

**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, <i>et al.</i>	)	MB Docket No. 05-192
	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

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**COMMENTS OF TIME WARNER CABLE INC.**

Time Warner Cable Inc. (“TWC”) hereby submits the following comments in response to the Further Notice of Proposed Rulemaking issued in the above-captioned dockets.<sup>1</sup> As discussed herein, the Commission should focus on scaling back program access mandates to account for today’s competitive marketplace, rather than adopting additional presumptions that would unreasonably (and unlawfully) tilt the complaint process against cable operators and their affiliated programming vendors.

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<sup>1</sup> *Revision of the Commission’s Program Access Rules, et al.*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 12-123, MB Docket No. 12-68, *et al.* (rel. Oct. 5, 2012) (“Order” or “FNPRM”).

## INTRODUCTION AND SUMMARY

In its recent Order, the Commission appropriately concluded that the two-decades-old preemptive ban on exclusive contracts between cable operators and their affiliated, satellite-delivered programming vendors should sunset, in favor of a case-by-case adjudicative approach.<sup>2</sup> That determination represents an important step toward aligning the program access regime with the realities of today's competitive marketplace. But it does not go nearly far enough, as the regulatory framework still unjustifiably singles out cable operators and cable-affiliated programmers for extensive regulation, without any mechanism to scrutinize (much less regulate) the practices of all other marketplace participants. Indeed, as TWC has pointed out previously, the program access rules are both over- and under-inclusive, as they target certain cable agreements that present no material risk of harming the public interest while ignoring other arrangements or practices that have a far more significant impact on competition.<sup>3</sup> Regulatory intervention should be based on data-driven findings of market failure, not on legacy classifications that have little meaning in today's dynamic media landscape.

Unfortunately, rather than seeking to explore additional deregulatory reforms based on the dramatic changes that have occurred since the enactment of the 1992 Cable Act,<sup>4</sup> the FNPRM takes a step backwards, as it seeks comment on proposals that would exacerbate the current rules' myopic focus on cable operators and their affiliated programming vendors. In particular, picking up on several eleventh-hour proposals made by various multichannel video programming

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<sup>2</sup> Order ¶ 31.

<sup>3</sup> *See, e.g.*, Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, *et al.* (filed Sept. 11, 2012) ("TWC Sept. 2012 Ex Parte").

<sup>4</sup> *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 628(c)(2)(D), 106 Stat. 1460, 1496 (1992).

distributors (“MVPDs”) just before the release of the Order,<sup>5</sup> the FNPRM seeks comment on whether the Commission should adopt a series of rebuttable presumptions to govern its adjudication of complaints relating to satellite-delivered, cable-affiliated programming. Through these presumptions, the Commission would prejudge a number of key issues relevant to assessing the competitive impact of exclusive programming contracts in complainants’ favor, putting cable operators and their affiliated programmers at a significant disadvantage in their efforts to defend arrangements that are likely to be procompetitive and pro-consumer.

As explained below, the proposed presumptions cannot be squared with the Commission’s rulings in the Order; in fact, they would simply replace the prior *de jure* prohibition on exclusive arrangements with a *de facto* one by facilitating complaints against cable operators and their affiliated programmers—and only against such entities. Rather than preserving—indeed, extending—the irrationally cable-centric nature of its program access rules, the Commission should limit any further action in this context to assessing whether any actual competitive harms exist and then modifying the scope of its rules to fit today’s competitive landscape.

