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
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COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

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December 14, 2012

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Comcast Corporation and NBCUniversal Media, LLC ("NBCUniversal") (collectively, "Comcast") hereby respond to the above-captioned Further Notice of Proposed Rulemaking ("*Further Notice*").[1] In today's vibrant and competitive marketplace, there is no factual or legal justification for the Commission to *expand* the program access regime. Accordingly, the Commission should reject the regulations proposed in the *Further Notice* and close this docket.

I. INTRODUCTION AND SUMMARY

Over the past two decades, competition in the video distribution marketplace has exploded. DBS and telco providers have become formidable, established competitors; vertical integration has decreased dramatically; and the number and variety of cable networks has increased drastically. Given today's vibrant, competitive marketplace, the Commission should scale back, not expand, government intrusion into private marketplace negotiations. This reduced government role is consistent with First Amendment principles and with the Commission's own deregulatory goals – in accordance with President Obama's directive – to remove outmoded rules and have no more regulation than is necessary. New rebuttable

[1] *Revision of the Commission's Program Access Rules*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 12605 (2012) ("*Further Notice*").

presumptions and expanded rules governing buying groups would conflict with these principles, especially in the absence of any evidence of marketplace harms that the proposals would solve.

The proposed presumptions fail to meet the standard for evidentiary presumptions articulated by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") and would be arbitrary and capricious under the Administrative Procedure Act ("APA"). For example:

- Adopting rebuttable presumptions that exclusive contracts for cable-affiliated regional sports networks ("RSNs") and national sports networks hinder significantly competitors' ability to deliver programming to subscribers *and also* are "unfair" would ignore the fact that the Commission previously has determined that individualized assessments are needed to make those factual and legal findings.
- Given the recognized benefits of exclusive contracts and the variety of individualized factors that affect a competitor's ability to deliver programming to subscribers, it is not "sound and rational" to presume that every exclusive sports contract is unfair and hinders significantly every competitor's ability to deliver programming – the standard required under the D.C. Circuit's test.
- A rebuttable presumption in favor of standstills for challenged exclusives would ignore that injunctions are extraordinary relief and that a heavy burden rests with the complainant to prove each element to justify the standstill.

Collectively, these proposals would effectively result in a de facto ban on exclusive sports contracts and, at minimum, a shift in the burden of proof – both impermissible results.

The proposed expansion of the program access rules with respect to buying groups is entirely unjustified. Buying groups are already fully protected by the program access rules and the American Cable Association's ("ACA's") proposals would only give buying groups unwarranted advantages. Consistent with the Commission's longstanding policies, if buying groups want to step into the shoes of their multichannel video programming distributor ("MVPD") members, they should assume the same financial liability as their members and be willing to make binding subscriber commitments in order to obtain the same benefits and prices as a "similarly situated" MVPD. Finally, ACA's proposed "safe harbor" of three million subscribers for "small" MVPDs to enter into a buying group's master agreement is unnecessary. NBCUniversal's experience is that MVPDs with three million subscribers (or even half that number) are perfectly capable of negotiating successfully on their own.

At a time when the marketplace is more vibrant than ever, the Commission should not expand the program access rules based on the unsupported fears and speculation of a few parties.

II. MARKETPLACE AND CONSTITUTIONAL CONSIDERATIONS MAKE IT INAPPROPRIATE TO EXPAND PROGRAM ACCESS REGULATION.

Twenty years ago, most Americans had access to only one cable operator and only 68 national cable programming networks, 57 percent of which were affiliated with cable operators.[2] "Today, over-the-air TV, cable TV, satellite TV [], and the millions of content suppliers . . . are overwhelming consumers with choices."[3] Consumers have as many as five MVPDs from which to choose, and nearly 800 national cable programming networks are available, only 12 percent of which are cable affiliated.[4] In other words, over the twenty years since the program access rules were first promulgated, video competition – at both the programming network level and the distributor level – has grown by leaps and bounds, and vertical integration has dramatically declined.[5] The Commission recognized this in the *Sunset Order*, where it determined that, as a

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2 *See* H.R. Rep. No. 102-628, at 41 (1992).

3 Statement of Commissioner Robert M. McDowell Before the Subcommittee on Oversight and Investigations, Committee on Energy & Commerce, U.S. House of Representatives 2-3 (July 7, 2011).

4 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd. 8610 ¶ 27 (2012); *Further Notice* apps. E & F. In the *Sunset Order*, the Commission excluded Comcast-controlled networks when assessing the continued need for the exclusivity ban, noting that these networks are covered by the program access conditions adopted during the Comcast-NBCUniversal transaction until January 2018. *See Revision of the Commission's Program Access Rules, et al.*, Order, 27 FCC Rcd. 12605 ¶ 24 (2012) ("*Sunset Order*"). This same logic justifies excluding the Comcast-controlled networks when assessing the need for new rebuttable presumptions for complaints alleging cable-affiliated exclusives violate Section 628(b). And when the Comcast-controlled networks are excluded, the percentage of cable-affiliated, national programming networks decreases from 12 percent to less than 10 percent. *See Sunset Order* ¶ 24 (noting that 30 national programming networks are Comcast-controlled).

5 Despite the fact that the U.S. communications sector is today more competitive than ever, the CFR pages devoted to FCC rules continue to increase – with 3,469 pages in a recent count of the 2011 edition.

result of these significant developments, a preemptive ban on exclusive contracts is no longer "necessary to preserve and protect competition and diversity in the distribution of programming."[6]

The same competitive analysis that led the Commission to conclude that there was no justification for a per se ban strongly suggests that there is no basis for the Commission to adopt any new program access regulations. Indeed, it would make no sense to adopt the regulations proposed in the *Further Notice* unless the Commission is assuming that the current competitive trends are likely to reverse and lead to unfair conduct – which is highly unlikely and not supported by marketplace evidence.[7] And of course, even leaving those trends aside, such a shift is unlikely given that many of the relevant networks are bound by the conditions in the *Comcast-NBCUniversal Order*, which provide additional protections against unfair conduct for a significant portion of the networks that are cable affiliated. Consistent with this and its recognition of today's vibrant marketplace, the Commission should be undertaking further efforts to scale back regulation and *limit* – not increase – the government's intrusion into private marketplace negotiations.[8]

This imperative is further strengthened by First Amendment considerations. The Commission recognized in the *Sunset Order* that the First Amendment requires a program access

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6 *Sunset Order* ¶¶ 29-31.

