC Rcd at 8337, Condition B.2; *News/Hughes Order*, 19 FCC Rcd at 553, ¶ 177. An arbitrator then chooses the final offer that “most closely approximates the fair market value of the programming carriage rights at issue.” *Comcast/NBCU Order*, 26 FCC Rcd at 4366, Condition VII.B.4; *Liberty Media Order*, 23 FCC Rcd at 3346-47, Condition IV.B.3; *Adelphia Order*, 21 FCC Rcd at 8338, Condition B.3.c; *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

³⁵¹ See ACA Comments on RSN Report at 10-11 (expressing concern with uniform price increases); ACA Comments on Comcast/NBCU at 42-43 (same).

³⁵² See *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-74 (2009); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act Analysis

103. As required by the Regulatory Flexibility Act of 1980 (“RFA”),³⁵³ the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this *NPRM*. The IRFA is attached to this *NPRM* as Appendix E.

B. Paperwork Reduction Act

104. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.³⁵⁴ In addition, pursuant to the Small Business Paperwork Relief Act of 2002,³⁵⁵ we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”³⁵⁶

C. Ex Parte Rules

105. Permit-But-Disclose. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.³⁵⁷ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

D. Filing Requirements

106. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,³⁵⁸ interested parties may file comments and reply comments on or before the dates indicated on the

³⁵³ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

³⁵⁴ Pub. L. No. 104-13.

³⁵⁵ Pub. L. No. 107-198.

³⁵⁶ 44 U.S.C. § 3506(c)(4).

³⁵⁷ 47 C.F.R. §§ 1.1200 *et seq.*

³⁵⁸ *See id.* §§ 1.415, 1.419.

first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS").³⁵⁹

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

107. **Availability of Documents.** Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

108. **People with Disabilities.** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

109. **Additional Information.** For additional information on this proceeding, contact David Konczal, David.Konczal@fcc.gov, or Diana Sokolow, Diana.Sokolow@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

110. Accordingly, **IT IS ORDERED** that pursuant to the authority found in 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, this *Notice of Proposed Rulemaking* **IS ADOPTED**.

³⁵⁹ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

111. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A

Nationwide MVPD Subscribership

	1 st Annual Report	2002 Extension	2007 Extension	Most Recent
# (and %) of MVPD subscribers attributable to cable operators	57.9 million ¹ (~95%) ²	68.98 million (78.11%) ³	65.4 million (67%) ⁴	58.3 million (58.5%) ⁵
# (and %) of MVPD subscribers attributable to DBS operators	40,000 ⁶	16.07 million (18.2%) ⁷	29.6 million (>30%) ⁸	33.745 million (33.9%) ⁹

¹ See 1st Annual Report, 9 FCC Rcd at 7540, Table 5.1.

² At the time the 1992 Cable Act was passed, cable operators served more than 95 percent of all multichannel subscribers. See 2002 Extension Order, 17 FCC Rcd at 12132, ¶ 20.

³ See 8th Annual Report, 17 FCC Rcd at 1338; see also 2002 Extension Order, 17 FCC Rcd at 12132-33, ¶ 20 (citing 8th Annual Report, 17 FCC Rcd at 1247 (indicating that, at that time, 78 percent of MVPD subscribers received their video programming from a cable operator, representing almost 69 million cable subscribers)).

⁴ See 2007 Extension Order, 22 FCC Rcd at 17806, ¶ 23 (citing 12th Annual Report, 21 FCC Rcd at 2507, ¶ 10 and 2617, Table B-1).

⁵ See SNL Kagan, U. S. Cable Subscriber Highlights, Sept. 30, 2011. The 58.5 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.645 million), then dividing the number of cable subscribers (58.3 million) by the 99.645 million total. This is an estimate, and it excludes certain overbuilders.

⁶ See 1st Annual Report, 9 FCC Rcd at 7475, ¶ 65.

⁷ See 8th Annual Report, 17 FCC Rcd at 1338. But see 2002 Extension Order, 17 FCC Rcd at 12134, ¶ 23 (citing 8th Annual Report, 17 FCC Rcd at 1341 (indicating that DirecTV had at the time 11 million subscribers, and EchoStar had 7 million subscribers, for a total of 18 million DBS subscribers)).

⁸ See 2007 Extension Order, 22 FCC Rcd at 17806, ¶ 23.

