

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
)	
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)	

**COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

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December 14, 2012

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**COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

The Independent Telephone & Telecommunications Alliance ("ITTA") hereby submits its Comments in response to the October 5, 2012 *Further Notice of Proposed Rulemaking* ("FNPRM") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceedings.¹

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*

INTRODUCTION AND SUMMARY

ITTA is deeply concerned with the Commission's recent decision to lift the exclusive contract prohibition of the program access rules.² This decision is particularly troubling given the Commission's repeated conclusion during the past several years that vertically-integrated cable companies continue to have the incentive and ability to withhold valuable video programming to the detriment of competition and consumers.³ These concerns were echoed just days before the FCC's decision was released when Congressman Edward J. Markey, the principal House author of the 1992 Cable Act, advised the Commission that the program access

Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., 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, MB Docket Nos. 12-68, 07-18, 05-192, 07-29, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 12-123 (rel. Oct. 5, 2012).

² See *id.*

³ See, e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, ¶¶ 60-61 (2007) (“2007 Program Access Extension Order”), *aff’d sub nom. Cablevision Sys. Corp., et al. v. FCC* 597 F.3d 1306 (D.C. Cir. 2010); See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 (2010) (“2010 Program Access Order”), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (“*Cablevision IP*”); *Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011), *affirmed, Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); *AT&T Servs. Inc. et al.*, Order, 26 FCC Rcd 13206 (MB 2011), *affirmed, AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.). Moreover, ITTA observes that in each case, the Commission’s findings have been affirmed by the courts.

rules “continue to serve vital public interest goals and remain ‘necessary to preserve and protect competition and diversity’ in the marketplace.”⁴

ITTA stands firm in its belief that the Commission should have extended the contract exclusivity prohibition for an additional five years.⁵ Although there have been positive developments in the *retail* multichannel video distribution (“MVPD”) marketplace since the ban was last reviewed in 2007, the *wholesale* market with respect to access to content has not changed sufficiently to warrant elimination of the ban. In fact, as the Commission itself has found, the growth in retail competition has only increased vertically-integrated MVPDs’ incentive to withhold programming that is necessary for ITTA members and other MVPDs to compete effectively.⁶

The FCC’s policies on program access must promote reasonable and non-discriminatory access to video content for ITTA members and other MVPDs in order to further competition and broadband deployment and adoption. As the Commission is aware, ITTA member companies and other new entrant video providers that offer video service as part of a bundle with data service have increased broadband subscribership. The ability for such providers to offer video service not only promotes video competition and consumer choice, it also furthers the Commission’s goals relating to broadband investment. Such investment, in turn, enables ITTA

⁴ Letter from the Honorable Edward J. Markey, 7th District, Massachusetts, to the Honorable Julius Genachowski, FCC Chairman (dated Oct. 2, 2012), *available at*: <http://markey.house.gov/sites/markey.house.gov/files/documents/Letter%20to%20FCC%20Program%20Access.pdf>.

⁵ See letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (filed Oct. 3, 2012) (“ITTA Oct. 3 Letter”); letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (filed Sept. 7, 2012); Comments of the Independent Telephone & Telecommunications Alliance, MB Docket Nos. 12-68, 07-18, 05-192 (filed June 22, 2012) (“ITTA Comments”).

⁶ See *2007 Program Access Extension Order* at ¶¶ 60-61.

member companies and other video providers to offer additional features and advanced services, including robust data services, that their subscribers desire.⁷

Alternative mechanisms currently available for invoking program access protections, such as the program access conditions adopted in the *Comcast/NBCU Order*⁸ and the program access complaint process, are insufficient to safeguard the interests of competing MVPDs or consumers. Among other things, the *Comcast/NBCU Order* conditions do not apply to vertically-integrated programming affiliated with MVPDs other than Comcast. Moreover, those conditions are set to expire within the next several years. The existing program access complaint process, which in the past has been inadequate even for large, well-financed MVPDs, is unusable for smaller and new entrant MVPDs like ITTA member companies who cannot devote the substantial time and resources required to pursue such relief.