7 *See id.* ¶ 34 ("We also recognize the possibility that the expiration of the exclusive contract prohibition may result in cable operators acquiring additional programming, including 'must have' programming, and then entering into exclusive contracts for such programming. . . . [and] that some existing satellite-delivered, cable-affiliated programming may increase in popularity in the future. *The record, however, provides no basis* on which to predict the likelihood of these developments or their impact on competition. *Indeed, such developments seem contrary to current market trends*[.]" (emphasis added)).

8 *See supra* note 4. The Commission noted that: (1) it was appropriate to exclude Comcast-controlled networks when assessing the continued need for a preemptive ban; (2) Comcast recently sold its interest in A&E networks, further decreasing the number of "popular" networks that are vertically integrated; (3) HBO and Cinemax were no longer cable affiliated; and (4) "only 18 RSNs (17 percent) are cable-affiliated, satellite-delivered, and not Comcast-controlled, and therefore potentially impacted by the expiration of the exclusive contract prohibition." *See Sunset Order* ¶ 28.

regime tailored to restrict no more speech than is essential to achieve an important government interest.[9] At a time when the Commission has recognized that competition has reached a level that permits it to reduce regulation, there can be no defensible government interest in expanding the program access rules to an unprecedented degree – one that was never deemed necessary by Congress or the Commission when the marketplace was far more concentrated.

A light regulatory touch, with an eye toward cutting back rather than expanding the Commission's role in the marketplace, is also consistent with Executive Branch guidance and the Commission's stated policies. In accordance with Executive Order 13579, the Commission adopted a plan earlier this year to analyze rules that may be outmoded, ineffective, insufficient, or excessively burdensome and determine whether any such regulations should be modified, streamlined, or repealed.[10] It would be decidedly inconsistent with the President's and the Commission's deregulatory goals to layer on new program access rules that have never before been thought necessary. As President Obama told a joint session of Congress, "We should have no more regulation than the health, safety and security of the American people require. Every rule should meet that common-sense test."[11] New presumptions for complaint proceedings and new rules for buying groups cannot remotely satisfy that standard.

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[9] *See id.* ¶ 69 (explaining that a case-by-case approach will be tailored to "target activities where the governmental interest is the greatest by limiting liability to cases where a complainant demonstrates that an exclusive contract is an 'unfair act' that has the 'purpose or effect' of 'significantly hindering or preventing' the provision of satellite programming in violation of Section 628(b)"); *id.* ¶ 38 ("[D]eclining to extend the exclusive contract prohibition beyond its sunset date and relying instead on a case-by-case process is consistent with our First Amendment obligations[.]").

[10] *See* FCC, Final Plan for Retrospective Analysis of Existing Rules, May 18, 2012; *Sunset Order* ¶ 38.

[11] Press Release, The White House, Office of the Press Secretary, *Address by the President to a Joint Session of Congress* (Sept. 8, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/08/address-president-joint-session-congress.

III. THERE IS NO FACTUAL JUSTIFICATION OR LEGAL BASIS FOR ADOPTING ADDITIONAL REBUTTABLE PRESUMPTIONS FOR CASE-BY-CASE COMPLAINTS UNDER SECTION 628(b).

Now that the exclusivity prohibition has expired, the Commission will address any challenged exclusive contracts involving cable-affiliated networks on a case-by-case basis under Section 628(b) of the Act.[12] The *Further Notice*, however, seeks comment on whether the Commission should adopt new presumptions, including that exclusive sports contracts are "unfair," "hinder significantly" MVPDs' ability to provide programming to consumers, and should be enjoined pending a full adjudication. Adoption of the rebuttable presumptions proposed in the *Further Notice* would result in Section 628(b)'s general prohibition reinstating an effective per se ban on exclusive sports contracts, further distorting the marketplace in light of the small percentage of networks that are vertically integrated today and thus would be subject to the presumptions.

Furthermore, the proposed rebuttable presumptions are a solution in search of a problem. First, programmers generally have powerful economic incentives to license their programming broadly and fairly, and MVPDs have access to a near-infinite array of content. Second, as noted above, the Comcast-controlled programming networks already are subject to specific restrictions on their licensing practices.[13] Third, the number of other vertically integrated programming networks that would be subject to the proposed presumptions would be relatively limited, even after excluding the Comcast-controlled networks.[14] Fourth, the remaining vertically integrated

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12 *See* 47 U.S.C. § 548(b) (prohibiting a cable-affiliated programmer and its affiliated operator from engaging in "unfair or deceptive acts or practices" that have the "purpose or effect of" "hinder[ing] significantly or prevent[ing]" an MVPD from providing video programming to subscribers); 47 C.F.R. § 76.1001(a).

13 *See supra* note 4.

14 As discussed above, less than 10 percent of national programming networks are cable-affiliated once the NBCUniversal networks are removed from the equation. *See supra* note 4. And while Discovery is affiliated with 22 national networks, none are sports-related, meaning three out of the four proposed rebuttable presumptions would not apply to these networks. In reality, the universe of networks that would be subject to the majority of the

networks have little incentive to enter into exclusive arrangements because of (i) the inclusive attribution standard that deems networks "cable-affiliated" even where there is only an attenuated interest with a cable operator,[15] and (ii) the relatively small geographic footprint of the cable operators affiliated with the remaining vertically integrated networks, which makes it unlikely that these networks would engage in restrictive licensing practices vis-a-vis other providers.[16] As such, the marketplace justification for adopting a whole set of presumptions in this area is simply lacking.

Further, the D.C. Circuit has made clear that evidentiary presumptions such as these are only permissible when: (i) "there is a sound and rational connection between the proved and inferred facts," *and* (ii) "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."[17] The *Further Notice*'s proposals cannot meet this test because the Commission itself has acknowledged that the analysis under Section 628(b) must be fact- and case-specific. Moreover, there can be no legitimate government interest in adopting presumptions that, in effect, compel a defendant to allow all MVPDs to carry its programming even when it is in its

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rebuttable presumptions is limited to sports networks affiliated with Cablevision, Cox, Bright House, and Time Warner Cable.