⁹ The 33.9 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.645 million), then dividing the number of DBS subscribers (33.745 million) by the 99.645 million total. See DIRECTV, Inc., SEC Form 10-Q (Nov. 4, 2011) (stating that DIRECTV had 19.8 million subscribers at the end of 3Q2011); DISH DBS Corporation, SEC Form 10-Q (Nov. 9, 2011) (stating that DISH had 13.945 million subscribers at the end of 3Q2011).

	1 st Annual Report	2002 Extension	2007 Extension	Most Recent
# (and %) of MVPD subscribers attributable to wireline providers	N/A ¹⁰	60,000 OVS subscribers (0.07%) ¹¹	~1.9% ¹²	7.6 million Verizon/AT&T subscribers (7.6%) ¹³
% of MVPD subscribers receiving their video programming from one of the four largest cable MSOs	47.18% ¹⁴	48% ¹⁵	53-60% ¹⁶	43.8% ¹⁷

¹⁰ See *2002 Extension Order*, 17 FCC Rcd at 12134, ¶ 23 (“In 1996, the Communications Act was amended to allow local exchange carriers to enter the video distribution market within their telephone service areas. . .”).

¹¹ See *8th Annual Report*, 17 FCC Rcd at 1338; see also *2002 Extension Order*, 17 FCC Rcd at 12135, ¶ 23 (citing *8th Annual Report*, 17 FCC Rcd at 1338).

¹² See *2007 Extension Order*, 22 FCC Rcd at 17807, ¶ 24. According to the *12th Annual Report*, as of June 2005, there were a total of 1.4 million OVS and Broadband Service Provider (“BSP”) subscribers, which represented 1.49 percent of MVPD subscribers. See *12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

¹³ See AT&T, Inc., SEC Form 8-K (Oct. 20, 2011) (stating that AT&T had 3.6 million U-verse video subscribers at the end of 3Q2011); Verizon Communications, Inc., SEC Form 10-Q (Oct. 25, 2011) (stating that Verizon had 4.0 million FiOS TV video subscribers at the end of 3Q2011). The 7.6 percent figure was calculated by adding the total number of cable subscribers, DBS subscribers, and Verizon/AT&T subscribers (99.645 million), then dividing the number of Verizon and AT&T subscribers (7.6 million) by the 99.645 million total.

¹⁴ See *1st Annual Report*, 9 FCC Rcd at 7586.

¹⁵ See *2002 Extension Order*, 17 FCC Rcd at 12133, ¶ 21 (citing *8th Annual Report*, 17 FCC Rcd at 1341).

¹⁶ See *2007 Extension Order*, 22 FCC Rcd at 17808, ¶ 27.

¹⁷ This figure was calculated by adding the number of subscribers for each of the four largest cable companies in terms of subscribers (Comcast, TWC, Cox, and Charter, a collective total of 43,629,187 subscribers) and dividing by 99.645 million, our estimated number of total MVPD subscribers. See SNL Kagan, U. S. Cable Subscriber Highlights, Sept. 30, 2011.

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
% of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs	47.18% ¹⁸	34% ¹⁹	54-56.75% ²⁰	42.7% ²¹

¹⁸ See *1st Annual Report*, 9 FCC Rcd at 7586. All but one of the ten largest MSOs had attributable ownership interests in at least one programming service. See *id.* at 7526, ¶ 168. The one MSO without attributable ownership interests was not among the top four cable MSOs. See *id.* at 7586.

¹⁹ See *2002 Extension Order*, 17 FCC Rcd at 12133, ¶ 20 (citing *8th Annual Report*, 17 FCC Rcd at 1341).

²⁰ See *2007 Extension Order*, 22 FCC Rcd at 17809, ¶ 27.

²¹ Four of the top five cable operators in terms of subscribers hold ownership interests in satellite-delivered, national programming networks. See *infra*, Appendix B, Table 2 (Comcast, TWC, Cox, and Cablevision). This figure was calculated by adding the number of subscribers for each of these cable operators (a total of 42,522,287 subscribers) and dividing by 99.645 million, our estimated number of total MVPD subscribers. See SNL Kagan, U. S. Cable Subscriber Highlights, Sept. 30, 2011.

