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

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

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EXECUTIVE SUMMARY

The record demonstrates that the program access rules continue to play a vital role in preserving competition and diversity in the video programming market. In fact, the record shows the need for the Commission to address well-documented shortcomings in these rules to ensure that they effectively afford multichannel video programming distributors the protections Congress intended. Moreover, it is vital that the Commission retain the exclusivity prohibition because the need for the ban continues, and the case for relaxing it has not been made.

Closing the Uniform Price Increases Loophole. Cable-affiliated programmers argue that the Commission should not expand the program access rules to address the uniform price increases loophole because there is no empirical evidence that vertically integrated programmers purposely raise their own internal transfer prices to disadvantage unaffiliated MVPDs. However, the Commission has recently and repeatedly found that cable-affiliated programmers have an incentive to engage in this harmful behavior and has adopted remedial measures to address the problem on a case-by-case basis. It is well established that, even in the absence of specific data, the Commission can take action based on its well-considered assessment of the nature of the incentives facing various market participants and the manner in which they are likely to respond to these incentives. It is appropriate for the Commission to rely on its predictive judgment in this instance.

In addition, contrary to the claims of some cable-affiliated programmers and their cable operator affiliates, the Commission has ample authority under Section 628(c)(2)(B) to address this issue. In fact, Section 628(c)(2)(B) not only permits Commission action to address the uniform price increases loophole, but it expressly *requires* that the Commission's program access regulations prohibit discrimination by cable-affiliated programmers against non-affiliated cable operators. Nor does the uniform price increases loophole raise the specter of burdensome wholesale price regulation as some commenters suggest. The fair market value approach proposed by ACA is both a workable and effective means of addressing the uniform price increases loophole, and would not be overly burdensome as cable-affiliated programmers argue.

Retention of the Prohibition on Exclusive Contracts. Cable-affiliated programmers and vertically integrated cable operators argue that the large number of programming networks, most of which are not cable-affiliated, demonstrate that it is unnecessary to continue the ban on exclusive programming agreements between vertically integrated programmers and their affiliated cable operators. This argument misses the mark. In its review of the ability of vertically-integrated operators to disadvantage competitors, one of the factors that the Commission focuses on is the amount of programming affiliated with cable operators that consumers consider "must have," that is programming in which a significant number of customers would leave their provider in the event that the programming was withdrawn. For this calculation, the total number of networks available to MVPDs is not the deciding factor. Rather, the popularity of the programming cable-affiliated programmers control is the significant fact. On this score, the Commission's own data shows that the number of top 20 satellite delivered national programming networks, and regional sports networks ("RSNs") controlled by cable-affiliated programmers actually increased between 2007 and 2011. This demonstrates that the ability of cable-affiliated programmers to disadvantage competitors of their cable operator affiliates has, if anything, increased since the last sunset review.

Nor is it true, as the vertically integrated programmers and their cable operator affiliates assert, that they have no incentive to withhold programming from competing cable operators. Despite their claims of having no incentive, about 18 months ago, the Commission found in the Comcast-NBCU license transfer proceeding that Comcast-NBCU has an incentive and ability to harm its rivals by withholding programming, and adopted conditions lasting 7 years to address these concerns. Also, in the last 5 years, again despite the assertions of cable operators that they have no incentive to withhold programming from competing cable operators, vertically integrated cable operators actually *have* withheld regional sports networks from competitors, claiming that the program access rules do not apply to terrestrially delivered programming. Upon evaluating the marketplace as part of a rulemaking on the matter, the Commission there again found that vertically integrated operators have the incentive and ability to harm competition by withholding programming, and prohibited these operators from continuing to engage in this practice.

Cable-affiliated programmers also claim that the affiliation rules are overly broad and sweep within their scope programmers over whose business decisions the affiliated cable operator exercises no control. This issue, however, is beyond the scope of this proceeding. The question raised in the NPRM is whether the exclusivity prohibition remains necessary to preserve and protect competition in the video distribution market, not whether the attribution level is set at the correct level. If certain parties believe that the program access affiliation rules warrant review, nothing restricts these parties from filing a petition for rulemaking focused specifically on these issues. The affiliation issue raised by cable-affiliated programmers in this proceeding should not sidetrack the Commission.

<u>The Commission Should Clarify that the Prohibition on Discrimination Does Not Allow Selective Refusals to Deal.</u> In its comments, NCTA appears to argue that once the exclusivity ban is allowed to sunset, the Commission may not address the discriminatory impact of any exclusive agreements involving cable-affiliated programmers through the Section 628(c)(2)(B) prohibition on discrimination. Regardless of whether the Commission decides to allow the program access rules to sunset, which ACA strongly believes it should not, it should make clear in its Order that the prohibition on discrimination contained in Section 628(c)(2)(B) prohibits selective refusals to deal. A selective refusal to deal is where a cable-affiliated programmer licenses programming both to its affiliated cable operator and to another MVPD that competes

with it for subscribers, but refuses to license the programming to another MVPD that compete for those same subscribers. As the Commission made clear in the NPRM, selective refusals to license programming by a cable-affiliated, satellite-delivered programmer in the same area violates the prohibition against discrimination in Section 628(c)(2)(B), absent a legitimate business reason.

To avoid confusion, the Commission must clearly and plainly state in its Order in this proceeding that Section 628(c)(2)(B) prohibits selective refusals to deal as a form of non-price discrimination and reiterate the observation made in the NPRM concerning the continued ability of unaffiliated MVPDs to bring discrimination complaints based on selective refusals to deal. This will decrease the possibility of abuses and disputes arising from misinterpretations of the scope of the discriminatory conduct covered under Section 628(c)(2)(B). This is of particular concern to small competitive MVPD overbuilders and new entrants, which are particularly vulnerable to this behavior because a cable-affiliated programmer could find it profitable to withhold programming from a small provider operating within its affiliated cable operator's service area, even if it would not find it profitable to withhold the same programming from the four large national MVPDs who typically compete against cable (DirecTV, Dish, AT&T and Verizon). In such a case, the discrimination prohibition would continue to provide the small competitive provider with some protection even if the exclusive contract prohibition is allowed to sunset. Allowing selective refusals to deal would give vertically integrated programmers a free hand to selectively discriminate against these competitors.