15 For example, Cablevision spun off both MSG and Rainbow Media (now AMC Networks) in 2011, but these networks are still deemed affiliated with Cablevision for program access purposes. MSG has stated that it has "no interest in an exclusive arrangement whereby it would sacrifice programming revenue for the benefit of Cablevision's . . . video programming distribution business." *See* Comments of MSG, MB Docket No. 12-68, at 14 (filed June 22, 2012). Similarly, Discovery is only cable-affiliated via Advance-Newhouse's interests in both Discovery (only 31 percent) and in Bright House Networks' cable systems; it is hard to imagine that this interest would influence Discovery's licensing decisions.

16 The Commission has in the past reasoned that forgone programming revenues are harder to recoup with increased cable subscriptions in smaller areas. *See, e.g.*, *Implementation of the Cable Television Consumer Protection & Competition Act of 1992, et al.*, Report & Order & Notice of Proposed Rulemaking, 22 FCC Rcd. 17791 ¶ 52 (2007) ("*2007 Extension Order*"); *Sunset Order* ¶ 17. By this logic, the networks affiliated with Time Warner Cable and Cablevision, whose subscribership is concentrated in certain regions of the country, are unlikely to forgo programming revenues from other MVPDs in areas where the cable operators have a limited geographic footprint.

17 *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011).

best interest to do an exclusive. The proposed presumptions would thus be inconsistent with both the APA and the First Amendment.[18]

A. The FCC Should Not Adopt a Rebuttable Presumption That an Exclusive Contract for a Cable-Affiliated RSN Is an "Unfair Act."

The Commission has already established a presumption of "significant hindrance" with respect to exclusive contracts involving cable-affiliated RSNs.[19] Establishing a further presumption that such contracts are also "unfair" would effectively shift the *entire* evidentiary burden to defendants in a program access complaint involving such networks. As the D.C. Circuit made clear in *Cablevision*, the APA requires that the complainant always bear the burden of proof on each element of a complaint.[20] The Commission's proposal effectively contradicts that directive.

Such a presumption also would be inconsistent with the legal standard for evidentiary presumptions set forth in *Cablevision* because there is no "sound and rational connection" between the fact that the Commission has found prior exclusive contracts to be "unfair" and an inference that *all* such exclusive contracts are "unfair."[21] The Commission has in the past determined whether challenged conduct is "unfair" by "balancing the anticompetitive harms of

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[18] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*"); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1132-36 (D.C. Cir. 2001).

[19] *See Sunset Order* ¶ 55.

[20] *See Cablevision Sys. Corp.*, 649 F.3d at 716 (making clear that while "agencies may adopt evidentiary presumptions," they may only do so "provided that the presumptions . . . shift the burden of production and not the burden of persuasion"); *see also Garvey v. NTSB*, 190 F.3d 571 (D.C. Cir. 1999); 5 U.S.C. § 556(d) (APA requirement that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof"). The D.C. Circuit has also recognized that, "at a certain point along an evidentiary continuum[,] a shift in the burden of production can become *de facto* a shift in the burden of persuasion[.]" *Nat'l Mining Ass'n. v. Babbitt*, 172 F.3d 906, 910 (D.C. Cir. 1999). The Commission might be crossing that line if it adopted the proposed presumptions.

[21] *Cablevision Sys. Corp.*, 649 F.3d at 716.

the challenged conduct against the procompetitive benefits."[22] In this regard, Congress, the Commission, and the courts have all recognized that exclusive contracts can result in procompetitive and pro-consumer benefits. For example, exclusive contracts can encourage more regional and local programming and more investment in programming that serves diverse interests, and can provide the incentives for MVPDs to differentiate themselves from their competitors in a given market.[23]

In recognition of these potential benefits, the D.C. Circuit has warned the Commission about making summary conclusions regarding "unfairness." In striking down as arbitrary and capricious a Commission finding that entering into exclusive contracts for terrestrially delivered programming was categorically unfair within the meaning of Section 628(b), the D.C. Circuit noted that "vertical integration and exclusive dealing arrangements are not always pernicious and, *depending on market conditions*, may actually be pro-competitive."[24] The Court emphasized that "unfairness" is an "inherently ambiguous statutory term" and the Commission "must grapple with whether its definition of 'unfairness' would apply to conduct that appears procompetitive and, if so, whether that result would comport with section 628."[25] Accordingly, and as the Commission has recognized, determining whether a particular contract is "unfair"

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22 *Sunset Order* ¶ 53 (citing *AT&T Servs., Inc. & S. New England Tel. Co. v. Madison Square Garden, L.P. & Cablevision Sys. Corp.*, Order, 26 FCC Rcd. 13206 ("*AT&T-MSG Media Bureau Order*") (Media Bureau 2011); *Verizon Tel. Cos. & Verizon Servs. Corp. v. Madison Square Garden, L.P. & Cablevision Sys. Corp.*, Order, 26 FCC Rcd. 13145 (Media Bureau 2011) ("*Verizon-MSG Media Bureau Order*")).

23 *See, e.g.*, *Sunset Order* ¶ 35 ("[E]xclusive contracts may result in the procompetitive benefit of increasing investment in programming in some cases, thereby promoting competition and diversity in the video programming market."); *id.* ("[E]xpiration of the exclusive contract prohibition may also encourage other MVPDs or non-MVPD-affiliated programmers to create programming to counteract any exclusives involving cable operators, thereby leading to more competition and diversity in the programming market."); *id.* ¶ 37 ("[E]xclusive contracts may result in the procompetitive benefit of allowing MVPDs to differentiate their service offerings . . . and thereby invite competitive countermeasures from their rivals.").

24 *See Cablevision Sys. Corp.*, 649 F.3d at 720-22 (emphasis added).