The central disconnect surrounding the FNPRM is that the rationale for sunseting the exclusivity ban militates strongly against the contemplated presumptions. The Commission appropriately based its sunset decision on the dramatic increase in competition among MVPDs since 1992, the sharp decline in vertical integration during that span, and the often procompetitive effects of exclusive arrangements under such conditions. In particular, the Commission found that, without even accounting for online video distribution, cable’s share

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<sup>5</sup> See Letter from Kevin Rupy, Senior Director, Policy Development, USTelecom, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, *et al.* (filed Sept. 26, 2012); Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, *et al.*, at 2 (filed Oct. 1, 2012).

among MVPDs has fallen steadily—from 95 percent in 1994 to 57.4 percent today—as DBS providers DIRECTV and DISH have grown into the second and third largest MVPDs nationwide, and as telco providers such as Verizon FiOS and AT&T U-Verse have made significant inroads.<sup>6</sup>

The Commission also found that the percentage of video programming vendors that are affiliated with cable operators has continued to fall. According to the Commission, “the number of Top 20 national cable networks as ranked by average prime time ratings that are cable-affiliated has fallen from seven in 2007 to one today”—that is, from 35 percent to just 5 percent over the past five years.<sup>7</sup> The same is true for regional sports networks (“RSNs”). As the Order notes, “while the Commission in 2007 relied on data indicating that 46 percent of all RSNs were satellite-delivered and cable-affiliated, this figure is only 17 percent today (not including Comcast-controlled networks, which are subject to program access merger conditions).”<sup>8</sup>

Finally, the Commission acknowledged the numerous procompetitive benefits of exclusivity arrangements in a competitive marketplace. For instance, it observed that exclusive contracts can increase investment in programming—and particularly local and regional programming—thereby promoting competition and diversity in the video programming market, and noted that Congress had reached the same conclusion.<sup>9</sup> The Commission also stated that exclusive contracts can lead to greater differentiation among the service offerings of competing MVPDs.<sup>10</sup> The Order thus explains that, “given market developments since 2007, we find no

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<sup>6</sup> Order ¶ 17, App. E.

<sup>7</sup> *Id.* ¶ 29.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ¶¶ 35-36.

<sup>10</sup> *Id.* ¶ 37.

basis to assume that the anticompetitive impact of exclusive arrangements always outweighs the procompetitive benefits.”<sup>11</sup>

Citing these various interlocking trends, the Commission allowed the preemptive prohibition on exclusive contracts to expire effective October 5, 2012. In its place, the Commission adopted a “nuanced, narrower, case-by-case” approach that the Commission found would be more consistent with its obligations under the First Amendment and with its mandate to avoid regulations that are outmoded, ineffective, or excessively burdensome.<sup>12</sup> In addition, the Commission affirmatively rejected several alternative approaches that would have “relax[ed]” the exclusivity ban while still keeping it in place.<sup>13</sup> In particular, the Commission determined that it lacked any evidentiary basis to retain an exclusive contract prohibition solely for satellite-delivered, cable-affiliated RSNs or for any other asserted “must have” programming, noting that the proponents of such measures had “fail[ed] to provide empirical data supporting their positions.”<sup>14</sup>

Given the Order’s sound reasons for rejecting such regulatory proposals, the FNPRM’s further exploration of ways to give complainants an advantage in program access adjudications is incongruous at best. The Commission should reject these proposals and focus instead on deregulatory measures that would account for the significant increase in competition since 1992.

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<sup>11</sup> *Id.* ¶ 37 n.151.

<sup>12</sup> *Id.* ¶¶ 38, 66-69.

<sup>13</sup> *Id.* ¶¶ 47-50.

<sup>14</sup> *Id.* ¶¶ 49-50.

## DISCUSSION

### I. THE COMMISSION SHOULD REJECT ANY RULES THAT SINGLE OUT CABLE OPERATORS FOR UNIQUE REGULATORY BURDENS

In light of the findings set forth in the Order, the last thing the Commission should do is tilt the playing field against cable operators and their affiliated programmers by adopting the new presumptions against exclusive arrangements at issue in the FNPRM. As a general matter, rules that impede the freedom of cable operators and their affiliated programmers to choose when and under what circumstances to license content to competing MVPDs raise significant First Amendment issues, and run headlong into the “presum[ption] that speakers, not the government, know best both what they want to say and how to say it.”<sup>15</sup> But rules that single out cable operators and treat them differently from other speakers—based on legacy classifications rather than any empirical finding of market power—raise particularly grave constitutional concerns.<sup>16</sup>

As TWC has explained previously in this proceeding, rules that target the relationship between cable operators and their affiliated programming vendors are both over-inclusive and under-inclusive, and thus do not entail the “fit” between statutory ends and regulatory means required under the First Amendment.<sup>17</sup> The focus on vertical integration as the justification for

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<sup>15</sup> *Riley v. Nat’l Fed. of the Blind, Inc.*, 487 U.S. 781, 790-91 (1988); *see also* Comments of Time Warner Cable Inc., MB Docket Nos. 12-68, *et al.*, at 2 (filed Jun. 22, 2012).