APPENDIX B

Satellite-Delivered, Cable-Affiliated, National Programming Networks

Table 1

	1 st Annual Report	2002 Extension	2007 Extension	Most Recent
# of satellite-delivered, national programming networks	106 ¹	294 ²	531 ³	~800 (SD and HD) ⁴
# (and %) of satellite-delivered, national programming networks that are cable-affiliated	56 (53%) ⁵	104 (35%) ⁶	116 (22%) ⁷	115 (SD and HD) (14.4%) ⁸ Excluding Comcast-controlled networks: 85 out of ~770 (11%)
# of Top 20 satellite-delivered, national programming networks (as ranked by subscribership) that are cable-affiliated	10 of the Top 25 ⁹	9 of the Top 20 ¹⁰	6 of the Top 20 ¹¹	7 of the Top 20 ¹² Excluding Comcast-controlled networks: 6 of the Top 20

¹ See *1st Annual Report*, 9 FCC Rcd at 7589-92.

² See *2002 Extension Order*, 17 FCC Rcd at 12131, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309).

³ See *2007 Extension Order*, 22 FCC Rcd at 17802, ¶ 17 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

⁴ See *supra* ¶ 26 (estimating a total of 800 satellite-delivered, national programming networks available to MVPDs today and seeking comment on this estimate).

⁵ See *1st Annual Report*, 9 FCC Rcd at 7589-90.

⁶ See *2002 Extension Order*, 17 FCC Rcd at 12131, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1309).

⁷ See *2007 Extension Order*, 22 FCC Rcd at 17802, ¶ 18 (citing *12th Annual Report*, 21 FCC Rcd at 2575, ¶ 157).

⁸ See *infra*, Appendix B, Table 2 (listing satellite-delivered, cable-affiliated, national programming networks).

⁹ See *1st Annual Report*, 9 FCC Rcd at 7599.

¹⁰ See *2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1363).

¹¹ See *2007 Extension Order*, 22 FCC Rcd at 17803, ¶ 19.

¹² See SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition), at 30 (listing the following satellite-delivered, cable-affiliated networks as among the Top 20 in terms of subscribers: Discovery Channel, USA Network, Weather Channel, TLC, A&E, Lifetime, and History).

	1st Annual Report	2002 Extension	2007 Extension	Most Recent
# of Top 20 satellite-delivered, national programming networks (as ranked by average prime time ratings) that are cable-affiliated	12 of the Top 15 ¹³	7 of the Top 20 ¹⁴	7 of the Top 20 ¹⁵	7 of the Top 20 ¹⁶ Excluding Comcast-controlled networks: 5 of the Top 20
# of cable operators that own programming	10, at least ¹⁷	5 ¹⁸	5 ¹⁹	6 ²⁰

¹³ See *1st Annual Report*, 9 FCC Rcd at 7600.

¹⁴ See *2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1364).

¹⁵ See *2007 Extension Order*, 22 FCC Rcd at 17803-04, ¶ 19.

¹⁶ See SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition), at 46 (listing the following satellite-delivered, cable-affiliated networks as among the Top 20 in terms of average prime time rating: USA Network, History, A&E, Syfy, Discovery, Lifetime, and Lifetime Movie Network).

¹⁷ See *1st Annual Report*, 9 FCC Rcd at 7596-98. Four of the top ten cable MSOs had an interest in at least 40 of the 56 satellite-delivered, cable-affiliated, national programming networks existing at that time. See *id.*

¹⁸ See *2002 Extension Order*, 17 FCC Rcd at 12131, ¶ 18 (citing *8th Annual Report*, 17 FCC Rcd at 1310). Four of these were among the seven largest cable MSOs. See *id.*

¹⁹ See *2007 Extension Order*, 22 FCC Rcd at 17804, ¶ 20 (citing *12th Annual Report*, 21 FCC Rcd at 2620, Table B-3). All of the five were among the six largest cable MSOs. See *id.*

²⁰ See *infra* Appendix B, Table 2; Appendix C, Table 2.

Table 2 – List of Cable-Affiliated, Satellite-Delivered, National Programming Networks

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Cablevision (10) ²¹	AMC (owned by AMC Networks Inc.)
	AMC HD
	Fuse (owned by MSG)
	Fuse HD
	Independent Film Channel (owned by AMC Networks Inc.)
	Independent Film Channel HD
	Sundance Channel (owned by AMC Networks Inc.)
	Sundance Channel HD
	WE tv (owned by AMC Networks Inc.)
	WE tv HD
Comcast (60) ²²	Comcast-controlled networks (30) ²³
	Bravo
	Bravo HD
	Chiller
	Chiller HD
	CNBC
	CNBC HD
	CNBC World
	E! Entertainment Television
	E! Entertainment Television HD
	G4
	G4 HD
	Golf Channel
	Golf Channel HD
	MSNBC
	MSNBC HD
	Mun2
	Oxygen
	Oxygen HD
	Cloo (formerly Sleuth)
	Syfy
	Syfy HD
	The Style Network
	The Style Network HD

²¹ See SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition), at 70, 74, 303; SNL Kagan, *Cable Network Ownership* (July 2011).