25 *Id.* at 722-23.

requires a detailed, individualized assessment of the facts.[26] Absent such an assessment, there is no "sound and rational connection" between exclusivity and unfairness, nor is it possible to find that unfairness is "so probable" that it can be sensibly inferred in a particular case.[27]

Finally, adopting a rebuttable presumption of "unfairness" would also raise significant First Amendment concerns. Where speech is at issue, as it clearly is here, the Commission's rules must (i) further an important government interest and (ii) restrict no greater speech than is essential to further that interest.[28] The Commission has no interest in shifting the entire burden of proof for a Section 628(b) claim that would only result in encouraging parties to bring meritless complaints. And while courts have recognized a government interest in policing anticompetitive conduct, a rebuttable presumption that all exclusive RSNs are unfair would be a blunt and overbroad means of addressing such rare, case-by-case circumstances, and thus would infringe upon far more speech than is required to address that interest. The Commission has recognized that, even with a case-by-case approach to Section 628(b), without the proposed

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26 In response to the Court's directive, the Media Bureau has made individualized assessments of whether particular conduct in a program access complaint is "unfair." For example, the Bureau utilized four different tests to determine whether Madison Square Garden's withholding of its HD versions of MSG and MSG+ was "unfair. First, it relied on the five factors set forth in Section 628(c)(4) for whether an exclusive contract is in the public interest to weigh the harms that withholding a service may cause in the video *distribution* marketplace against the benefits that may result in the video *programming* marketplace. Second, it made a more general inquiry into the potential anticompetitive harms and procompetitive benefits of an alleged "unfair act," following the analysis used in the *MDU Order*. Third, the Bureau examined whether there was a "legitimate business justification" for withholding the service. Finally, it examined the withholding using the Federal Trade Commission's definition of "unfairness" – "whether an act causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *See AT&T-MSG Media Bureau Order* ¶¶ 25-42; *Verizon-MSG Media Bureau Order* ¶¶ 24-41. Whatever the merits of these four tests, a presumption of "unfairness" would arbitrarily bypass the individualized assessments that the Commission previously determined are needed. The Commission even recognized in the *Sunset Order* that "the issue of whether the procompetitive benefits of [an exclusive] outweigh the anticompetitive harms is *a fact-specific determination* best handled on a case-by-case basis," citing to the MSG cases. *Sunset Order* ¶ 37 (emphasis added). This precedent is antithetical to presuming "unfairness" for RSN programming.

27 *Cablevision Sys. Corp.*, 649 F.3d at 716.

28 *See id.* at 710-11 (citing *Turner I*, 512 U.S. at 662). The D.C. Circuit in *Time Warner* held that the program access rules implicate speech rights, and found that intermediate scrutiny applied to a facial challenge of the program access rules established pursuant to Section 628(c)(2). *See Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 977-78 (D.C. Cir. 1996).

presumption, there are "incidental" restrictions on speech.[29] The proposed presumption would result in restrictions on speech that are no longer merely incidental, but which impermissibly chill speech. Cable-affiliated programmers would be forced to err against exclusivity provisions for fear of litigation, even where the provision is legitimate. As a result, those programmers may be less likely to invest in unique programming in the first place.

B. The FCC Should Not Adopt a Rebuttable Presumption That a Complainant Challenging an Exclusive Contract Involving a Cable-Affiliated RSN Is Entitled to a Standstill.

The Commission should not adopt a presumption to alter the rules governing standstills. A standstill – i.e., an injunction – is "extraordinary relief."[30] The four-factor balancing test laid out in Section 76.1003(*l*) of the Commission's rules is based on the test that courts use to determine whether to grant injunctive relief: (1) likelihood of success on the merits; (2) irreparable harm to petitioner absent the stay; (3) effect on other interested parties; and (4) the public interest.[31] Given the extraordinary nature of this relief, established jurisprudence does not contemplate – or permit – "presuming" that any element of the four-factor test, let alone the entire test, has been satisfied.[32] Rather, the burden is on the plaintiff to prove each element. In fact, when adopting Section 76.1003(*l*) and explaining what the complainant must demonstrate, the Commission recognized that the bar for obtaining a standstill is set high: "'the law is clear that [a standstill request is] extraordinary relief and courts therefore require such party to

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[29] *Sunset Order* ¶ 69. The proposed presumptions would negate the Commission's own recognition that a "tailored, case-by-case process for addressing exclusive contracts . . . targets activities where the governmental interest is greatest by limiting liability to cases where a complainant demonstrates that an exclusive contract" violates Section 628(b). *Id.* Requiring the *defendant* to show that an exclusive contract *is not* unfair (*and is* not a significant hindrance) – rather than initially requiring the complainant to show that it is – would chill speech.

[30] *See, e.g., Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[31] *See* 47 C.F.R. § 76.1003(*l*); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report & Order, 25 FCC Rcd. 746 ¶ 73 (2010) ("*Terrestrial Order*").

[32] *See, e.g., Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (noting that *petitioners* have to meet "*their burden* of showing that exercise of the courts extraordinary injunctive powers is warranted" (emphasis added)).

demonstrate, on a case-by-case basis with a sufficient evidentiary record, that it satisfies the criteria' set forth in *Virginia Petroleum Jobbers Ass'n*."[33]

Further, shifting to a defendant the burden of proving why a standstill is not warranted would be arbitrary and capricious because there is no credible basis for reaching presumptive conclusions on any of the four factors. As to the first factor, there is no basis for finding that a complainant challenging an exclusive RSN contract is likely to prevail on the merits. Even though the Commission has already established or is considering adopting presumptions with respect to "unfairness" and "significant hindrance," these presumptions are rebuttable, and the defendant's rebuttals will often involve detailed economic analyses.[34]

Nor is there any basis to presume that a complainant challenging an exclusive RSN contract would prevail on the remaining standstill factors. Whether the complainant would suffer irreparable harm absent a standstill, how other interested parties would be impacted, and how a standstill would affect the public interest are all fact-specific inquiries that cannot be reduced to presumptions. The Commission would need to consider, among other things, the network and programming at issue, the MVPD bringing the complaint, the geographic market involved, and other circumstance-specific issues. And how the balance of these four factors tips in any given complaint proceeding will vary. For example, courts have noted that "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits."[35] The final factor alone, the public interest, may have "many facets" to be considered depending on the

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[33] *See Terrestrial Order* ¶ 73 n.266 (quoting Comments of Time Warner Inc., MB Docket No. 07-198, at 14 n.42 (filed Jan. 4, 2008)).