<sup>16</sup> *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994) (“Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.”); *Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (holding that regulations that discriminate among speakers threaten to “distort the market for ideas”).

<sup>17</sup> TWC Sept. 2012 Ex Parte at 3-4; *see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-23 (1991) (rejecting narrow tailoring argument because distinction drawn by the law in prohibiting only certain speech was both over- and under-inclusive relative to the state’s interest in limiting speech); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 793-94 (1978) (rejecting restriction on certain forms

heightened scrutiny of exclusive arrangements involving cable-affiliated programming is over-inclusive because there are numerous vertically integrated programming services that lack market power under any conceivable measure. For example, the Commission has recognized that exclusive arrangements involving cable-affiliated news services would be highly unlikely to pose public policy concerns given their strongly procompetitive nature.<sup>18</sup>

At the same time, to the extent that there is any valid basis for the government to intervene and limit exclusivity arrangements between video programmers and distributors, the Commission's myopic focus on *cable* exclusivity is under-inclusive because it does not even consider, let alone prohibit, other distributors' exclusive programming arrangements that may well entail market power. Perhaps most notably, the marketplace effects of DIRECTV's exclusive NFL Sunday Ticket arrangement have been well documented in this proceeding,<sup>19</sup> and broadcasters routinely use their control of other marquee sports programming to extract inflated

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of corporate lobbying due to over-inclusiveness and under-inclusiveness of restriction); *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-15 (1975) (rejecting narrow tailoring justification because speech restriction was "broader than permissible" in some respects yet "strikingly underinclusive" in other respects).

<sup>18</sup> See, e.g., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 51 n.200 (2010) ("*2010 Program Access Order*") ("[W]e believe it highly unlikely that an unfair act involving local news and local community or educational programming will have the prescribed purpose or effect under Section 628(b).").

<sup>19</sup> See, e.g., TWC Sept. 2012 Ex Parte at 2 (noting that DIRECTV's "exclusive NFL Sunday Ticket arrangement is far more competitively significant than many potential exclusive arrangements involving cable operators, yet the exclusivity ban does not apply to DirecTV at all" despite the fact that it "is the second-largest MVPD in the nation," and also noting that DIRECTV "holds an affiliated interest in certain [RSNs]"); Comments of Cox Communications, MB Docket Nos. 12-68, *et al.*, at 3 (filed Jun. 22, 2012) ("[T]he exclusivity deal causing the most significant market distortion today is DirecTV's Sunday Ticket package.").

compensation in retransmission consent disputes.<sup>20</sup> Yet the FNPRM’s proposals would do nothing to examine or address any competitive harms associated with these practices, belying any claim that the Commission’s rules rationally advance the goal of ensuring access to “must have” programming. In addition to presenting constitutional concerns, this disconnect between the asserted ends and means renders the cable-specific regulatory proposals arbitrary and capricious in violation of the Administrative Procedure Act (“APA”).<sup>21</sup>

The Commission thus should decline to adopt the various proposals in the FNPRM that would place a thumb on the scale in favor of program access complainants and against cable operators and their affiliated programmers, and that would unreasonably impede cable operators’ ability to enter into procompetitive arrangements with their affiliates for sports programming (and other genres). In today’s dynamic marketplace, the Commission cannot justify a continued myopic focus on cable operators and affiliated programmers. Instead, rather than simply asserting or presuming that certain agreements or practices involving cable operators are uniquely deserving of regulation, the Commission should design its rules to prevent demonstrable harms to competition and consumers in a more rational and straightforward manner. Thus, if ensuring access to certain programming—and in particular, sports programming, which is the express subject of three of the four proposed presumptions—is deemed to be a sufficiently important objective to justify the adoption of new regulations, then