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REPLY COMMENTS

American Cable Association

I. INTRODUCTION AND BACKGROUND

The American Cable Association ("ACA") submits these reply comments in response to comments filed addressing the issues raised by the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] The record conclusively demonstrates the need for Commission action to continue to protect unaffiliated multichannel video programming distributors ("MVPDs")

[1] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et. al.*, Notice of Proposed Rulemaking, 2012 FCC LEXIS 1257, MB Doc. No. 12-68, 07-18, 05-192 (rel. Mar. 20, 2012) ("NPRM").

against vertical effects, including by closing the uniform price increases loophole and extending the exclusivity prohibition for another five-year period.

Arguments made by cable-affiliated programmers and vertically integrated cable operators against retention of the exclusivity prohibition and extension of the Commission's program access rules lack supporting data and analysis as well as a basis in law. Therefore, they should be rejected. Specifically, to preserve and protect competition in the video distribution market, and improve the efficacy of its program access rules, the Commission must: (i) reject cable-affiliated programmer and vertically integrated cable operators arguments that the uniform price increases loophole is not a competitive problem, and adopt ACA's "fair market value" pricing standard; (ii) reject arguments of cable-affiliated programmers and vertically integrated cable operator arguments that the ban on exclusive programming contracts must be sunset and retain the prohibition in its entirety for five more years; and (iii) make clear that the prohibition on discrimination bars selective refusals to deal in which a cable-affiliated programmer licenses programming to its affiliated cable operator and at least one other MVPD that competes with it for subscribers but selectively refuses to license the programming to other MVPDs that also compete for these same subscribers.

II. THE COMMISSION SHOULD REJECT CABLE-AFFILIATED PROGRAMMER ARGUMENTS THAT UNIFORM PRICE INCREASES ARE NOT A SIGNIFICANT COMPETITIVE PROBLEM AND CLOSE THE LOOPHOLE BY ADOPTING A FAIR MARKET VALUE STANDARD FOR JUDGING DISCRIMINATION CLAIMS

The NPRM identifies the uniform price increases loophole[2] as a significant problem with the program access rules that the Commission has previously recognized and closed on a case-by-case basis during its review of license transfers and sought comment on whether and how

[2] The uniform price increases loophole involves a cable-affiliated programmer avoiding a claim of price discrimination by raising the price of a network for all distributors, including its own cable affiliate, to a level greater than would be charged by a non-vertically integrated programmer, but nonetheless disadvantaging non-affiliated cable operators due to the internal transfer of costs between the vertically integrated affiliates. *See* NPRM, ¶ 101; *see also* ACA Comments at 34-35.

the Commission should address the issue through rules of general applicability.[3] In its Comments, ACA agreed that the uniform price increases loophole undermines the program access prohibition on discrimination because it allows pricing that is facially neutral but has a disparate, discriminatory impact on unaffiliated MVPDs[4] and proposed that, to address the problem, the Commission adopt a "fair market value" standard for complaints filed under Section 628(c)(2)(B).[5] The approach advocated by ACA would allow an MVPD to sustain a program access complaint if it can establish that cable-affiliated programming is offered at a rate higher than fair market value, as evidenced by prices that other non-cable affiliated programmers offer for similar programming.[6]

A. The Lack of Empirical Evidence Documenting Abuse of Uniform Price Increases is Not Dispositive Because the Commission Can Make Predictive Judgments.

In their comments, cable-affiliated programmers argue that the Commission should not expand the program access rules to address wholesale pricing because there is no empirical evidence that vertically integrated programmers purposely raise their own internal transfer prices to disadvantage unaffiliated MVPDs.[7] The lack of this sort of evidence in the record documenting abuse of the uniform price increases loophole is neither surprising nor should it stand as an impediment to Commission action. Programmer pricing data is highly confidential and is typically protected by programmers through non-disclosure agreements. As a result, the evidence that cable-affiliated programmers assert is lacking in the record is inaccessible to non-

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[3] *See* NPRM, ¶¶ 101-102.

[4] *Id.* ¶ 102 ("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 price for unaffiliated MVPDs.")

[5] ACA Comments at 40.

[6] *Id.*

[7] Comcast Comments at 21-22; MSG Comments at 35.

vertically integrated MVPDs who only have access to the programming rates that they themselves pay. Only the cable-affiliated programmers are in possession of the prices that they charge other MVPDs, including their own cable affiliates. Thus, the Commission should not take seriously suggestions by cable-affiliated programmers and vertically integrated operators that it cannot act unless it has this data.[8]

It is well established that, even in the absence of specific data demonstrating competitive harms, the Commission can take action based on its well-considered assessment of the nature of the incentives facing various market participants and the manner in which they are likely to respond to these incentives.[9] This approach is particularly appropriate with respect to the program access rules in light of congressional findings that cable-affiliated programmers have the incentive and ability to favor their affiliated cable operators by making it more difficult for unaffiliated MVPDs to secure access to programming on nondiscriminatory prices, terms and conditions and its decision to delegate broad authority to the Commission to prevent such anticompetitive abuse through Section 628.[10]

Consequently, the Commission has routinely taken action to ensure that cable-affiliated vendors do not disadvantage MVPD competitors even without empirical evidence documenting

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[8] ACA Comments at 41.

[9] *See Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1313 (D.C. Cir. 2010)(*"Cablevision I"*); *see also Cablevision Systems Cor. v. FCC*, 649 F.3d 695, 714, 716-717 (D.C. Cir. June 10, 2011) (Commission may use its "predictive judgments" in determining that an unfair act has the purpose or effect of hindering or preventing the provision of satellite programming to customers); *In re: Core Communications, Inc.* 455 F.3d 267, 279 (D.C. Cir. June 30, 2006) (FCC determination that changes to reciprocal compensation regulations were necessary to prevent regulatory arbitrage and distorted economics incentives were not mere "FCC econo-babble," but was permissible where the Commission's economic analysis is reasonable).

[10] 1992 Cable Act, Section 2(a)(5) (stating that the cable industry has become vertically integrated and "cable operators have the incentive and ability to favor their affiliated programmers"); *see also* Senate Report at 24; House Report at 41-45. The Commission has relied on an analysis of market incentives in other circumstances as well, such as in adopting its Network Neutrality regulations. *See In the Matter of Preserving the Open Internet Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, ¶21 (2010) (establishing net neutrality regulations based in part on the record that showed broadband providers face "at least three types of incentives to reduce the current openness of the Internet").

actual abuses.[11] Indeed, the Commission has repeatedly examined the economic incentives of cable-affiliated programmers and concluded in multiple license-transfer proceedings that the uniform price increases loophole presents a problem that needs to be addressed.[12] These precedents make it clear that the Commission may adopt rules addressing known incentives that drive cable-affiliated programmers to engage in behavior that disadvantages MVPD competitors of their affiliated cable operators. This well-considered economic basis is sufficient for the Commission to conclude that the uniform price increases loophole needs to be closed.