[34] Indeed, this is exactly why the Commission extended the time for defendants to Section 628(b) complaints to file Answers from 20 to 45 days. *See Sunset Order* ¶ 59.

[35] *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925.

circumstances at hand.[36] To be sure, the presumption on each factor is subject to rebuttal, but this rule would stack the deck against the defendant without any logical basis for that outcome.[37]

C. The FCC Should Not Adopt Rebuttable Presumptions for Exclusive Contracts Involving Cable-Affiliated National Sports Networks.

The *Further Notice*'s proposal to extend the Commission's existing and proposed rebuttable presumptions that apply to RSNs to cable-affiliated national sports networks or general entertainment networks that carry some sporting events should be rejected. The Commission is constrained from imposing the proposed presumptions on such networks by its prior precedent, recent factual findings, and the APA. There is simply no evidence whatsoever to presume that an exclusive contract for a national sports network is "unfair" or a "significant hindrance," or entitles a complainant to a standstill.[38]

The APA requires the Commission to rely on record evidence of *actual* problems when it promulgates regulations, not simply posit a hypothetical harm to be cured.[39] However, the

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36 *Id.*

37 The Commission has already instituted a presumption for one prong of a two-prong test under Section 628(b). It is considering adding a presumption for the second prong of that two-prong test. In addition, it now considers adding a presumption of a four-part test that earns the complainant the right to injunctive relief – a normally extraordinary remedy. If Section 628(b) litigation were a game, it would be like requiring the defendant to start a checkers game by arranging pieces to allow the complainant to triple jump and get a king in the complainant's first move.

38 A further problem with these proposals is that there is no workable definition of a "national sports network." The Commission would have to resolve a range of complex threshold questions regarding: (1) *The amount of sports programming* – How many hours of the network's programming must be devoted to live sports in order for a network to qualify as a national sports network? What if a network carries games or an event for a brief period of time, for a particular round or series of games, or for the limited duration of an event?; (2) *The types of sports programming* – Which sports would be included in the definition?; (3) *The level of sports programming* – Would a "national sports network" cover only professional sports, or would it include collegiate sports as well? If it includes collegiate sports, would the Commission distinguish between Division I, Division II, and Division III? What about high school sports?; and (4) *The circumstances of carriage of sports programming* – Would a network that carries "spill-over" games be included in the definition? It would be impossible to craft the proposed presumption without parsing these questions. But resolving them would raise serious First Amendment concerns about content-based regulation. *See Turner I*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

39 *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1132-36 (D.C. Cir. 2001); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

Commission has never found any evidence of a problem with MVPDs' access to national sports programming. In fact, the last time the Commission dealt with the issue in 2007, the Commission concluded that there was no "evidence of competitive harm resulting from [an MVPD's] inability to offer [national sports] programming."[40] And the Commission recently found that cable operators have a reduced incentive to enter into exclusive contracts, especially for national programming.[41] Consequently, there would be no basis for presuming that exclusive contracts for such networks would be "unfair" or "hinder significantly or prevent an MVPD from providing programming to consumers," or that a complainant should be entitled to a standstill. In short, there are absolutely no "proved" facts on which the Commission could draw any inference about exclusive agreements for national sports networks generally.[42]

Nor would the presumption be appropriate for particular subsets of national sports programming. On two previous occasions, the Commission has decided *not* to single out specific categories of national programming as "must have." The Commission underscored the "difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition" and emphasized that "making such a channel-by-channel determination would place the Commission in the untenable position of designating certain programming as more essential than others and thus

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40 *2007 Extension Order* ¶ 77 & n.380 (finding that "[t]he one example of an exclusive programming arrangement entered into by a competitive MVPD is DIRECTV's exclusive deals for certain national sports programming . . . . [and that] commenters have not provided any evidence of competitive harm resulting from their inability to offer this programming"). In the *Sunset Order*, the FCC adopted a rebuttable presumption of "significant hindrance" for RSN programming in large part because that programming is highly desired within the local teams' home territories and non-replicable. That logic is irrelevant to *national* sports programming. While it may be the case that some sports programming distributed nationally is highly desired, it is hardly the rule. Further, the non-replicability of RSN programming is largely based on the regional nature of sports fans. A Washington, D.C. RSN will carry programming that is of a particular interest to District residents. But a national network that features sports programming will not be of particular interest on a regional basis and so does not provide non-replicable programming in the same way as an RSN.

41 *Sunset Order* ¶ 17 & n.64.

42 *See Cablevision Sys. Corp.*, 649 F.3d at 716.

raise constitutional questions."[43] Nothing has changed that could explain or support a different outcome here.

The only purported evidence in the record of an issue involving national sports networks is ACA's baseless concerns about national networks that are not even vertically integrated – and which therefore would be unaffected by the proposed program access regulations.[44] In fact, as ACA's ex parte tacitly acknowledged, there are very few vertically integrated services that could even qualify as "national sports networks" using any definition.[45] ACA claimed that the Commission would be "short-sighted" to rely on current marketplace conditions and encouraged the Commission to use its "predictive judgment" to impose these presumptions because it surmised that cable operators are sure to "obtain more" sports programming now that the exclusivity ban has sunset.[46] The Commission cannot base regulation on this type of pure speculation.[47]

Given the absence of any demonstrated need for such rules, the Commission could hardly identify a valid government interest, let alone a compelling one, to justify the regulation.[48] The First Amendment concerns are exacerbated by the fact that non-vertically integrated sports

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[43] *Implementation of the Cable Television Consumer Protection & Competition Act of 1992, et al.*, Report & Order, 17 FCC Rcd. 12124 ¶ 69 (2002); *see 2007 Extension Order* ¶ 69.

[44] Letter from Barbara Esbin, Cinnamon Mueller, Counsel to American Cable Ass'n, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68, at 5-6 (Oct. 1, 2012) ("*ACA October 1 Ex Parte*").