²² See *Comcast/NBCU Order*, 26 FCC Rcd at 4410-18, Appendix D; *GE/Comcast/NBCU Application* at 19-20, 30-31; SNL Kagan, *Cable Network Ownership* (July 2011); SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition), at 68.

²³ See *supra* n.91 (discussing the distinction between Comcast-controlled networks and Comcast-affiliated networks).

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Comcast (continued)	Comcast-controlled networks (continued)
	Universal HD
	Universal Sports
	Universal Sports HD
	USA Network
	USA Network HD
	NBC Sports Network (formerly Versus)
	NBC Sports Network HD
	Comcast-affiliated networks (30) ²⁴
	A&E ²⁵
	A&E HD ²⁵
	Bio ²⁵
	Bio HD ²⁵
	Crime & Investigation ²⁵
	Crime and Investigation HD ²⁵
	History ²⁵
	History HD ²⁵
	History en Español ²⁵
	H2 (formerly History International) ²⁵
	H2 HD ²⁵
	Lifetime ²⁵
	Lifetime HD ²⁵
	Lifetime Real Women ²⁵
	Lifetime Movie Network ²⁵
	Lifetime Movie Network HD ²⁵
	Military History Channel ²⁵
	Current TV ²⁶
	FEARnet ²⁷
	FEARnet HD ²⁷
	MusicChoice ²⁸

²⁴ See *id.*

²⁵ A&E-owned network, in which NBCU holds a minority interest (16 percent). See Comcast Corporation, SEC Form 10-K (Feb. 25, 2011), at 12 (“Comcast 2011 SEC Form 10-K”); see also *Comcast/NBCU Order*, 26 FCC Rcd at 4411, Appendix D; *GE/Comcast/NBCU Application* at 31.

²⁶ See *GE/Comcast/NBCU Application* at 20 (stating that Comcast has a 10 percent interest in Current Media); see also *Comcast/NBCU Order*, 26 FCC Rcd at 4415, Appendix D.

²⁷ See Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 31 percent interest in FEARNet); *GE/Comcast/NBCU Application* at 20; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4414, Appendix D.

²⁸ See Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 12 percent interest in MusicChoice); *GE/Comcast/NBCU Application* at 20.

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Comcast (continued)	Comcast-affiliated networks (continued)
	NHL Network ²⁹
	NHL Network HD ²⁹
	Shop NBC ³⁰
	TV One ³¹
	TV One HD ³¹
	PBS Kids Sprout ³²
	PBS Kids Sprout HD ³²
	The Weather Channel ³³
	The Weather Channel HD ³³
Discovery ³⁴ (22)	Animal Planet
	Animal Planet HD
	Discovery
	Discovery HD
	Discovery en Español
	Discovery Familia
	Discovery Fit & Health
	Velocity (HD only)
	Investigation Discovery
	Investigation Discovery HD
	Military Channel
	Planet Green
	Planet Green HD
	Science
	Science HD
	TLC

²⁹ See *GE/Comcast/NBCU Application* at 20 (stating that Comcast has a 15.6 percent interest in NHL Network); see also *Comcast/NBCU Order*, 26 FCC Rcd at 4415, Appendix D.

³⁰ See *Comcast/NBCU Order*, 26 FCC Rcd at 4411, Appendix D; *GE/Comcast/NBCU Application* at 31; *ValueVision Media, Inc.*, SEC Form 10-Q (Sept. 8, 2011), at 12.

³¹ See *Comcast 2011 SEC Form 10-K* at 8 (stating that Comcast has a 34 percent interest in TV One); *GE/Comcast/NBCU Application* at 20; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4414, Appendix D.

³² See *Comcast 2011 SEC Form 10-K* at 8 (stating that Comcast has a 40 percent interest in PBS KIDS Sprout); *GE/Comcast/NBCU Application* at 20; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4414, Appendix D.

³³ See *Comcast 2011 SEC Form 10-K* at 12 (stating that NBCU has a 25 percent interest in The Weather Channel); *GE/Comcast/NBCU Application* at 31; see also *Comcast/NBCU Order*, 26 FCC Rcd at 4411, Appendix D.