In light of the decision to allow the contract exclusivity prohibition to expire, it is essential that the Commission adopt alternative safeguards to ensure that its statutory obligations to protect and preserve competition are being met. Commission adoption of rebuttable presumptions that lack of critical access to sports and other unique, desired programming harms competition and should be subject to standstill treatment would provide some means to ensure that competition, consumer choice, and continued broadband investment are not foreclosed.⁹ In addition, the Commission should utilize this proceeding to address discriminatory pricing

⁷ See ITTA Comments at 8-9.

⁸ See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) (“*Comcast/NBCU Order*”).

⁹ ITTA has previously advocated the adoption of such presumptions, both independently and through its participation in the Coalition for Competitive Access to Content (“CA2C”). See, e.g., Letter from Kevin G. Rupy, on behalf of the CA2C Coalition, to Marlene H. Dortch, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (filed Sept. 26, 2012).

practices of vertically-integrated programmers, such as volume discounts and uniform price increases, because they put smaller and new entrant MVPDs at a competitive disadvantage relative to entrenched video providers and impede or preclude their ability to offer desired programming to consumers.

I. THE COMMISSION’S DECISION TO LIFT THE PROGRAM ACCESS CONTRACT EXCLUSIVITY BAN WILL HARM COMPETITION AND BROADBAND DEPLOYMENT

A. Vertically-Integrated Cable Operators Retain The Incentive and Ability to Discriminate Against Competing MVPDs

As further discussed below, access to video content is a key component for new entrant MVPD competition with incumbent and vertically-integrated cable operators.¹⁰ While competition in the video distribution market has increased since the exclusive contract prohibition was introduced in 1992, local exchange company MVPDs are new entrants to the video marketplace and require additional time and the opportunity to mature in order to compete effectively with incumbent and vertically-integrated cable operators. Notwithstanding the positive technological and competitive developments that have occurred in the video distribution area in the last several years, program access protections that ensure reasonable and non-discriminatory access to vertically-integrated programming remain vital to protecting and preserving competition among video distributors.

Incumbent and vertically-integrated cable companies have for decades been, and continue to remain, the dominant forces in the video distribution market. The number of subscribers attributable to cable operators since the exclusive contract prohibition was adopted remains virtually unchanged, and cable operators currently have nearly 58% market share for distribution

¹⁰ See Section I.C., *infra*.

of video services.¹¹ In comparison, wireline provider MVPDs currently have less than 9 percent market share.¹²

Notably, the number of cable operators that own programming has increased since the exclusive contract prohibition was last extended in 2007,¹³ and the majority of cable subscribers still get their programming from one of the four largest vertically-integrated MSOs.¹⁴ Despite predictions to the contrary, vertically-integrated cable companies remain a formidable presence in the MVPD marketplace.¹⁵ In some instances, such providers have increased their market share in the past few years.¹⁶

Moreover, the rise in the number of MVPD competitors gives vertically-integrated cable operators additional motivation to discriminate against competitors with respect to affiliated programming because doing so affords them a competitive advantage over their rivals. As the Commission has found, the growing presence of DBS and telco competition makes it even more

¹¹ See *FNPRM* at Appendix E.

¹² *Id.*

¹³ *FNPRM* at Appendix F, Table 1.

¹⁴ See *FNPRM* at Appendix E.

¹⁵ *Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010) (stating the court's anticipation that if the marketplace continued to develop at such a rapid pace, the Commission may be able to conclude that the exclusive contract prohibition is no longer necessary).