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<sup>20</sup> See, e.g., David D. Kirkpatrick, *Murdoch’s First Step: Make the Sports Fan Pay*, N.Y. TIMES (Apr. 14, 2003), at C1 (“Mr. Murdoch has long described sports programming as his ‘battering ram’ to attack pay television industries around the world, using a portfolio of exclusive broadcasts to demand high programming fees . . .”).

<sup>21</sup> See, e.g., *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (“an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently”) (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983)).

that goal should warrant a modification of the program access rules to encompass other entities whose practices may undermine it.

## **II. THE COMMISSION SHOULD DECLINE TO ADOPT ANY FURTHER PRESUMPTIONS FOR CABLE-AFFILIATED REGIONAL SPORTS NETWORKS**

The proposed presumptions that would target cable-affiliated sports networks are particularly ill-conceived. As an initial matter, even apart from their improper cable-centric nature, presumptions relating to RSNs or national sports networks (“NSNs”) are immediately suspect in light of their undeniably content-based nature.<sup>22</sup> More broadly, those presumptions would run afoul of the APA by causing the Commission to prejudge the competitive effects of a particular exclusivity arrangement irrespective of the specific facts presented. In allowing the exclusivity ban to sunset, the Commission explained that, “in the context of present market conditions, . . . an individualized assessment of exclusive contracts in response to complaints is a more appropriate regulatory approach than the blunt tool of a prohibition that preemptively bans all exclusive contracts between satellite-delivered, cable-affiliated programmers and cable operators.”<sup>23</sup> But if the Commission were to adopt the inflexible presumptions proposed in the FNPRM—particularly the “unfair act” and standstill presumptions relating to cable-affiliated RSN programming—it would simply be replacing one “blunt tool” with another, undercutting the case-by-case approach extolled in the Order and blessed previously by the D.C. Circuit.<sup>24</sup> Given the dynamic conditions in the video marketplace, the Commission would be able to

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<sup>22</sup> See, e.g., *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 537 (1980).

<sup>23</sup> Order ¶ 3.

<sup>24</sup> See *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 722 (D.C. Cir. 2011) (explaining, in evaluating the Commission’s case-by-case approach to agreements involving cable-affiliated, terrestrially delivered programming, that the rules’ “focus[] on the effect of . . . withholding in individual cases . . . is one reason why [the] rules survive First Amendment scrutiny”).

resolve complaints more accurately and reliably by conducting fact-based inquiries in which it balances the asserted harms and benefits, rather than by adopting the evidentiary shortcuts that the proposed presumptions would offer.

**A. The Proposed “Unfair Act” Presumption Cannot Be Justified and Would Undercut the Commission’s Case-by-Case Analysis.**

The proposed presumption that any exclusive arrangement with a cable-affiliated RSN constitutes an “unfair act” under Section 628(b) flunks the D.C. Circuit’s standard for establishing such presumptions in rulemaking proceedings. As the D.C. Circuit has explained, “an evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until the adversary disproves it.”<sup>25</sup> Here, there is no record evidence indicating that an exclusive arrangement between a cable operator and an affiliated RSN is inherently “unfair,” or that the mere existence of such an arrangement creates a sufficient “probab[ility]” that the cable operator or the RSN has engaged in an “unfair act.” To the contrary, record evidence and applicable precedent suggest that, in today’s competitive environment, such arrangements should, if anything, be deemed presumptively procompetitive.

It is well-settled that, in a competitive marketplace, exclusive dealing represents “a presumptively legitimate business practice,”<sup>26</sup> and that exclusive contracts are “presumptively

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<sup>25</sup> *Id.* at 716 (internal quotation marks, alterations, and citations omitted).