³⁴ See SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition), at 69; SNL Kagan, *Cable Network Ownership* (July 2011); see also *Liberty Media Order*, 23 FCC Rcd at 3300-02, ¶¶ 78-80 (explaining that Discovery is a cable-affiliated programmer due to its affiliation with Advance-Newhouse, which holds an attributable interest in a cable system).

Cable Operator	Affiliated, Satellite-Delivered, National Programming Network
Discovery (continued)	TLC HD
	OWN: Oprah Winfrey Network
	OWN: Oprah Winfrey Network HD
	The Hub
	The Hub HD
	3net (3D)
Cox (2) ³⁵	Travel Channel
	Travel Channel HD
Other ³⁶ (23)	MLB Network (affiliated with Comcast, Cox, TWC) ³⁷
	MLB Network HD (affiliated with Comcast, Cox, TWC) ³⁷
	iN DEMAND L.L.C. (21) ³⁸
	iN Demand 1, 2, 3, 4, 5, 6 and 7
	Hot Choice
	Hot Choice HD
	NBA League Pass
	NBA League Pass HD
	MLS Direct Kick
	MLS Direct Kick HD
	MLB Extra Innings
	MLB Extra Innings HD
	NHL Center Ice
	NHL Center Ice HD
	GameHD
	Game2HD
	Team HD
	HDPPV

³⁵ See SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition), at 70; SNL Kagan, *Cable Network Ownership* (July 2011).

³⁶ These networks are affiliated with more than one cable operator.

³⁷ See SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition), at 67, 405. Because Comcast has a less than 50 percent interest in MLB Network, we consider MLB Network for purposes of the estimates in this *NPRM* to be a "Comcast-affiliated" network, and not a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *supra* n.91; *GE/Comcast/NBCU Application* at 20 (stating that Comcast has a 8.3 percent interest in MLB Network).

³⁸ See *TWC/Insight Application* at Exhibit F (listing national programming services owned by iN DEMAND). iN DEMAND is affiliated with Comcast, Cox, TWC, and Bright House Networks. See *About iN DEMAND – Ownership*, available at <http://www.indemand.com/business/business-overview/about/ownership.php>. For the reasons discussed above, for purposes of the estimates in this *NPRM*, we consider the iN DEMAND networks to be "Comcast-affiliated" networks, and not "Comcast-controlled" networks subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *supra* n.91.

APPENDIX C

Cable-Affiliated, Regional Sports Networks

Table 1

	1 st Annual Report	2002 Extension	2007 Extension	Most Recent
# of RSNs	N/A ¹	28 ²	39 ³	109 (SD and HD) ⁴
# (and %) of cable-affiliated RSNs	N/A ⁵	24 (86%) ⁶	18 (46%) ⁷	57 (SD and HD) (52.3%) ⁸ Excluding Comcast-controlled networks: 41 out of 93 (44.1%)

¹ In 1998, there were 27 regional sports programming services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24439-41 (1998) (“5th Annual Report”).

² *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing 8th Annual Report, 17 FCC Rcd at 1354-56).

³ *See 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 21.

⁴ *See supra* n.98 (explaining that previous RSN estimates did not consider SD and HD RSNs separately); SNL Kagan, *Media Trends* (2011 Edition), at 70-74; SNL Kagan, *RSN Subscribers* (August 26, 2011); *GE/Comcast/NBCU Application* at 21; *TWC/Insight Application* at 3-4 and Exhibit F; *see also 13th Annual Report*, 24 FCC Rcd at 551, ¶ 21 (43 RSNs as of June 2006).

⁵ In 1998, 22 of the regional sports programming services (82 percent) were affiliated with at least one cable MSO. *See 5th Annual Report*, 13 FCC Rcd at 24439-41.

⁶ *See 2002 Extension Order*, 17 FCC Rcd at 12132, ¶ 19 (citing 8th Annual Report, 17 FCC Rcd at 1354-56).

⁷ *See 2007 Extension Order*, 22 FCC Rcd at 17805, ¶ 22.

⁸ *See infra* Appendix C, Table 2; SNL Kagan, *Media Trends* (2011 Edition), at 70-74; *see also 13th Annual Report*, 24 FCC Rcd at 551, ¶ 21 (19 out of 43 RSNs (44 percent) were cable-affiliated as of June 2006).