¹⁶ For example, Cablevision has experienced a significant increase in subscribership since 2010. Compare "Top 25 Multichannel Video Programming Distributors as of Dec. 2011," available at: <http://www.ncta.com/Stats/TopMSOs.aspx> with "Top 25 Multichannel Video Programming Distributors as of Sept. 2010," available at: http://blogs.indiewire.com/tedhope/top_25_multichannel_video_programming_distributors. Comcast, Time Warner Cable, and Cox have experienced negligible subscriber losses in that same timeframe and remain firmly rooted, respectively, as the #1 (with 22.343 million subscribers), #4 (with 12.484 million subscribers), and #5 (with 4.761 million subscribers) MVPDs in the nation. *Id.*

enticing for vertically-integrated cable operators to withhold critical access to unique and desired programming that they alone can offer and that other MVPDs need to compete effectively.¹⁷

B. Cable-Affiliated Networks, Particularly RSNs, Remain Must-Have Programming for Competing MVPDs

Cable-affiliated network programming is still must-have programming for competing MVPDs. Although the percentage of cable-affiliated national programming networks has decreased over time with the rise in both standard digital and high definition programming services, the Commission's data indicates that today there are 100 vertically-integrated satellite-delivered national networks.¹⁸ Moreover, several of these networks are among the most popular programming networks nationwide in terms of subscribership.¹⁹ With respect to regional sports network ("RSN") programming, there has been dramatic growth in the number of networks that are vertically integrated over the past several years. Today, there are 56 cable-affiliated RSNs as compared to only 18 cable-affiliated RSNs in 2007.²⁰ Given the importance of such programming to competing MVPDs, the Commission must ensure that its program access protections provide competing MVPDs with access to such vertically-integrated programming on reasonable terms and conditions.

Unlike established cable operators, new entrant MVPDs like ITTA member companies are not in a position to take advantage of the competitive benefits of programming exclusivity by launching their own new programming networks. This is unlikely to change materially in the foreseeable future given that recent Commission policy dictates that telco investment be focused on deployment of broadband network infrastructure rather than innovation through the creation

¹⁷ See *2007 Program Access Extension Order* at ¶¶ 60-61.

¹⁸ See *FNPRM* at Appendix F, Table 4.

¹⁹ See *FNPRM* at Appendix F, Table 1.

²⁰ See *FNPRM* at Appendix G, Tables 1-3.

of new services to be provided over such networks. Simply put, there is no realistic means for new entrants and smaller video providers to replicate the unique and valuable attributes of cable-affiliated sports and popular national network programming. Access to such networks therefore will remain important to protect smaller and new entrant MVPDs' ability to compete in the video distribution marketplace.

C. Robust Program Access Protections Are Important to Advancing The Commission's Broadband Deployment and Adoption Goals

Video is an important component of the service suites offered by ITTA member companies. Research demonstrates that the availability of video service drives broadband deployment and that investment in broadband networks and the provision of advanced services is greatly improved by telco providers' access to video content. In other words, program access protections that allow MVPDs to obtain non-discriminatory access to programming should allow telco video providers to make cost-based decisions that facilitate their continued investment in broadband facilities.

In a 2009 study, the National Exchange Carrier Association found that members offering Internet access along with a video component had broadband adoption rates nearly 24 percent higher than those companies offering Internet access without access to subscription video services.²¹ Thus, ITTA member companies' provision of video services in addition to their voice and data offerings delivers a huge public benefit in the form of increased broadband adoption, and increased adoption, in turn, provides the incentive and means necessary to expand broadband infrastructure deployment.

As new entrants in the areas where they provide video service to subscribers, ITTA members have a disproportionately limited amount of bargaining power in comparison to

²¹ See NECA Comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009).

vertically-integrated programmers and other MVPDs. Nonetheless, consumers have come to expect access to voice, data, and video services from their choice of provider, and ITTA member companies must do what is necessary to provide these “triple play” bundles to their customers. ITTA member companies that cannot offer a competitive video product face the prospect of losing subscribers and the revenues they generate which are necessary for continued investment in networks that offer the additional and advanced services desired by customers. Robust program access protections remain necessary to ensure reasonable access to vertically-integrated programming and therefore prevent such outcomes.

D. The Program Access Complaint Process and Other Existing Relief Mechanisms, Alone, Are Insufficient to Preserve and Protect MVPD Competition

The program access conditions adopted in the *Comcast/NBCU Order*²² are insufficient to safeguard the interests of competing MVPDs or consumers. Among other things, the *Comcast/NBCU Order* conditions do not apply to vertically-integrated programming affiliated with MVPDs other than Comcast. Moreover, those conditions are set to expire within the next several years.