<sup>26</sup> *United States v. Microsoft*, 253 F.3d 34, 69 (D.C. Cir. 2001) (en banc) (“Permitting an antitrust action to proceed any time a firm enters into an exclusive deal would . . . discourage a presumptively legitimate business practice.”).

procompetitive.”<sup>27</sup> As noted above, today’s video programming distribution marketplace is more competitive than ever, with horizontal concentration and vertical integration levels at all-time lows. For this very reason, the Commission has now eliminated preemptive restrictions on exclusive arrangements between cable operators and their affiliated, satellite-delivered programmers, in recognition of the procompetitive benefits of such arrangements. The D.C. Circuit relied on similar considerations when, in 2011, it vacated an attempt by the Commission to establish a categorical rule that all exclusive arrangements between cable operators and their affiliated, terrestrially delivered programmers—including terrestrially delivered RSNs—are “unfair” under Section 628(b).<sup>28</sup> The reasons identified by the court for vacating that rule—such as the emergence of vigorous MVPD competition across the country and the procompetitive benefits of exclusivity<sup>29</sup>—militate just as strongly against the “unfair act” presumption at issue here, if not more so, given the continued strengthening of competition as confirmed by the Order.

A presumption that every exclusive arrangement involving a cable-affiliated RSN is an “unfair act” also would undercut the benefits of the Commission’s current case-by-case approach to evaluating such arrangements. The Commission’s case-by-case approach is intended to “allow[] for an individualized assessment of exclusive contracts based on the facts presented in each case.”<sup>30</sup> Indeed, when the D.C. Circuit upheld the Commission’s equivalent approach to assessing exclusive arrangements for terrestrially delivered programming, an important factor in

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<sup>27</sup> 18 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1803a (2d ed. 2005) (describing “agreement[s] under which a seller promises to sell its goods only to a specific buyer” as “presumptively procompetitive”).

<sup>28</sup> *See Cablevision*, 649 F.3d at 720-22.

<sup>29</sup> *Id.*

<sup>30</sup> Order ¶ 31.

the court’s First Amendment analysis was the rules’ “focus[] on the effect of . . . withholding in individual cases.”<sup>31</sup>

But the proposed “unfair act” presumption—especially in tandem with the presumption adopted in the Order that exclusive deals involving cable-affiliated, satellite-delivered RSNs “significantly hinder[]” a competing MVPD’s ability to provide service<sup>32</sup>—would thwart this “individualized assessment” by placing a heavy thumb on the scale in favor of complainants. Indeed, such an approach would presumptively resolve all required elements of a complainant’s case in its favor from the very outset, shifting the burden entirely to the defendant. Moreover, the Commission recognizes elsewhere in the Order that there is no need to import a new presumption for RSNs into its current case-by-case analysis, stating that “our recent actions addressing complaints involving terrestrially delivered, cable-affiliated RSNs demonstrates the adequacy of [the current] case-by-case process.”<sup>33</sup> It would be arbitrary and capricious for the Commission to abandon that determination in order to adopt an alternative presumption relating to RSNs, particularly given the absence of any evidentiary basis to justify that reversal.

**B. The Proposed Presumption in Favor of Standstills Should be Rejected.**

The FNPRM’s other proposal related to RSNs—a presumption that a complainant challenging an exclusive arrangement between a cable operator and its affiliated RSN is entitled to a standstill—likewise is flawed and should be rejected. First and foremost, establishing a presumption that all program access complaints warrant preliminary injunctive relief would

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<sup>31</sup> *Cablevision*, 649 F.3d at 722.

<sup>32</sup> Order ¶ 55.