Table 2 – List of Cable-Affiliated, Regional Sports Networks⁹

Cable Operator	Affiliated Regional Sports Networks ¹⁰
Bright House Networks (2) ¹¹	Bright House Sports Network
	Bright House Sports Network HD
Cablevision (4)	MSG
	MSG HD
	MSG Plus
	MSG Plus HD
Comcast (20)	Comcast-controlled RSNs (16) ¹²
	Comcast SportsNet California
	Comcast SportsNet California HD
	Comcast SportsNet Washington
	Comcast SportsNet Washington HD
	Comcast SportsNet New England
	Comcast SportsNet New England HD
	Comcast SportsNet Northwest
	Comcast SportsNet Northwest HD
	Comcast SportsNet Philadelphia
	Comcast SportsNet Philadelphia HD
	Comcast Sports Southwest
	Comcast Sports Southwest HD
	Comcast SportsNet Bay Area ¹³
	Comcast SportsNet Bay Area HD ¹³
	The Mtn. – Mountain West Sports Network ¹⁴
	The Mtn. – Mountain West Sports Network HD ¹⁴

⁹ This list is provided for illustrative purposes only. Inclusion or exclusion of a network should not be read to state or imply any position as to whether the network qualifies as an “RSN” as defined by the Commission.

¹⁰ See SNL Kagan, *Media Trends* (2011 Edition), at 70-74; *GE/Comcast/NBCU Application* at 21.

¹¹ See *Media Bureau RSN Report* at ¶ 16 n.52; *Bright House Customers to See Exclusive Coverage of Top College Basketball Games*, available at <http://brighthouse.com/corporate/about/738.htm>.

¹² See *supra* n.91 (discussing the distinction between “Comcast-controlled” networks and “Comcast-affiliated” networks).

¹³ Because Comcast has a 50 percent or greater interest in Comcast SportsNet Bay Area, we consider Comcast SportsNet Bay Area for purposes of the estimates in this *NPRM* to be a “Comcast-controlled” network subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *id.*; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 67 percent interest in Comcast SportsNet Bay Area).

¹⁴ Because Comcast has a 50 percent or greater interest in The Mtn. – Mountain West Sports Network, we consider The Mtn. – Mountain West Sports Network for purposes of the estimates in this *NPRM* to be a “Comcast-controlled” network subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *supra* n.91; *GE/Comcast/NBCU Application* at 21 (stating that Comcast owns a 50 percent interest in The Mtn. – Mountain West Sports Network).

Cable Operator	Affiliated Regional Sports Networks (continued)
Comcast (continued)	Comcast-affiliated RSNs (4) ¹⁵
	Comcast SportsNet Chicago ¹⁶
	Comcast SportsNet Chicago HD ¹⁶
	Comcast SportsNet Houston ¹⁷
	Comcast SportsNet Houston HD ¹⁷
Cox (4)	Channel 4 San Diego ¹⁸
	Channel 4 San Diego HD ¹⁸
	Cox Sports Television (New Orleans)
	Cox Sports Television HD (New Orleans)
Time Warner Cable (23) ¹⁹	Lakers RSN ²⁰
	Lakers RSN HD ²⁰
	Lakers RSN (Spanish language) ²⁰
	Lakers RSN HD (Spanish language) ²⁰
	Metro Sports (Kansas City)
	Metro Sports HD (Kansas City)
	Metro Sports (Nebraska)

¹⁵ See *supra* n.91 (discussing the distinction between “Comcast-controlled” networks and “Comcast-affiliated” networks).

¹⁶ Because Comcast has a less than 50 percent interest in Comcast SportsNet Chicago, we consider Comcast SportsNet Chicago for purposes of the estimates in this *NPRM* to be a “Comcast-affiliated” network, and not a “Comcast-controlled” network subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *supra* n.91; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 30 percent interest in Comcast SportsNet Chicago).

¹⁷ Comcast SportsNet Houston is scheduled to launch in 2012, featuring the games of the Houston Astros (of MLB) and the Houston Rockets (of the NBA). See *Go Back to the Future When the Astros and Rockets Launch Their Channel, It Likely Will Remind Viewers of HSE* (Nov. 8, 2010), available at <http://www.chron.com/sports/rockets/article/Astros-Rockets-network-likely-to-resemble-old-1705389.php>. Because Comcast will have a less than 50 percent interest in Comcast SportsNet Houston, we consider Comcast SportsNet Houston for purposes of the estimates in this *NPRM* to be a “Comcast-affiliated” network, and not a “Comcast-controlled” network subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *id.*; Comcast 2011 SEC Form 10-K at 8; see also *supra* n.91.