Reliance on the Commission’s program access complaint process, as it currently stands, also is insufficient to preserve and protect competition in the MVPD marketplace. Although the Commission established a six-month timeframe for resolution of program access complaints,²³ this action alone did not make the complaint process any more helpful to smaller or new entrant MVPDs. For such providers, the time and financial resources involved in bringing a program

²² See n. 8, *infra*.

²³ See *R&O* at ¶ 63.

access complaint to remedy the immediate harm from lack of access to programming make pursuing such relief infeasible.²⁴

More specifically, any relief to which smaller and new entrant MVPDs may be entitled at the end of the current program access complaint process would come too late to be meaningful or effective. After six months, the damage in terms of subscriber losses, decreased market share, and other harms would already be done. Given that the Commission's existing case-by-case approach effectively leaves smaller and new entrant MVPDs with no practical remedy to ensure that they have reasonable access to vertically-integrated programming they must carry to compete, the Commission must adopt the additional safeguards identified below to preserve and protect competition in the MVPD marketplace.

II. THE COMMISSION MUST ADOPT ADDITIONAL PROGRAM ACCESS SAFEGUARDS TO PRESERVE AND PROTECT COMPETITION IN THE MVPD MARKETPLACE

A. The FCC Should Establish a Rebuttable Presumption that an Exclusive Contract for Critical Programming is an "Unfair Act"

Under the case-by-case process for complaints alleging that an exclusive contract violates Section 628(b), the complainant has the burden of proving that the exclusive contract at issue (i) is an "unfair act" and (ii) has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming.²⁵ With respect to the second element, the FCC has established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN (either terrestrially

²⁴ See ITTA Comments at 9-10.

²⁵ 47 U.S.C. § 548(b).

delivered or satellite-delivered) has the purpose or effect of significantly hindering or preventing the complainant from providing cable or broadcast programming as set forth in Section 628(b).²⁶

ITTA urges the FCC to modify the standard to allow complainants to invoke a rebuttable presumption with respect to the first element, *i.e.*, that the withholding of certain critical programming (any cable-affiliated RSN, national sports network, or top-20 national network) is an “unfair act” that has the purpose or effect of hindering or preventing competition.²⁷ Rather than forcing competitors and FCC staff to undertake repetitive and time-consuming examinations of historical evidence and precedents concerning the withholding of such programming, the FCC should allow complainants to invoke a rebuttable presumption that lack of reasonable and non-discriminatory access to such programming, regardless of whether it is terrestrially delivered or satellite-delivered, is an “unfair act” that has the purpose or effect of hindering or preventing competition as described in Section 628(b) of the Communications Act.

With respect to sports programming, the presumption should apply to any network (regardless of whether it is a regional or national network) that carries the same amount of sports as an RSN that the Commission has identified in creating program access conditions for RSNs in its transaction reviews.²⁸ As the Commission previously has recognized, “RSNs have no good

²⁶ See *R&O* at ¶ 55; *2010 Program Access Order* at ¶ 52.

²⁷ See *FNPRM* at ¶¶ 77, 80.

²⁸ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8256, ¶ 158 (2006) (“*Adelphia Order*”); *Comcast-NBCU Order*, Appendix A, § 1 (defining RSN as “any non-broadcast video programming service that (i) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (ii) in any year, carries a minimum of either 100 hours of programming that meets the criteria set forth in (i) above, or 10% of the regular season games of at least one sports team that meets the criteria set forth in (i) above”).

substitutes, are important for competition, and are non-replicable.”²⁹ Any rebuttable presumptions applying to vertically-integrated RSNs also should be applied to vertically-integrated national sports networks because there is no practical difference between the types of non-replicable and valuable sports programming on regional versus national sports programming networks.