B. The Commission has Ample Statutory Authority to Close the Uniform Price Increases Loophole.

In their comments, vertically integrated programmers and cable operators argue that any action the Commission might take to close the uniform price increases loophole would result in wholesale price regulation, an area beyond the scope of authority Congress delegated to the Commission.[13] This argument is without merit. The Commission has ample authority under Section 628(c)(2)(B) to address the uniform price increases loophole.

As an initial matter, Section 628(c)(2)(B) not only permits regulation of programming rates, but it expressly *requires* that the Commission's program access regulations "prohibit discrimination" by cable-affiliated programmers against non-affiliated MVPDs "in the prices,

[11] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶¶ 50 & 51 (2007) ("2007 Extension Order") (holding that the exclusivity ban should not sunset in part because "vertically integrated cable programmers retain the incentive to withhold programming from their competitors" and "cable-affiliated programmers continue to have an economic incentive to favor their affiliated cable operators over competitive MVPDs by entering into exclusive agreements."); *see also id.*, ¶16 (FCC analysis for determining whether to extend its exclusivity prohibition focuses on "whether, in the absence of the exclusivity prohibition, vertically integrated programmers would currently have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators . . . .").

[12] *See* NPRM, ¶ 101 n. 350 (identifying instances where the Commission has adopted measures to address the uniform price increases loophole).

[13] Comcast Comments at 22; Discovery Comments at 15-16; MSG Comments at 34.

terms, and conditions of sale or delivery" of cable programming.[14] The discriminatory conduct involving the sale of programming between cable-affiliated programmers and unaffiliated MVPDs that is prohibited by Section 628(c)(2)(B) itself occurs at the wholesale level. It is therefore difficult to fathom how these express statutory terms can be interpreted as not providing the Commission with broad authority over wholesale rates, terms and conditions of programming arrangements that fall within the scope of Section 628(c)(2)(B).

Moreover, there is nothing in the statute that limits the Commission to reviewing only the difference between the price a cable-affiliated programmer charges its affiliated cable operator and the price it charges non-affiliated MVPDs when analyzing a discrimination complaint.[15] It is true that Sections 628(c)(2)(B)(i)-(iv) contain specifically enumerated pricing practices that are statutorily permitted, and the Commission can and should take these into account in its consideration of a program access complaint. However, Section 628(c)(2)(B) requires the Commission to "prohibit discrimination."[16] If doing so requires a review of the fair market value of the programming offered by the cable-affiliated programmer because a uniform price increase results in an internal transfer between affiliates that has a discriminatory impact on non-affiliated cable operators,[17] then Section 628(c)(2)(B) of the Cable Act provides more than sufficient authority for the Commission to engage in such a review.

Thus, the upshot of Section 628(c)(2)(B) is clear – Congress *directly and expressly authorized* the Commission to exercise oversight of the "prices, terms, and conditions" of the sale and delivery of cable programming offered by cable-affiliated programmers to ensure that

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[14] 47 U.S.C. § 628(c)(2)(B).

[15] *See* Comcast Comments at 22 ("The statute is clear that the Commission must focus on whether the *differential* between the price a cable-affiliated programmer charges its affiliated cable operator and the price it charges other MVPDs is reasonable – not on whether the price charged to either or both is the "right" price as determined by an MVPD that wants a lower price or by the Commission.").

[16] 47 U.S.C. § 628(c)(2)(B).

[17] *See* NPRM, ¶ 101 (explaining how the internal transfer of programming costs between a cable-affiliated programmer and its affiliated cable operator can have a discriminatory effect).

they are not discriminatory.[18] The claims that the Commission does not have authority to regulate in this area are unfounded.

C. ACA's "Fair Market Value" Proposal to Close the Uniform Price Increases Loophole is Workable and Effective.

Finally, by raising the issue of "wholesale rate regulation," cable-affiliated programmers and affiliated cable operators conjure up notions of interminable cost proceedings where a regulatory authority reviews cost inputs and calculates appropriate rates.[19] However, this type of proceeding is precisely what would <u>not</u> happen under the fair market value standard that ACA proposed.

Instead, ACA's proposal is both workable and effective in addressing the uniform price increases loophole. Under ACA's approach, if a complaint is filed alleging that a cable-affiliated programmer will only offer prices above fair market value, the Commission would compare the prices that a cable-affiliated programmer charges to a particular MVPD, to the prices that other programmers charge the same MVPD and other MVPDs for similar programming.[20] This is not very different from the non-discrimination standard that is currently in place.[21] Under the current rules, the Commission compares prices that a cable-affiliated programmer charges to a particular MVPD with the prices that the same programmer charges other MVPDs for the same programming.[22] The fair market value standard simply expands and improves the comparison

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[18] *Id.*

[19] *See* Comcast Comments at 15-16; Discovery Comments at 15; MSG Comments at 34.

[20] ACA Comments at 39.

[21] *See* 47 C.F.R. § 76.1003 (c)(4) & (5) (establishing standards for reviewing program access complaints based on discrimination).

[22] *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, ¶15 (1993) ("1993 Program Access Order") ("When evaluating a discrimination complaint, we will initially focus on the difference in price paid by (or offered to) the complainant as compared to that paid by (or offered to) a competing distributor. The program vendor will then have to justify the difference using the statutory factors set forth in Section 628(c)(2)(B)."); *see also*

set to include prices charged by other programmers for similar programming.[23]

While ACA's proposal for addressing the uniform price increases loophole will not be significantly more burdensome than the current rules, it *will* further the purpose of the program access rules by ensuring that cable-affiliated programmers are not charging other MVPDs rates that hinder competition in the market. The Commission has in the past sought to deter the use of the uniform price increases loophole through case-by-case action in license transfer proceedings.[24] Absent the threat of enforcement, there is nothing to prevent vertically integrated programmers from engaging in a strategy involving discriminatory uniform price increases as part of their normal course of business. This renders the program access rules ineffective in preventing the discriminatory effects of this practice. It is time for the Commission to prevent wider competitive harms resulting from discriminatory uniform price increases by addressing the issue with a rule of general applicability.