[45] *Id.* Given that the FCC is not likely considering the NBCUniversal networks for this proceeding, the pool of potential "national sports networks" is even shallower. *See Sunset Order* ¶ 24.

[46] *ACA October 1 Ex Parte* at 5-6.

[47] *See, e.g.*, *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1318-19 (D.C. Cir. 2000) ("If a regulation on speech is intended to redress an actual or an anticipated harm to an important governmental interest, then the Government 'must demonstrate that the recited harms are real, not merely conjectural . . . .'" (quoting *Turner I*, 512 U.S. at 664)); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) ("[T]he Commission has failed entirely to determine whether the evil the rules seek to correct 'is a real or merely a fanciful threat.'" (citation omitted)). Indeed the need for support in the record extends even to the agency's predictive judgments. *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995) (finding that the need for support in the record extends even to the agency's predictive judgments).

[48] *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

networks would be unaffected by anything adopted in this proceeding, so similar networks would operate under disparate rules.[49]

D. The FCC Should Not Adopt a Rebuttable Presumption for Previously Challenged Exclusive Contracts.

The Commission cannot rationally presume that its decision in a program access complaint proceeding about a particular MVPD's need for a particular network in a particular market has any carry-over effect as applied to a different MVPD or a different market. Rather, at most, that decision should have only precedential, not presumptive, effect in future proceedings.[50]

As noted, determining whether a complaint satisfies both prongs of Section 628(b) is a fact-specific exercise, and the Commission's various tests for the "unfairness" prong already call for such individualized examination. In *Verizon v. Madison Square Garden*, the Commission assessed whether the contract was unfair based on factors that were specific to the geographic area, such as the effect of an exclusive contract on competition and diversity in the local marketplace, and specific to the MVPD, such as the duration of the exclusive contract.[51] Determining whether an exclusive contract "significantly hinders" another MVPD is similarly highly fact-dependent. For example, different MVPDs focus on different programming to meet their customer's needs. Consequently, an exclusive contract for an RSN may have some

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[49] While ACA would like the Commission to regulate non-vertically integrated national networks, the Commission lacks any authority to do so under Section 628.

[50] This proposal tilts the playing field unnecessarily toward complainants and grants no reciprocal benefit to a defendant who wins a program access case (e.g., if an MVPD loses its Section 628(b) complaint, then by the Commission's logic, there should be a presumption in favor of the programmer in a subsequent case with a different MVPD that the exclusive does *not* violate Section 628(b)).

[51] *See Verizon-MSG Media Bureau Order* ¶¶ 24-41 (citing 47 U.S.C. § 548(c)(4)).

measurable impact on an MVPD that has a strong focus on sports in a particular area, while another MVPD might not be affected at all.[52]

In sum, there are far too many variables at play for either of these presumptions to survive the *Cablevision* standard.[53] The Commission cannot rationally presume that its findings in one proceeding apply to a different market, a different programming service, or a different MVPD. Accordingly, adopting such a presumption would be arbitrary and capricious.

IV. THERE IS NO EVIDENCE TO SUPPORT EXPANDING THE PROGRAM ACCESS RULES WITH RESPECT TO "BUYING GROUPS."

The *Further Notice* seeks comment on three ACA proposals to revise the Commission's rules for buying groups. The Commission should reject these proposals. There is no evidence of marketplace harms that would justify further regulations in this area. Furthermore, ACA's proposals would give buying groups special advantages under the program access rules and otherwise raise concerns that are not unique to cable-affiliated programmers or relevant to the underlying goals of the rules.[54] ACA's concerns could be fully remedied without regulatory

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[52] For example, despite the Commission's apparent belief that RSN programming is "must have" to an MVPD, the marketplace reality is that the nation's third-largest MVPD, Dish Network, has *chosen* not to carry numerous RSNs. For example, in the New York marketplace, Dish has never carried YES Network, ceased carriage of MSG Network and MSG Plus in 2010, and dropped SportsNet New York in 2011. Dish has also dropped all of the Fox RSNs and Comcast SportsNet California for some period of time. Further, both Dish and DirecTV have chosen not to carry either Comcast SportsNet Philadelphia or CSN-Northwest, despite the fact that the networks are available to them. *See* Comments of Comcast Corp. & NBCUniversal Media, LLC, MB Docket No. 12-68, at 21 (filed June 22, 2012); Reply Comments of Comcast Corp. & NBCUniversal Media, LLC, MB Docket No. 12-68, at 12 (filed July 23, 2012).

[53] There is no "sound and rational connection between the proved" facts in a prior case – i.e., that an exclusive contract was unfair and significantly hindered a particular MVPD's ability to provide programming to consumers in a particular market – and the "inferred facts" that an exclusive contract is unfair against and significantly hinders a wholly different MVPD, potentially in a completely different market. *Cablevision Sys. Corp.*, 649 F.3d at 716.

[54] The principal concern underlying program access discrimination rules is the notion that a cable-affiliated programmer will charge excessive prices to an MVPD that competes with the programmer's affiliated cable operator. This concern does not apply at all to the vast majority of ACA's members, most of which serve areas that are not contested by any vertically integrated cable operator. As to those, it is beyond dispute that a cable-affiliated programmer has every incentive to reach agreement and obtain the widest possible distribution.

intervention if buying groups would meet the same liability requirements and make the same binding subscriber commitments in their negotiations as do MVPDs.

A. The FCC Should Continue to Require Buying Groups to Meet the Same Liability Requirements as MVPDs.

The Commission should reject ACA's proposal to loosen the definition of "buying groups" to include groups whose only responsibility is to forward payments received from their members. ACA's proposal reflects a basic misunderstanding of how the program access rules are intended to work, would cause significant adverse effects for programmers, and is unnecessary.