In addition, the Commission should extend its rebuttable presumptions to the most popular cable-affiliated programming networks (such as the 20 with the highest ratings according to national ratings services), because they are critical to MVPD competition, particularly for new entrants to the video distribution marketplace. The ability to offer a comprehensive line-up of diversified programming options that appeal to a wide audience and a variety of interests is critical for competing MVPDs to constitute a viable competitive alternative to dominant incumbent cable operators.

Such an approach is crucial to preserving competition and consumer choice in the video distribution marketplace, particularly for new entrants and smaller MVPDs. First, it would make the program access complaint process a somewhat more affordable, and therefore a more realistic, means to pursue relief when competing MVPDs are denied access to critical programming. Second, it would streamline the program access complaint process for Commission staff, making it possible to comply with the newly-established six-month deadline for resolution of complaints regarding denial of access to cable-affiliated programming. Third,

²⁹ See, e.g., *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.*, MB Docket Nos. 12-68, 07-18, 05-192, Notice of Proposed Rulemaking, FCC 12-30, ¶ 28 (rel. Mar. 20, 2012) (internal citations omitted).

lowering some of the barriers to the complaint process and affirmatively establishing that having an exclusive contract for critical programming constitutes an “unfair act” that significantly hinders the ability of unaffiliated MVPDs to compete will have a deterrent effect on vertically-integrated cable operators and programmers by helping ensure that they act in good faith in negotiating with competing MVPDs for carriage of such programming. Most important, all of these actions would serve the public interest by making it less likely that consumers will have to pay higher rates for critical sports and popular national network programming or be denied access to such programming either permanently or for some period of time.

Furthermore, adopting the above-described safeguards would satisfy the D.C. Circuit’s requirement that an evidentiary presumption is only permissible (i) “if there is a sound and rational connection between the proved and inferred facts” and (ii) “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.”³⁰ Given the highly competitive nature of the retail video marketplace and the continuing ability and incentive for vertically-integrated cable operators to withhold valuable sports and other programming from their rivals, it is “sound and rational” to conclude that withholding such programming is unfair to competing MVPDs and makes it “so probable” that competing MVPDs would be put at a competitive disadvantage “that it is sensible and timesaving to assume” that lack of access to such programming on a reasonable and non-discriminatory basis is an “unfair act” within the meaning of the statute.

³⁰ *Cablevision II*, 649 F. 3d at 716.

B. The FCC Should Establish a Rebuttable Presumption for Previously Challenged Exclusive Contracts

The FCC also should establish a rebuttable presumption that an exclusive contract involving a cable-affiliated programming network that was the subject of a successful complaint is both unfair and has the purpose or effect of significantly hindering a competing MVPD's ability to provide such cable-affiliated programming.³¹ This approach would address concerns with the expense, burden, and lack of utility of the case-by-case complaint process for new entrant and smaller MVPDs. It also would be beneficial for the Commission because it would economize the Commission's limited resources by obviating the need for Commission staff to undertake repetitive examinations of program access complaints involving the same critical programming. In addition, it would serve as a deterrent to vertically-integrated cable operators and programmers by helping ensure that they treat all MVPDs fairly, which in turn would benefit consumers by giving them additional choices in providers for cable-affiliated programming.

Indeed, the case for establishing a rebuttable presumption is particularly compelling when the D.C. Circuit's standard for an evidentiary presumption is applied to this situation. Once the Commission has established that the withholding of particular programming is unfair and significantly hinders the ability of one competing MVPD to compete, it is "sound and rational" to conclude that such behavior is "so probable" to have a similar impact on another competing MVPD "that it is sensible and timesaving to assume" that would be the case.