III. THE RECORD CONCLUSIVELY DEMONSTRATES THAT THE COMMISSION MUST AGAIN RETAIN THE EXCLUSIVITY BAN IN ITS ENTIRETY IN ORDER TO PROTECT AND PRESERVE COMPETITION IN VIDEO DISTRIBUTION MARKETS

MVPD purchasers of cable-affiliated programming and other groups commenting in the record overwhelmingly agree that changes in market conditions since the Commission's last examination of whether to sunset the prohibition on exclusive contracts have not diminished the need for retention of this critical competitive safeguard.[25] Not surprisingly, cable-affiliated programmers and vertically integrated cable operators insist that the market for video

47 C.F.R. § 76.1003(c)(4) & (5).

[23] ACA Comments at 39.

[24] *See* NPRM, ¶ 101 n. 350 (identifying instances where the Commission has imposed conditions aimed at addressing the uniform price increases loophole).

[25] ACA Comments at 5-7; AT&T Comments at 6-23; CenturyLink Comments at 6-16; DirecTV Comments at 6-26; Dish Comments at 3-5; ITTA Comments at 3-5; Joint Rural Iowa MVPD Comments at 2-5; OPASTCO/NTCA Comments at 3-6; Blooston Rural RLEC Video MVPD Comments at 6-7; US Telecom Comments at 2-5; Free Press Comments at 1-2; Writers Guild Comments at 4-7; Verizon Comments at 3-10. *But see* Cox Comments at 3 ("exclusive contracts for cable-affiliated programming are relatively rare and are no longer a major factor in market distortions or cost increases").

distribution today is so different than the market of yesterday that it commands a complete sunset of the exclusivity prohibition.[26] However, the record overwhelming demonstrates that nothing could be further from the truth.

Sunset proponents argue that changes in the market have removed the incentive and ability of cable-affiliated programmers to disadvantage rival MVPDs through exclusive distribution contracts because: (i) there are an extremely large number of programming networks in the market, most of which are not cable-affiliated;[27] (ii) cable-affiliated programmers have no incentive to engage in anti-competitive exclusive deals;[28] and (iii) the Commission's rules are overly broad in subjecting some cable-affiliated programmers to program access restrictions that allegedly operate completely independently from the affiliated cable operator.[29] As demonstrated below, none of these arguments has merit standing alone nor, taken together, would they justify sunset of the exclusivity prohibition at the present time.

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[26] Comcast-NBCU Comments at 4-14 (marketplace developments support sunset of exclusivity ban); Cablevision Comments at 2-5 (exclusivity ban no longer necessary to preserve and protect competition in video programming market); Time Warner Cable Comments at 17-21 (exclusivity ban can no longer pass constitutional muster); NCTA Comments at 14-16 (market conditions warrant sunset of the exclusivity ban in its entirety). Programmers affiliated with the large vertically integrated cable operators similarly support sunset of the exclusivity ban in its entirety. *See* MSG Comments at 6-13 (blanket ban on exclusivity has outlived its usefulness and is no longer necessary to encourage and preserve MVPD competition); Discovery Comments at 5-11 (Commission should allow ban on exclusive contracts to sunset).

[27] Comcast-NBCU Comments at 2; MSG Comments at 11-12.

[28] Comcast-NBCU Comments at 7 ("absent extraordinary circumstances, it would be economically irrational for cable-affiliated programmers to cut themselves off from DBS and telco customers, who together account for more than 40 percent of all multichannel subscribers"); Discovery Comments at 5-8 (cable-affiliated programmers can only benefit from withholding if they can recoup lost affiliated fees and advertising revenue from forgoing carriage, an option that becomes more difficult as the number of subscribers the competing distributor has risen; such a strategy in today's declining cable market is virtually impossible).

[29] MSG Comments at 13-16 (the blanket ban on exclusivity is overbroad because it sweeps in programmers that operate independently notwithstanding their status as "cable-affiliated" under the Commission's "outdated ownership attribution rules"); Discovery Comments at 3 ("program access rules are triggered by an overbroad notion of affiliation, resulting in arbitrary application of the rules, without regard to whether or not a programmer's affiliated cable operator exercises any actual business control over the programmer's decisions or whether or not the affiliated cable operator has the geographic reach or market power to exercise the type of control over programming that the rules assume exists").

A. The Large Number of Programming Networks Available to MVPDs, Most of Which are Unaffiliated, Does Not Lessen the Ability of Cable-Affiliated Programmers to Harm Unaffiliated MVPDs by Withholding Popular Programming.

Cable-affiliated programmers assert that the exclusivity prohibition is unnecessary in today's marketplace, given the large number of programming networks available to MVPDs, most of which are unaffiliated. Comcast-NBCU cites data from the Commission indicating that today there are approximately "800 satellite-delivered, national programming networks, and more than 85 percent of those networks are unaffiliated with a cable operator."[30] Similarly, MSG argues that the continued decline of vertical integration demonstrates the lack of need for a continued ban on exclusive contracts for cable-affiliated programmers. "Thus, while more than half the cable programming available in the marketplace was controlled by cable operators when the exclusivity ban was adopted, now only a small slice of the numerous networks available for distribution are nominally at risk of being leveraged anti-competitively."[31]

Arguments based on the sheer volume of unaffiliated programming in the market are beside the point. The key factors the Commission evaluates in analyzing the incentives of vertically integrated programmers to disadvantage competitors by withholding programming from competitors are well established. One of these factors is the amount of programming affiliated with cable operators that consumers consider "must have"; that is, programming that if withdrawn would cause a significant number of consumers to leave their provider.[32] The total

[30] Comcast-NBCU Comments at 2.

[31] MSG Comments at 11-12.