The program access rules are, and have always been, intended to cover the MVPDs that may be harmed by a cable-affiliated programmer's discriminatory practices. Accordingly, the rules provide a remedy for a buying group only to the extent that the buying group stands in the position of its MVPD members when it contracts with a programmer and is itself bound by the contract terms. As the Commission noted in its *1993 Program Access Order*, buying groups "can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute."[55] However, by the same token, "in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance."[56] To that end, the Commission required "that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party."[57]

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55 *Implementation of Sections 12 & 19 of the Cable Television Consumer Protection & Competition Act of 1992*, First Report & Order, 8 FCC Rcd. 3359 ¶ 114 (1993) ("*1993 Program Access Order*").

56 *Id.*

57 *Id.* ¶ 115.

ACA utterly fails to explain why the current rules need to be changed so that buying groups that are *not* financially responsible for the fees due under a contract would still have the right to bring complaints under the program access rules. ACA attempts to frame this issue as conforming regulation to the current business practices of its preferred buying group, National Cable Television Cooperative ("NCTC"). But, as the Commission recognized long ago, there is no uniform "business practice" with respect to how buying groups handle the liability issue in their contracts with programmers, which is why the Commission established three different options for being "considered a 'buying group' eligible to avail itself of the non-discrimination protections afforded to MVPDs under the program access rules."[58] The fact that programmers accept NCTC's preference for avoiding liability and still agree to negotiate discounted programming rates for NCTC's members does not mean that NCTC should be afforded the right to bring program access complaints.

If NCTC wants the benefit of litigating under the rules, it should assume the liability responsibilities associated with its contracts. Otherwise, NCTC would, in direct contradiction to the Communications Act and the Commission's rules,[59] obtain the advantages of "unitary treatment" without "offer[ing] vendors similar advantages or benefits as a single purchaser."[60] For example, in the event of a default, a contract with NCTC would not spare a programmer from having to enforce its contractual rights against each defaulting MVPD member, individually, which defeats one key advantage to the programmer of working with a buying group. And, because NCTC, however it may style itself, is not a single entity, but a consortium of multiple providers who may or may not participate in a particular negotiation or opt in to a

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58 *Further Notice* ¶ 84; 47 C.F.R. § 76.1000(c).

59 47 U.S.C. § 548(c)(2)(B)(i); 47 C.F.R. §§ 76.1000(c), 76.1002(b)(1).

60 *1993 Program Access Order* ¶¶ 114-115.

particular agreement, a negotiation with NCTC provides no guarantee that the programmer will be spared the burden of negotiating again with many of NCTC's members. This is not the scenario the Act or the Commission had in mind, and the Commission should not tailor its definition of a buying group to accommodate NCTC's preferred business model.

B. The FCC Should Not Adopt a Standard of Comparability for Buying Groups.

The Commission also should reject ACA's proposal that buying groups be considered "similarly situated" to an individual MVPD offering the same number of subscribers. In essence, ACA wants NCTC to obtain the better terms that a large MVPD obtains – by virtue of having more subscribers – without negotiating with programmers in the same manner or agreeing to the same commitments that large MVPDs do. Such preferential treatment is unjustified and would skew marketplace negotiations.

The price that any MVPD may receive from a programmer is closely related to the number of subscribers to whom it agrees to deliver the programmer's network. That is, a programmer may well be willing to cut its price to an MVPD when it is assured of high levels of distribution – guaranteed access to many millions of viewers, the ability to sell advertising based on assured exposure in a specified number of homes and in specified markets, and the ability to make programming investments based on an assured revenue stream of a particular magnitude.

NCTC does not bargain in this way, but has candidly admitted that it could obtain better prices if it did. As then-President and CEO of NCTC Jeff Abbas acknowledged, programmers will "say we can't make subscriber commitments, but that's not true – we can; we've chosen not to."[61] Instead NCTC wants programmers (at least, cable-affiliated programmers) to bargain with it based on the number of *potential* subscribers that it *might* bring to the programmer if and when

[61] *See* Mike Farrell, *Hardly Cooperative: Special Deals Cause Friction Among Small Buyers*, Multichannel News, Sept. 20, 2010, *available at* http://www.multichannel.com/article/457335-Hardly_Cooperative.php.

multiple MVPDs opt into the deal, and deliver whatever number of subscribers they choose, at any particular point in time. When a buying group chooses to operate in this fashion, it cannot provide programmers the main benefits that they enjoy when they negotiate with a large MVPD – an assured number of subscribers and increased efficiencies – so there is no reason why such a buying group that *hypothetically might* deliver a particular number of subscribers should automatically be considered "similarly situated" to an individual MVPD that *actually commits to* delivering that number of subscribers for purposes of a program access complaint.[62]

For similar reasons, the Commission should reject ACA's additional proposal that cable-affiliated programmers offer a non-discriminatory "rate schedule" based on the *potential*, rather than *actual*, number of MVPD subscribers a buying group can deliver under a particular programming contract. ACA contends that requiring a rate schedule will solve the "chicken and egg" problem that "might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high, even though the license fees would go down if the members decided to opt in."[63] But ACA does not even acknowledge that NCTC created this "chicken and egg" problem and can resolve it by providing the programmer with specific commitments regarding the number of subscribers it can deliver under a master agreement.[64] At that point, the programmer and NCTC can negotiate for specific prices, terms, and conditions.[65]

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62 *1993 Program Access Order* ¶ 114.

63 *Further Notice* ¶ 99.

64 *See* Comments of ACA, MB Docket No. 12-68, at 27-29 (filed June 22, 2012) ("ACA 6/22/12 Comments").