C. The FCC Should Establish a Standstill Mechanism During the Pendency of a Complaint Involving Programming Subject to a Rebuttable Presumption

Under the Commission's rules, an MVPD seeking renewal of an existing programming contract may obtain a temporary standstill of the price, terms, and other conditions of such a

³¹ See *FNPRM* at ¶ 81.

contract through the program access complaint process upon a showing that the complainant is likely to prevail on the merits of its complaint, the complainant will suffer irreparable harm, that grant of a stay will not substantially harm other interested parties, and that the public interest favors grant of a stay.³² The Commission also should adopt a rule that a complainant challenging an exclusive contract with respect to programming subject to a rebuttable presumption is entitled to a standstill of an existing programming contract for such programming during the pendency of a program access complaint proceeding.³³

Given the valuable, unique, and sometimes time-sensitive nature of sports and popular national network programming (*e.g.*, playoff games, current weather-related information), the implementation of a standstill mechanism is essential in program access disputes. Numerous benefits would arise from implementing a standstill mechanism, including minimizing the impact on subscribers who may lose access to critical programming during a pending dispute, limiting the ability of vertically-integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations), encouraging good-faith negotiation and settlement of program access disputes, and increasing the utility of the program access complaint process.

The correct standard for such presumptive treatment is the D.C. Circuit test described above rather than the much more onerous test for grant of a stay in judicial proceedings. The requirements for a stay have little application in this context as they typically relate to preventing implementation of new rules or laws. Standstill treatment involves continued application of contract terms and conditions negotiated by the defendant, does not cause harm to the defendant as it contemplates a “true up” once a new agreement is in place or the proceeding is resolved,

³² See *2010 Program Access Order* at ¶¶ 71-75; see also 47 C.F.R. § 76.1003(l).

³³ See *FNPRM* at ¶¶ 74, 78-80.

and serves the public interest by protecting consumers from losing access to critical programming they desire.

Applying the D.C. Circuit standard for evidentiary presumptions, it is “sound and rational” to conclude that, absent standstill relief, it is “so probable” that the public interest ramifications stemming from service disruptions and denial of access to programming would be an “unfair act” that significantly hinders the ability of an unaffiliated MVPD from competing effectively that it is therefore “sensible and timesaving to assume” that standstill treatment is warranted during pending program access complaint proceedings. As such, with respect to programming that is subject to any of the rebuttable presumptions described above, the Commission should grant a standstill as a matter of course unless the vertically-integrated cable operator or programmer provides evidence to the contrary.

D. The Commission Should Modify Its Rules to Ensure that Buying Groups Can Benefit from Program Access Protections

ITTA urges the Commission to modify its rules to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of the program access rules.³⁴ Buying groups play an important role for small and medium-sized MVPDs in the video distribution marketplace by negotiating master agreements with video programmers that their MVPD members can opt into. Buying groups also act as an interface between their members and programmers so that programmers are able to deal with a single entity. As a result, buying groups are generally able to obtain lower license fees on behalf of their members than members could obtain by dealing with programmers directly. Similarly, there are lower transaction costs for programmers with respect to negotiating agreements and collecting payments when dealing with a single entity as opposed to numerous individual MVPDs.

³⁴ See *FNPRM* at ¶¶ 87-88.

Given that small and medium-sized MVPDs frequently rely on buying groups as the primary means by which they purchase [some] programming, it is imperative that buying groups are afforded the same program access protections in their dealings with cable-affiliated programmers as the individual MVPDs they represent. Although the Commission's rules contemplate program access protections for buying groups based on the level of liability the buying group assumes on behalf of its member MVPDs, the Commission's criteria do not reflect current industry practices.³⁵ Rather than assuming full liability, joint and several liability, or maintaining a cash reserve on behalf of its members, as the Commission's rules stipulate, a buying group's liability is typically limited to forwarding any payments due and received from its members under a master programming agreement to the appropriate programmer and terminating membership for entities that are delinquent in their payments. ITTA urges the Commission to adopt its tentative conclusion to revise its rules to include this widely accepted practice as an alternative liability option that would make a buying group eligible to avail itself of the non-discrimination protections afforded to MVPDs under the program access rules.