[32] 2007 Extension Order, ¶¶ 37, 52; *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶¶ 36-37 (2011) ("Comcast-NBCU Order"). The Commission has also considered the following key factors: (i) the market share of affiliated cable operators in the market for its programming, and (ii) the profit margins of affiliated cable operators. *Id.* 2007 Extension Order, ¶¶ 37, 52.

number of satellite-delivered cable programming networks that are available to competing MVPDs is simply not a critical factor in this analysis.[33] As the Commission recognized in 2007:

> What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace.[34]

Similarly, in the *Comcast-NBCU Order* the Commission found that what mattered was not the percentage of total programming networks controlled, but rather the popularity of the programming.[35] Specifically, the Commission determined that the transaction at issue would give:

> Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion, causing them to be less effective competitors. . . . This is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes. . . . [T]he record evidence supports a finding that without Comcast-NBCU's suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast.[36]

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[33] *See, e.g.*, CenturyLink Comments at 14 ("The Commission recognized that not all channels are fungible, and that in a subscriber's mind, they believe that access to a number of networks is essential to inform their selection of a video provider."); Dish Comments at 5-6 (increase in number of networks available is irrelevant because the "most popular networks remain some of the longest-standing, and these networks remain affiliated with cable"); DirecTV Comments at 19-23 (available evidence continues to show that cable-affiliated programming represents some of the most popular and significant programming available today); Verizon Comments at 6 (the Commission has recognized that "cable programming . . . is not akin to so many widgets;" access to non-replicable programming remains essential to a competitive MVPD marketplace); ITTA Comments at 5-8 (cable-affiliated networks remain "must-have" programming for competing MVPDs).

[34] 2007 Extension Order, ¶ 37.

[35] Comcast-NBCU Order, ¶¶ 36-37.

[36] *Id*. In evaluating whether cable affiliated programmers have the incentive and ability to hinder competition, the Commission has not only examined the impact of the withdrawal of individual affiliated networks, but also the impact of the withdrawal of the suite of individual affiliated networks. Indeed, the Commission found as little as 18 months ago that the full array or "suite" of Comcast-NBCU satellite-

The data provided in the NPRM demonstrates that cable-affiliated programmers still control a sizeable amount of critical programming assets.[37] As ACA explained in its comments:

> [I]n 2011, vertically integrated cable operators had an interest in 7 of the top 20 satellite delivered national programming networks (as ranked by subscribership). This represents an increase in the number of top 20 satellite delivered national programming networks affiliated with cable operators since 2007. The data regarding RSNs also shows an increase in the number affiliated with cable operators since 2007. In 2007, 46 percent of RSNs were cable-affiliated, while in 2011 the number was up to 52.3 percent -- a 6.3 percent increase since 2007, with a majority of these being affiliated with the same four operators.[38]

Unaffiliated MVPDs correctly observe that the decline in the percentage of satellite-delivered, national programming networks that are affiliated with cable operators is not, in and of itself, dispositive of the question of whether the exclusivity ban should be lifted. As Dish explains, it "is only the proliferation of niche and specialty channels over this time frame that has affected the percentage. Cable-affiliated programmers retain their market power in the video distribution marketplace because the most popular networks are still some of the longest-

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delivered national cable programming networks constituted "marquee" programming that was necessary for a competitive MVPD regardless of whether any particular individual component within the suite did not. Comcast-NBCU Order, ¶¶ 36-37; ACA Comments at 38-39; DirecTV Comments at 20 ("the loss of several networks might have a dramatic effect on the MVPD's subscribership, even if the loss of any one network alone might not"); *see also* Dish Comments at 7 (profitability of foreclosure increases further still for those cable operators affiliated with more than one network). This finding was wholly consistent with the Commission's conclusion in the 2002 Extension Order that "[f]ailure to secure even a portion of vertically integrated programming would put a nonaffiliated cable operator or competitive MVPD at a significant disadvantage vis-à-vis a competitor with access to such programming." *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶32 (2002) . Commenters have confirmed that consumers have come to expect an array of long-standing, popular cable-affiliated programming from their subscription television provider, without which no MVPD can enter or remain in the market. *See* AT&T Comments at 9-13; CenturyLink Comments at 14.

[37] NPRM, Appendix B, Table 1, Table 2.

[38] ACA Comments at 6-7.

standing, and these networks remain affiliated with cable."[39] Nearly every unaffiliated MVPD commenting in this proceeding has affirmed that cable-affiliated programmers' control of critical programming assets gives them and their cable affiliates the ability to limit competition and diversity in the distribution of video programming, notwithstanding changes in the number of cable networks or to cable's share of the distribution market share since 2007.[40]

Simply put, the fact that there are a large number of unaffiliated programming networks available to MVPDs does not lessen the need for the exclusivity prohibition to remain in place to ensure access to well established and popular cable-affiliated programming for which there is significant consumer demand. Accordingly, in the Commission's assessment of the need to

[39] Dish Comments at 6.

[40] AT&T Comments at 9-20 (proliferation of niche programming networks is not dispositive; consumer decisions whether to subscribe to a particular MVPD and to switch providers are driven by the popularity of the programming, and not the sheer volume of programming networks; cable affiliated networks among the Top 20 satellite-delivered national programming networks has increased from six to seven since 2007, while the number of cable-affiliated networks among the Top 20 as ranked by average prime time viewing ratings remains at seven; six of the top ten cable series in 2011 based on average viewers were run on vertically integrated cable networks); CenturyLink Comments at 10-16 (there has been no significant change in the number of cable-affiliated satellite-delivered national programming networks since 2007 and cable-affiliated programming predominates the Top 20 satellite-delivered networks as ranked by subscribership; Commission "has recognized that not all channels are fungible, and in a subscriber's mind, they believe that access to a number of networks is essential to inform their selection of a video provider;" competing MVPDs continue to need access to key popular programming, both national or regional); Dish Comments at 5-10 (foreclosure continues to be profitable even as market share declines because the key factor is not the size of the cable company, but the popularity of the programming; the more popular the programming for the rival distributor's customer base, the more profitable a withholding strategy becomes and the data shows that some of the most popular programming remains cable-affiliated programming); DirecTV Comments at 19-23 (it is largely irrelevant that there is one fewer cable-affiliated national programming network today than there was in 2007 or that the explosion in the number of non-affiliated national programming networks has decreased the overall share of cable-affiliated programmers in view of the fact that today, 7 of the Top 20 most widely distributed national programming networks are affiliated with a cable operator, compared to 6 in 2007, and that the same number of Top 20 highest rated national programming networks are cable-affiliated today as were in 2007); US Telecom Comments at 5-12 (vertically integrated networks remain "must have" programming for MVPD competitors and the number of vertically integrated networks has remained unchanged); Verizon Comments at 5 ("[c]able operators today continue to exert extensive control over critical video programming, building on a legacy of vertical integration that predates the rise of competition;" these cable-affiliated networks "account for some of the most popular and significant programming in the marketplace, including seven of the top 20 networks, ranked by subscribership or their prime time ratings"); ITTA Comments at 5-6 (cable-affiliated programming networks, particularly RSNs, remain must-have programming for competing MVPDs; the number of such networks has remained virtually unchanged since 2007).

continue the exclusive contract prohibition, the existence of hundreds of non-affiliated, but less demanded, satellite-delivered programming networks available for carriage by competing MVPDs should be afforded little weight.