65 It also bears noting that ACA's rate schedule proposal has nothing to do with the issue of cable-affiliated programming. ACA has long complained about the prices that programmers – both non-cable-affiliated and cable-affiliated – charge to small MVPDs. *See, e.g.*, Comments of ACA, MB Docket No. 04-227, at 39-40 (filed July 23, 2004); Comments of ACA, MB Docket No. 07-269, at 10 (filed June 8, 2011). ACA does not allege, much less prove, that it needs only cable-affiliated networks, but not other networks, to provide a rate schedule for negotiations. Further, the Commission has no authority over non-cable-affiliated networks, and it would be competition-distorting for the Commission to impose a rate schedule requirement only on cable-affiliated networks, which comprise only 12.3 percent of all national cable networks, while leaving over 87 percent of all national cable

Requiring a rate schedule for varying levels of potential subscribership is simply not contemplated, and certainly not required, under Section 628(c) or any other portion of the program access rules. The Commission considered and declined to require a rate card as part of its original *1993 Program Access Order*, finding that requiring a rate card "would impose an excessive constraint on vendors – thus increasing the possibility of limiting the sale of programming – and could diminish competitive pricing . . . through a standardization of higher programming rates as vendors become more aware of the pricing practices by competitors."[66] The same risks apply today. Then, as now, the parties remain free to bargain for a rate schedule, and some contracts with buying groups may well contain such schedules. But there is no factual or legal basis to require rate schedules.[67]

Finally, any determination of whether the buying group is "similarly situated" to any given MVPD in a program access complaint proceeding cannot be limited just to subscriber volume and price. There are numerous "puts and takes" that an MVPD makes across a range of issues in negotiating a deal, such as duration of the contract, packaging and distribution commitments, commercial availabilities, Video On Demand ("VOD") and online video rights, and branding and security issues. For example, an MVPD may offer increased packaging and distribution commitments, or distribution on a more highly penetrated tier, in exchange for increased VOD or online video rights, or for a concession on price. A buying group that cannot meaningfully negotiate on such issues (because it refuses to make binding commitments on behalf of its members) simply is not similarly situated to an MVPD that can, and does.

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networks free to negotiate without such a requirement. *See Revision of the Commission's Program Access Rules, et al.*, Notice of Proposed Rulemaking, 27 FCC Rcd. 3413, apps. A & B (2012).

66 *1993 Program Access Order* ¶ 113.

67 A rate schedule requirement would bear an uncanny resemblance to Title II common carrier tariffs. The Communications Act and the Commission's rules make clear that cable services are not subject to such tariff requirements. *See* 47 U.S.C § 522(6); 47 U.S.C. § 153(8), (11), (51)-(53); 47 C.F.R. § 61.3(ss).

C. The FCC Should Not Restrict Programmers' Ability to Prevent Certain Members of a Buying Group from Opting into a Master Agreement.

The Commission should also reject ACA's proposal to establish a "safe harbor" based on the number of subscribers served for any buying group member MVPD to participate in a master agreement. There is no evidence of marketplace failure that would justify establishing any safe harbor. To the extent the Commission nonetheless elects to adopt a safe harbor, the proposed threshold (three million subscribers) is simply too high, as it would cover MVPDs that are perfectly capable of negotiating contracts with programmers on their own.

ACA's "safe harbor" proposal is not grounded in marketplace facts. ACA does not point to any evidence of actual negotiating disadvantages or inability on the part of NCTC members to participate in master agreements.[68] Rather, its proposal seems aimed at encouraging NCTC's largest members to participate in NCTC's master agreements.[69]

In any event, there is no basis for establishing a "safe harbor" threshold at three million subscribers. The basic purpose of a buying group is to enable small MVPDs to bargain collectively to achieve greater economies of scale and thus, lower rates on programming. MVPDs with three million subscribers are not "small" MVPDs. In fact, this threshold would encompass all but the nine largest MVPDs.[70] In NBCUniversal's experience, MVPDs with three

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68 *See* ACA 6/22/12 Comments at 27-29.

69 *Further Notice* ¶ 94 n.363 ("ACA explains that the four largest NCTC members, which do not currently license substantial amounts of programming through NCTC, each have more than 3 million subscribers, while the remaining members of the group of the largest 25 members, which do license substantial amounts of programming through NCTC, currently have less than 1.5 million subscribers.").

70 NCTA, Top 25 Multichannel Video Programming Distributors as of June 2012, *at* http://www.ncta.com/Stats/TopMSOs.aspx (last visited Dec. 14, 2012).

million subscribers (or even half that number) have consistently negotiated independently from buying groups, and they have been perfectly capable of negotiating successfully on their own.[71]

Moreover, the three million subscriber threshold far exceeds subscriber thresholds that have been established in other contexts. For example, in the *News-Hughes Order*, the Commission allowed "small cable companies" to appoint a bargaining agent to *collectively* bargain on their behalf in negotiating carriage of RSNs with News Corp. There, it defined "small cable company" consistent with its *1995 Program Access Order* as cable companies with 400,000 subscribers or fewer.[72] In the *Comcast-NBCUniversal Order*, the Commission permitted any MVPD with 1.5 million or fewer subscribers to appoint a bargaining agent to collectively bargain on its behalf.[73] ACA provides no rational basis for adopting a subscriber threshold that is 7.5 times the *News-Hughes* number and double the *Comcast-NBCUniversal* number.[74]

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71 Cablevision, for example, recently signed a new distribution agreement with NBCUniversal. *See* Joe Flint, *Cablevision and NBCUniversal Sign Distribution Deal*, L.A. Times, Nov. 5, 2012, *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-retrans-nbc-20121105,0,5324507.story.

72 *See General Motors Corp. & Hughes Electronics Corp., Transferors, And The News Corp. Limited, Transferee, For Authority To Transfer Control*, Memorandum Opinion & Order, 19 FCC Rcd. 473 ¶ 176 & n.491 (2003) ("*News-Hughes Order*") (setting the threshold at 400,000 subscribers and requiring an agency relationship); *see Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Sixth Report & Order & Eleventh Order on Reconsideration, 10 FCC Rcd. 7393 ¶ 3 (1995). Similarly, only "large" MVPDs (serving more than 400,000 subscribers) and "very large" MVPDs (serving more 10 million subscribers) are required to conduct spot checks under the Commission's new CALM Act regulations. *See Implementation of the Commercial Advertisement Loudness Mitigation Act*, Report & Order, 26 FCC Rcd. 17222 ¶¶ 35-36 & n.164 (2011).

73 *Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion & Order, 26 FCC Rcd. 4238 ¶ 58 & app. A, § VII.D.

74 The overwhelming majority of NCTC members have fewer than 1.5 million subscribers. *Further Notice* ¶ 94 n.363.

V. CONCLUSION

For the reasons discussed above, the Commission should not further expand the program access rules by adopting rebuttable presumptions or expanding its rules governing buying groups.

Respectfully submitted,

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December 14, 2012