¹⁸ While press reports indicate that Channel 4 San Diego will no longer hold the rights for the Major League Baseball games of the San Diego Padres in 2012, these reports also indicate that Channel 4 San Diego carries NCAA Division I basketball games. See *Cox to Layoff Baseball Programming Employees*, Aug. 30, 2011, available at <http://www.10news.com/news/29032885/detail.html>; *SDSU Men’s Hoops at Arizona to be Simulcast on 4SD*, Nov. 22, 2011, available at <http://goaztecs.cstv.com/sports/m-baskbl/spec-rel/112211aab.html>.

¹⁹ See *Media Bureau RSN Report* at ¶ 16 n.52; *TWC/Insight Application* at 3-4 and Exhibit F.

²⁰ TWC recently announced that it will launch two RSNs in 2012 featuring the games of the Los Angeles Lakers (of the NBA), including the first Spanish-language RSN. See *Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season* (Feb. 14, 2011), available at <http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight>.

Cable Operator	Affiliated Regional Sports Networks (continued)
Time Warner Cable (continued)	OC Sports (Hawaii)
	OC Sports HD (Hawaii)
	TWC Sports (Albany)
	TWC Sports HD (Albany)
	TWC Sports (Central NY)
	TWC Sports HD (Central NY)
	TWC SportsNet (Buffalo)
	TWC SportsNet HD (Buffalo)
	TWC SportsNet (Rochester)
	TWC SportsNet HD (Rochester)
	TWC Connection/Sports (Mid-Ohio)
	TWC Connection/Sports (SW Ohio)
	TWC Sports 32 (Wisconsin)
	TWC Sports 32 HD (Wisconsin)
	Texas Channel (Texas)
	YNN Non-Stop Sports (Texas)
	Other ²¹ (4)
SportsNet New York HD (Comcast, TWC) ²²	
Comcast/Charter Sports Southeast (Comcast, Charter) ²³	
Comcast/Charter Sports Southeast HD (Comcast, Charter) ²³	

²¹ These RSNs are affiliated with more than one cable operator.

²² Because Comcast has a less than 50 percent interest in SportsNet New York, we consider SportsNet New York for purposes of the estimates in this *NPRM* to be a "Comcast-affiliated" network, and not a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *supra* n.91; Comcast 2011 SEC Form 10-K at 8 (stating that Comcast has a 8 percent interest in SportsNet New York); *GE/Comcast/NBCU Application* at 21.

²³ Because Comcast has a 50 percent or greater interest in Comcast/Charter Sports Southeast, we consider Comcast/Charter Sports Southeast for purposes of the estimates in this *NPRM* to be a "Comcast-controlled" network subject to the program access conditions adopted in the *Comcast/NBCU Order*. See *supra* n.91; *GE/Comcast/NBCU Application* at 21 (stating that Comcast has a 81 percent interest in Comcast/Charter Sports Southeast).

Table 3 – List of Unaffiliated, Regional Sports Networks¹

Altitude Sports Network
Altitude Sports Network HD
Big Ten Network
Big Ten Network HD
Fox Sports Arizona
Fox Sports Arizona HD
Fox Sports Carolinas
Fox Sports Carolinas HD
Fox Sports Detroit
Fox Sports Detroit HD
Fox Sports Florida
Fox Sports Florida HD
Fox Sports Midwest
Fox Sports Midwest HD
Fox Sports North
Fox Sports North HD
Fox Sports Ohio
Fox Sports Ohio HD
Fox Sports Prime Ticket
Fox Sports Prime Ticket HD
Fox Sports South
Fox Sports South HD
Fox Sports Southwest
Fox Sports Southwest HD
Fox Sports Tennessee
Fox Sports Tennessee HD
Fox Sports West
Fox Sports West HD
Fox Sports Wisconsin
Fox Sports Wisconsin HD
Longhorn Network
Longhorn Network HD
MASN
MASN HD
NESN
NESN HD
PAC-12 Network
PAC-12 Network HD

¹ See SNL Kagan, *Media Trends* (2011 Edition), at 70-74. This list is provided for illustrative purposes only. Inclusion or exclusion of a network should not be read to state or imply any position as to whether the network qualifies as an “RSN” as defined by the Commission.