B. Cable-Affiliated Programmers Continue to Have the Incentive to Engage in Anticompetitive Exclusive Deals.

Cable-affiliated programmers argue that they have no incentive to withhold programming for anticompetitive purposes, and that successful pursuit of such a strategy in today's competitive marketplace is virtually impossible. Comcast, for example, argues that "[a]bsent extraordinary circumstances, it would be economically irrational for cable-affiliated programmers to cut themselves off from DBS and telco customers, who together account for more than 40 percent of all multichannel video programming distributors."[41] Given the Commission's repeated and recent findings to the contrary, these claims should be given little credence.

Within the last 5 years alone, the Commission has twice examined the potential harms that would follow from allowing vertically integrated programmers to withhold programming from competitors, and in each proceeding concluded that it was necessary to require exclusivity prohibitions. In these cases, the Commission found that action was required to prevent harms that would follow from permitting cable-affiliated programmers to act on their incentives to disadvantage non-affiliated MVPDs.[42] Indeed, approximately 18 months ago, in its *Comcast-*

[41] Comcast-NBCU Comments at 7.

[42] Comcast-NBCU Order, ¶¶ 36-48; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 , ¶¶27-28, 60 (2010) ("Terrestrial Loophole Order"); ACA Comments at 7-9 (discussing 2010 Terrestrial Loophole Order and 2011 Comcast-NBCU Order); CenturyLink Comments at 12 (recent Commission actions on the terrestrial loophole and Comcast-NBCU transaction to implement substantial conditions in order to preserve access to vertically integrated programming demonstrate continued need to exclusivity prohibition); DirecTV Comments at 8-13 (Commission findings in recent proceedings confirm the ongoing need for safeguards against exclusive arrangements involving cable-affiliated programming; *citing* 2010 Terrestrial Loophole Order, Verizon v. MSG, 26 FCC Rcd 13145 (MB 2011) and AT&T v. MSG, 26 FCC Rcd 13206 (MB 2011), and Comcast-NBCU Order); *see also* AT&T Comments at 13-20 (describing course of conduct giving rise to its program access complaints and the Media Bureau's order concerning access to RSNs that confirms that cable operators continue to have the incentive and ability to withhold critical

NBCU Order, the Commission examined an extensive record and concluded that economic theory demonstrated that Comcast-NBCU had the incentive and ability to disadvantage competing MVPDs by withholding programming given its current market shares, profit margins, and the extent to which subscribers will likely shift between MVPDs in response to a withdrawal of its programming.[43] The Commission adopted conditions that would prevent Comcast-NBCU from acting on its incentives until 2018.

Prior to this license transfer proceeding, in the Terrestrial Loophole Order, which involved the only circumstance where the program access rules did not prevent cable-affiliated programmers from foreclosing competitors (terrestrially-delivered RSN programming due to the "terrestrial loophole"), the Commission concluded that cable-affiliated programmers were significantly disadvantaging competing MVPDs by withholding programming.[44] In addition, because vertically integrated cable operators and their affiliated programming vendors continue to attempt to use their control over key programming assets to disadvantage rival MVPDs, the

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programming from their competitors and consequently, that exclusive access prohibition remains as necessary now to preserve and protect competition and diversity in the distribution of video programming as it was in 2007).

[43] Comcast-NBCU Order, ¶¶ 36-37 ("Our analysis adapts an analytical framework employed in antitrust law. First, we agree with commenters who assert that this transaction gives Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion, causing them to be less effective competitors. . . . This is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes. . . . [T]he record evidence supports a finding that without Comcast-NBCU's suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast. . . . In addition, we find that Comcast-NBCU will negotiate more aggressively relative to the pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals. Unlike the pre-transaction NBCU, the integrated firm will take into account that any possibility of harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals.").

[44] Terrestrial Loophole Order, ¶ 32 (discussing the Commission's 2006 regression analysis which concluded that Comcast's withholding of Comcast SportsNet Philadelphia RSN from DBS operators caused DBS subscribership in Philadelphia to be 40 percent lower than it otherwise would have been and "providing evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming").

Commission also required vertically integrated programmers to make available certain RSNs to competitive MVPDs as the result of several recent adjudications.[45] There can be no clearer demonstration that there is still an incentive for vertically integrated programmers to withhold programming from their competitors, than that they in fact engage in withholding strategies unless flatly prohibited from doing so.

These recent cases are fully consistent with the Commission's findings in its 2007 review of the exclusive contract prohibition concerning the incentive and ability of cable-affiliated programmers to disadvantage rival MVPDs.[46] They further demonstrate that, absent a prohibition, cable affiliated programmers will engage in withholding programming from competing MVPDs.[47] Given that the Commission's own data confirms no changes to market fundamentals have occurred in the brief interval since 2007, as ACA noted in its comments, it "is a fortiori the case that no significant changes have occurred in the market in the even briefer interval since these last two recent decisions were made."[48] In short, it is well documented in this proceeding that the incentives of cable-affiliated programmers to withhold important programming from rival MVPDs continue in the marketplace up to the present day.[49]

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[45] *See AT&T Servs. Inc., et al*., Order, 26 FCC Rcd 13206 (2011), *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 (2d Cir.); *AT&T Services, Inc., et. Al,* Program Access Complaint, File No. CSR-8066-P (filed Oct. 3, 2008); *AT&T Servs. Inc., v. Rainbow Media Holdings, LLC,* File No. CSR-7429-P (filed June 18, 2007); *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 (2d Cir.).

[46] *See, e.g.*, 2007 Extension Order, ¶ 51.

[47] *Id*.

[48] ACA Comments at 9.