In addition, the Commission should take steps to prohibit cable-affiliated programmers from unreasonably preventing particular members of a buying group from opting into a master agreement.³⁶ While the program access rules prohibit unfair methods of competition and discriminatory practices, including selective refusals to license, the rules do not explicitly prevent cable-affiliated programmers from arbitrarily excluding particular members of a buying group from participating in a master agreement. If a cable-affiliated programmer enters into a master agreement with a buying group, all buying group members should have a right to participate in the master agreement. Furthermore, the Commission should establish that when an

³⁵ See 47 C.F.R. § 76.1000(c).

³⁶ See *FNPRM* at ¶¶ 91-94.

expiring master agreement is up for renewal, buying group members participating in the expiring agreement have the right to participate in the renewed agreement. Under this approach, it would be a violation of the Section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that regularly participates in a master agreement.³⁷

E. The Commission Should Utilize This Proceeding to Address Discriminatory Pricing of Cable-Affiliated Programming

Cable-affiliated programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs due to volume discounts, which are based on the number of subscribers the MVPD serves. One study indicates that “small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs.”³⁸ In the experience of ITTA member companies, fees paid for RSN programming in particular are as much as 50% higher for smaller MVPDs than for larger providers. However, program production and acquisition costs are sunk, and the transmission and administrative costs associated with delivery of programming are the same for all MVPDs, regardless of size. Thus, volume discounts or other pricing methods that favor larger or vertically-integrated providers are not reflective of marketplace considerations or the cost of doing business, placing smaller providers at an unreasonable competitive disadvantage vis-à-vis their larger rivals.

The Commission’s rules contemplate that an MVPD may file a program access complaint challenging volume-based pricing in certain circumstances.³⁹ However, a primary reason that

³⁷ 47 U.S.C. § 548(c)(2)(B).

³⁸ See Comments of the American Cable Association, MB Docket No. 07-269 (June 8, 2011), at 9.

³⁹ 47 U.S.C. § 548(c)(2)(B)(iii).

the Commission has not seen complaints filed on this issue is because, as noted above, the existing program access complaint process is too costly and time-consuming for smaller and new entrant MVPDs to utilize to pursue timely relief for price discrimination.⁴⁰ The Commission must take action to address this issue in a manner that would provide such providers meaningful protections.

Similarly, the Commission must take appropriate steps to address situations where a vertically-integrated programming distributor uses uniform price increases to gain a competitive advantage over its smaller rivals by charging all distributors, including itself, a higher rate for affiliated programming than it would normally charge a non-vertically-integrated distributor. While the vertically-integrated programming distributor could treat that higher price as an internal transfer it can disregard when setting its own prices, competing MVPDs would be forced to pay more for that programming and pass on the increase to their subscribers, or forgo purchasing the programming altogether.

Thus, while a uniform price increase may appear facially neutral in that it applies to all MVPDs equally, this practice clearly constitutes discrimination that is actionable under Section 628 because it has a disparate impact on MVPDs that are not affiliated with the vertically-integrated MVPD.⁴¹ Alternatively, it qualifies as an “unfair act” that significantly hinders or prevents a competing MVPD from providing programming to consumers.⁴² As with volume discounts, the Commission must take action to address uniform price increases in a manner that would provide non-vertically-integrated MVPDs a meaningful avenue to seek relief from such conduct.

⁴⁰ See Section I.D., *supra*.

⁴¹ 47 U.S.C. § 548(c)(2)(B).

⁴² 47 U.S.C. § 548(b).

Without non-discriminatory access to must-have content under reasonable terms and conditions, smaller and new entrant MVPDs face an unfair competitive disadvantage that will impede their ability to compete or deter them from entering the video marketplace altogether. The Commission must utilize this proceeding to address discriminatory pricing of cable-affiliated programming to ensure that smaller and new entrant MVPDs can compete effectively in the video distribution marketplace.

CONCLUSION

For the foregoing reasons, the Commission should adopt the reasonable, narrowly tailored rebuttable presumptions and program access protections for buying groups described herein. The Commission also should address discriminatory pricing practices with respect to cable-affiliated programming to ensure that smaller and new entrant MVPDs can compete effectively against incumbent and vertically-integrated MVPDs and provide programming that subscribers desire.

Respectfully submitted,

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December 14, 2012