<sup>33</sup> *Id.* ¶ 32.

upend the general rule that such relief is an “extraordinary” remedy.<sup>34</sup> The current rules require complainants to meet an ostensibly rigorous four-part standard before being awarded a standstill. In addition to establishing a likelihood of success on the merits, a complainant must also demonstrate that, in light of its particular circumstances, it will suffer irreparable harm absent a standstill, that interested parties will not be harmed if a standstill is granted, and that the public interest favors a standstill.<sup>35</sup>

The proposed presumption would turn that exacting standard on its head, enabling—if not requiring—the Commission to grant standstills as a matter of course unless the *defendant* introduces evidence rebutting all four elements. The presumption also would put defendants in the impossible position of presenting evidence during the opening stages of litigation showing, for instance, that the *complainant* would not suffer irreparable harm absent a standstill. Indeed, the defendant likely would not possess the requisite evidence (such as economic evidence concerning the complainant’s ability to withstand such harm) to make that showing. The inevitable result of such a presumption would be a dramatic increase in the number of standstills granted, as well as a barrage of program access complaints seeking standstills based on nothing more than unsupported allegations.

By making standstills far easier to obtain, this proposal also would dramatically increase the risk of error in standstill proceedings. Under the proposed presumption, a complainant could obtain a standstill—even on the basis of an unsupported or entirely frivolous complaint—so long as the defendant is unable to come forward with evidence in a highly compressed time frame rebutting each of the four elements described above. The Commission thus could force a cable-

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<sup>34</sup> See *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 ¶ 10 (MB 2010) (finding that Sky Angel had not “met its burden of demonstrating that the extraordinary relief of a standstill order is warranted”).

<sup>35</sup> See 47 C.F.R. § 76.1003(1); see also *2010 Program Access Order* ¶ 73.

affiliated RSN to accept carriage on another MVPD's system absent any showing—or any prospect of a showing—that the exclusive arrangement at issue violates the program access rules. This risk of error has grave First Amendment implications, as it would involve compelling the speech of cable-affiliated RSNs without any specific justification. Indeed, faced with the prospect of an effectively automatic standstill, many cable-affiliated programmers would be pressured to enter into carriage arrangements they otherwise would reject, substituting government coercion for business judgment.

A presumption in favor of standstills is particularly unwarranted given the availability of several other possible remedies for alleged program access violations, such as the awarding of damages and the establishment of reasonable terms and conditions for the sale of the programming service at issue.<sup>36</sup> Without some showing that the newly established complaint process is deficient, it is at best premature to consider a rigid presumption favoring standstills in every case.

### **III. THE COMMISSION LIKewise SHOULD REJECT CALLS TO ADOPT PRESUMPTIONS RELATED TO NATIONAL SPORTS NETWORKS**

The FNPRM next asks whether the Commission should establish “unfair act” and/or “significant hindrance” presumptions for cable-affiliated national sports networks (“NSNs”), whether or not they are satellite delivered.<sup>37</sup> This proposal, however, is a solution in search of a problem, and the Commission should reject it.

First, the FNPRM identifies no rationale for singling out cable-affiliated NSNs for adverse treatment. Indeed, the FNPRM advances this proposal in a vacuum, as it simultaneously

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<sup>36</sup> See 47 C.F.R. § 76.1003(h)(1)-(3).

<sup>37</sup> See FNPRM ¶ 80.

asks how NSNs should be defined, and whether any even exist.<sup>38</sup> As it happens, the number of cable-affiliated NSNs—under any conceivable definition of that term—actually is very small, and there is no evidence that any such networks have been withheld from competing MVPDs. In fact, the Commission in the Order signaled that any concerns related to NSNs are entirely hypothetical.<sup>39</sup>

Moreover, there is no reasonable basis that could be developed in this proceeding to support the proposed presumption regarding NSNs, as no plausible economic theory could justify the adoption of blanket presumptions regarding NSNs. In particular, it would make little sense for a cable operator to withhold an affiliated NSN from an MVPD outside its footprint, as such a strategy would entail forgoing licensing revenue without any prospect of recovering that revenue through subscriber gains. In contrast, there apparently is no economic disincentive to other MVPDs' entering into exclusive arrangements with *unaffiliated* national sports programmers, as DIRECTV's contract with NFL Sunday Ticket attests. In fact, as noted above, that arrangement has a significant marketplace impact, yet there presently is no legal mechanism to challenge it, and the FNPRM proposes none.