[49] *See* AT&T Comments at 13-20 (describing "AT&T's need to resort repeatedly to litigation during the past five years to obtain access to cable-affiliated regional sports programming is 'must have' programming, access to which is critical to the competitive viability of any MVPD"); DirecTV Comments at 26-34 (exclusive contracts are generally not used by non-affiliated programming vendors whereas "just about the only circumstance in which one does find exclusivity involves cable-affiliated RSNs not covered by the cable exclusivity prohibition (because of terrestrial delivery). In those circumstances, however, withholding is almost always found."); US Telecom Comments at 9-10 ("in previous instances, the Commission has concluded that the withholding of RSN content has a substantial impact on the ability of

Finally, several commenters have noted that because exclusive contracts between cable operators and their affiliated satellite cable programming vendors have been in effect since 1992, there is limited direct evidence of anticompetitive foreclosure upon which the Commission may rely in making its extension decision.[50] For this reason, sunset opponents note that the Commission has appropriately relied, and the courts have upheld its reliance, on economic theory, record evidence, and its own predictive judgments.[51] ACA reiterates that these decisional bases are once again appropriate[52] and continue to point in only one direction – the prohibition on exclusive contracts between vertically integrated cable operators and their affiliated satellite cable programming vendors remains necessary to preserve and protect competition and diversity in video distribution markets and must be retained for an additional five-year period.

C. Questions Concerning the Propriety of the Definition of a "Cognizable Interest" in the Commission's Attribution Rules are Completely Separate From the Question of the Continued Need for the Exclusivity Prohibition.

Discovery and MSG lodge similar complaints that the program access rules "are triggered by an overbroad notion of affiliation, resulting in arbitrary application of the rules, without regard to whether or not a programmer's affiliated cable operator exercises any actual

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MVPDS to compete. . . This is exactly the type of anti-competitive behavior the Commission's rules were meant to address, and there is simply no policy basis for the Commission to sunset these protections."); Verizon Comments at 9-10 ("Cable operators have a long history that continues through the present day demonstrating that they will in fact use their control over RSN programming to harm competitors when they perceive they can get away with it.").

[50] *See, e.g.*, DirecTV Comments at 5; NCTA Comments at 13-14; Comcast-NBCU Comments at 19; MSG Comments at 28-29.

[51] ACA Comments at 4-5; CenturyLink Comments at 4; DirecTV Comments at 5; Dish Comments at 10; Free Press Comments at 1. *See also* NPRM, ¶ 15; *Cablevision I,* 597 F.3d at 1313 ("conclusions based on [the Commission's] predictive judgment and technical analysis are just the type of conclusions that warrant deference from this Court").

[52] *See* ACA Comments at 5-6 ("ACA concurs with the NPRM's assessment that it is appropriate to consider data similar to that examined in previous sunset orders to determine whether the exclusive contract prohibition remains necessary today."); NPRM, ¶ 22.

business control over the programmer decisions, or whether or not the affiliated cable operator has the geographic reach or market power to exercise the type of control over the programming that the rules presume exists."[53] MSG argues further that the constraints of the exclusivity ban are particularly unjustified with respect to its relationship to Cablevision because corporate controls and fiduciary obligations will ensure that the programmer "will maximize value for its shareholders and not sacrifice its own profits for the benefit of another corporation like Cablevision or any other cable operator."[54]

Generally speaking, for purposes of determining which programmers and cable operators are subject to the program access rules, the Commission's rules provide that actual working control, in whatever manner exercised, shall be deemed a cognizable interest, as will partnership and direct ownership interests and any voting stock amounting to five percent or more of the outstanding voting stock of a corporation.[55] When it first adopted the program access attribution standard in 1993, the Commission explained that the policy objective of curbing incentives for influencing behavior of affiliates to the detriment of competitors "warrants a relatively inclusive attribution rule."[56] When it again reviewed its attribution standard in 1999, the Commission reaffirmed that it was "designed to address specific misconduct that adversely affects competition and to focus on economic incentives to discriminate."[57] Discovery and MSG

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[53] Discovery Comments at 3; MSG Comments at 4, 14-16 (the constraints of the exclusivity ban are particularly unjustified for a programmer such as MSG, which has been spun off from Cablevision as a separate public company; the "crude instrument of a blanket ban on exclusivity arrangements sweeps in even programmers that are deemed "cable-affiliated" notwithstanding the cable operator's inability to exert control over the programmer's licensing decisions.").

[54] MSG Comments at 15.

[55] 47 C.F.R. § 501, Notes 1, 2. The five percent interests under this rule shall include all voting or nonvoting stock or limited partnership equity interests of five percent or more. 47 C.F.R. § 76.1000(b)(2).

[56] 1993 Program Access Order, ¶ 31.

[57] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 Review of the Commission's Cable Attribution Rules*, Report and Order, 14 FCC Rcd 19014, ¶ 103 (1999)("1999 Cable Attribution Order").

now raise the question of whether the Commission's carefully circumscribed definition of an "affiliated" programming vendor should again be reviewed.[58] This is a completely separate issue from whether or not there is a need for the program access rules to apply to cases in which a satellite-delivered cable programming network and a cable operator are operating under common control per the Commission's rules. Any review of the program access attribution rules should be conducted separately in a new proceeding devoted to that issue.

For the reasons stated above, ACA submits that the program access exclusivity prohibition remains necessary to safeguard MVPD competitors from the incentive and ability of cable-affiliated programmers and vertically integrated programmers to withhold access to key programming assets for the purpose of disadvantaging these downstream rivals. Should questions concerning the continued propriety of the ownership or control levels established by the Commission for program access purposes warrant further consideration, they can be addressed in a proceeding devoted to attribution questions separate and apart from consideration of the continued need for the exclusivity prohibition.

IV. REGARDLESS OF WHETHER THE COMMISSION ALLOWS THE EXCLUSIVITY PROHIBITION TO SUNSET, IT MUST MAKE CLEAR THAT THE DISCRIMINATION PROHIBITION PREVENTS CABLE-AFFILIATED PROGRAMMERS FROM SELECTIVELY REFUSING TO DEAL

In its comments, NCTA argues that once the exclusivity ban is allowed to sunset, the Commission may not address the discriminatory effects of any exclusive agreements involving

[58] *See* 1993 Program Access Order, ¶¶ 31-32 (adopting "a relatively inclusive attribution rule" in view of the policy objectives of the program access rule "to curb incentives got influencing behavior of affiliates to the detriment of competitors"). The exclusive contract prohibition provides: "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 (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest." (emphasis added).

cable-affiliated programmers through the Section 628(c)(2)(B) prohibition on discrimination.[59] According to NCTA, Congress specified that once an exclusive contract was found to be "permissible under subparagraph (D)" of Section 628(c)(2), it is also permissible under the anti-discrimination terms contained in Section 628(c)(2)(B). Thus, as NCTA put it, once the exclusivity prohibition sunsets, "*all* exclusive contracts are permissible under Section 628(c)(2)(D) – and *none* are prohibited by the discrimination ban in Section 628(c)(2)(B)."[60] Otherwise, NCTA asserts, the sunset provision would be meaningless because exclusive contracts, unless they meet the public interest standard of Section 628(c)(2)(D), would still be prohibited under the discrimination ban.[61]

As the Commission made clear in the NPRM, selective refusals to license programming by a cable-affiliated, satellite-delivered programmer violates the prohibition against discrimination in Section 628(c)(2)(B), absent a legitimate business reason.[62] That is, if a cable-affiliated programmer licenses programming both to its affiliated cable operator and one other MVPD that competes with it for subscribers, the discrimination prohibition prohibits it from refusing to license the programming to other MVPDs that also compete for those same subscribers. Irrespective of the merits of NCTA's arguments about how best to interpret the discrimination prohibition contained in Section 628(c)(2)(B) after the sunset of Section 628(c)(2)(D), the Commission should plainly state in its Order that there is no uncertainty that Section 628(c)(2)(B) prohibits selective refusals to deal as a form of non-price discrimination

[59] NCTA Comments at 15-16. Presumably, in making this argument, NCTA is postulating that if a cable-affiliated programmer offers an exclusive contract to its affiliated cable operator, a complaint could be lodged premised on the view that, by doing so, the cable-affiliated programmer was effectively not maintaining an exclusive deal, but rather offering the programming at very high prices to all MVPDs other than its affiliated cable operator, therefore running afoul of the prohibition against discrimination among distributors.

[60] NCTA Comments at 16, emphasis in the original.

[61] *Id.*

[62] NPRM, ¶ 64.

and reiterate the observation made in the NPRM concerning the continued ability of unaffiliated MVPDs to bring discrimination complaints based on selective refusals to deal.[63] The Commission should make this clarification even if it does not allow Section 628(c)(2)(D) to sunset. This will avoid any confusion and decrease the possibility of abuses and disputes arising from misinterpretations of the scope of the discriminatory conduct covered under Section 628(c)(2)(B).

Making this clarification in the Order in this proceeding is of particular importance to small competitive MVPDs (i.e. small overbuilders) that operate primarily within the footprint of a vertically integrated cable operator.[64] The incentive of a cable-affiliated programmer to withhold programming from a competing MVPD is reduced to the extent that the competing MVPD also serves subscribers outside the footprint of the programmer's affiliated cable operator. However, this ameliorating effect does not exist when a competitive MVPD operates entirely within the footprint of the cable operator affiliated with the programmer. Thus, it is possible that, in some cases, a cable-affiliated programmer might find it profitable to withhold programming from a small overbuilder operating within its affiliated cable operator's footprint, even if it would not find it profitable to withhold the same programming from the four large national MVPDs who typically compete against cable (DirecTV, Dish, AT&T, and Verizon). In such a case, the discrimination prohibition would continue to provide the small overbuilder with some protection even if the exclusive contract prohibition is allowed to sunset.

Clarification on this point would also be of particular importance to new entrants. The

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[63] *Id.*, ¶ 59 n. 201 (defining the prohibition on exclusive contracts in served areas as prohibiting a cable operator from "enter[ing] into any exclusive contracts, or *engag[ing] in any practice, activity or arrangement tantamount to an exclusive contract* . . . with" specified programmers); 47 C.F.R. § 76.1002(c)(2).

[64] As the Commission recognized in 2007, unless restrained, cable-affiliated programmers will successfully and profitably implement a withholding strategy "particularly where competitive MVPDs are limited in their market share" because "a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues forgone by pursuing a withholding strategy." 2007 Extension Order, ¶ 52.

incentive of a cable-affiliated programmer to withhold programming will be particularly great in the case of a new entrant that threatens to grow much larger over time. This is because the loss of licensing revenue from withholding in the short run (which is based on the size of existing sales) will be small compared to the benefits of not having the entrant grow larger in the long run (which is based on the size of future sales). Given the economics of serving new entrants, it is possible that in some cases a cable-affiliated programmer might find it profitable to withhold programming from a new entrant even if it does not find it profitable to withhold programming from established competitors. In this case, the discrimination prohibition would still continue to provide new entrants with some protection even if the Commission permits the exclusive contract prohibition to sunset.

V. CONCLUSION

For the foregoing reasons, the Commission should reject the arguments made by cable-affiliated programmers and vertically integrated cable operators that it is time to remove the restrictions on exclusive agreements. Rather, the Commission must take the actions necessary to ensure that cable-affiliated programming remains available to competing cable operators in a real and meaningful way.

Appropriate measures to be taken include closing the uniform price increases loophole, which currently undermines the effectiveness of the current rules by allowing cable-affiliated programmers to impose price increases on unaffiliated MVPDs that are not facially discriminatory, but that have discriminatory effects. There is no merit to claims that the lack of empirical evidence or lack of authority restrict or impair the Commission's ability to act on this important issue. ACA believes the most straightforward way for the Commission to address this issue is by allowing an MVPD to sustain a program access complaint if it can establish that cable-affiliated programming is offered at a rate higher than fair market value. Such a complaint would be supported by evidence of the prices that other non-cable affiliated programmers offer for similar programming. This approach is both workable and effective in closing the uniform price increases loophole.

In addition, the Commission must not allow the exclusive access prohibition to sunset as advocated by the largest cable operators and cable-affiliated programmers. As the record demonstrates, Cable-affiliated programmers retain the ability and incentive to harm unaffiliated cable operators by withholding critical programming. Cable operators are still affiliated with a sizeable percentage of popular programming, which gives them the ability to hinder competition with their rivals. The fact that the amount of unaffiliated programming has increased in the last five years has no bearing on this reality. In fact, over the course of the past five years the Commission has repeatedly found that cable-affiliated programmers continue to have the incentive and ability to use their affiliated programming to harm their rivals, and have actually engaged in exclusive activities. This demonstrates that the concerns that justified extension of the ban on exclusive arrangements in 2007 remain valid today. For this reason, the Commission should once again extend the prohibition on exclusive arrangements for another five years.

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