Finally, as with RSNs, any proposal that singles out NSNs necessarily turns on the content of that programming, giving rise to content-based determinations in violation of the First Amendment. Therefore, the adoption of presumptions regarding cable-affiliated NSNs cannot be justified and would be arbitrary and capricious and otherwise contrary to law.

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<sup>38</sup> *See id.*

<sup>39</sup> Order ¶ 34 & n.134 (citing comments describing hypothetical transactions by which NSNs could become affiliated with cable operators).

#### IV. THE PROPOSED PRESUMPTION FOR PREVIOUSLY CHALLENGED EXCLUSIVE CONTRACTS IS UNNECESSARY AND OVERBROAD

The notice of proposed rulemaking that preceded the Order sought comment on whether the Commission should adopt a rebuttable presumption that, “once a complainant succeeds in demonstrating that an exclusive contract involving a satellite-delivered, cable-affiliated programming network” violates the program access rules, “any other exclusive contract involving the same network violates” those rules as well.<sup>40</sup> Although the Order “decline[d] to adopt this rebuttable presumption” on the basis that the record on this issue was “not sufficiently developed,” the FNPRM again seeks comment on this issue without any reason to believe that more public discussion will make up for the absence of any coherent rationale.<sup>41</sup> In fact, in light of the Commission’s findings in the Order, this particular proposal is even less appropriate now.

As an initial matter, such a presumption is entirely unnecessary. In the event the Commission (a) is presented with a program access complaint involving the same cable-affiliated network as in a previously adjudicated complaint, and (b) finds that the issues in the two cases are sufficiently similar, the Commission will of course take that prior adjudication into account. Indeed, it would have no choice but to do so, as the Commission is legally obligated to treat similarly situated complainants the same under the APA.<sup>42</sup> Thus, if a complainant were successful in demonstrating that an exclusive contract involving a particular network is unlawful, the Commission undoubtedly would look to that precedent and consider the extent to which it

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<sup>40</sup> *Revision of the Commission’s Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 ¶ 56 (2012).

<sup>41</sup> Order ¶ 58 n.237; FNPRM ¶ 81.

<sup>42</sup> *See, e.g., Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”) (internal citations omitted).

provides guidance in a subsequent dispute. By the same token, in the event a complainant were unsuccessful in showing that an exclusive contract is unlawful—and notably, the FNPRM does not propose that this corollary scenario be treated as a presumption of any kind—the Commission would be expected to consider that precedent as well.

By proposing that this general principle of *stare decisis* be codified as a formal presumption in the program access context, however, the FNPRM’s proposal would sweep far too broadly. The FNPRM would have the Commission establish a categorical, default rule that any adverse decision involving a particular network not only should be presumed to apply to a subsequent dispute involving the same network but should dictate the outcome of that dispute unless the defendant can show otherwise. Such a rule would be irrational. While a prior program access adjudication involving a particular cable-affiliated network sometimes may be relevant to a subsequent adjudication involving the same network, that will not always be the case. Indeed, in order to hold that a cable-affiliated programmer’s conduct violates Section 628(b), the Commission must find that the conduct significantly hindered the *complainant’s* ability to provide MVPD service. It would make no sense for such an adjudication to create a presumption in a later proceeding involving a *different* complainant—and different marketplace conditions—whose ability to provide MVPD service without the withheld programming might not be similarly impaired. For instance, as NCTA observed the first time this presumption was proposed, it would be unfair, not to mention arbitrary and capricious, to prejudge the competitive effects of an exclusive arrangement entered into in an urban market in the Northeast based upon

a finding of exclusivity involving that same network entered into a rural market in the Southwest.<sup>43</sup>

In short, the proposed presumption would allow a complainant to establish a prima facie case merely by citing a prior decision, forcing the defendant to distinguish that precedent. Such an outcome risks effectively restoring the *per se* ban on exclusive contracts that the Commission has found to be unnecessary and harmful. Accordingly, the Commission should reject this proposal.

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<sup>43</sup> Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 12-68, *et al.*, at 2-3 (filed Oct. 3, 2012).

