

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Revision of the Commission’s Program)	MB Docket No. 12-68
Access Rules)	

**REPLY COMMENTS OF COMCAST CORPORATION AND
NBCUNIVERSAL MEDIA, LLC**

Comcast Corporation and NBCUniversal Media, LLC (“NBCUniversal”) (collectively, “Comcast”) hereby reply to comments filed in response to the Further Notice of Proposed Rulemaking (“*Further Notice*”) in the above-captioned proceeding.¹ The comments demonstrate that there is no factual or legal basis for the Commission to *expand* the program access regime. Accordingly, at a time when the marketplace is more vibrant than ever, the Commission should reject the regulations proposed in the *Further Notice* and close this docket.

I. THE RECORD SHOWS THAT NO EXPANSION OF PROGRAM ACCESS REGULATION IS WARRANTED.

The program access rules were adopted two decades ago, at a time when most Americans had access to only one multichannel provider and when vertical integration between cable operators and programmers was at its peak. But, as numerous commenters explained, the marketplace for video programming has fundamentally changed since that time.² There is now

¹ *Revision of the Commission’s Program Access Rules*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 12605 (2012) (“*Further Notice*”).

² *See, e.g.*, Time Warner Cable Inc. (“TWC”) Comments at 3-4; Cablevision Sys. Corp. (“Cablevision”) Comments at 1; Madison Square Garden Co. (“MSG”) Comments at 4; National Cable & Telecommunications Ass’n (“NCTA”) Comments at 4, 6; Comcast Corp. & NBCUniversal Media, LLC (“Comcast”) Comments at 3-4; *see also* Comments of Comcast Corp., MB Docket No. 12-203, at 1-3 (Sept. 10, 2012) (“Comcast Video Competition Comments”); Reply Comments of Comcast Corp., MB Docket No. 12-203, at 1-5 (Oct. 10, 2012) (“Comcast Video Competition Reply Comments”). Unless otherwise noted, all comments cited herein refer to those filed in MB Docket No. 12-68 on December 14, 2012.

robust competition in the video marketplace. There are three or more multichannel video programming distributors (“MVPDs”) in virtually every community; cable’s share of MVPD customers is under 60 percent; and DBS and telco providers rank among the largest MVPDs in the country.³ Consumers can also access video from numerous online sources. Likewise, vertical integration has dropped substantially since adoption of the program access rules.⁴ In fact, the number of cable programming networks even affected by the sunset of the exclusivity ban is very small.⁵

The Commission took “an important step toward aligning the program access regime with the realities of today’s competitive marketplace” in the *Sunset Order*.⁶ It found that, based on an analysis of the competitive marketplace, the exclusivity ban – one of the central pillars of the program access regime – was no longer “necessary to preserve and protect competition and diversity in the distribution of video programming.”⁷ No commenters in the *Further Notice* proceeding disputed the underlying competitive changes in the video marketplace.

In light of these marketplace facts, there is no legal, policy, or factual basis for adopting further program access regulation. If anything, “the change in marketplace circumstances that led to the elimination of the exclusivity ban should lead . . . to a presumption, in case-by-case complaint proceedings, that an exclusive contract is *not* anticompetitive.”⁸ As Time Warner Cable pointed out, in a competitive marketplace, exclusive dealing represents ““a presumptively

³ See TWC Comments at 3-4; Comcast Comments at 3-4; Comcast Video Competition Comments at 1-3; Comcast Video Competition Reply Comments at 1-5.

⁴ See TWC Comments at 3, 4; Comcast Comments at 3; *see also Revision of the Commission’s Program Access Rules*, Order, 27 FCC Rcd. 12605 ¶¶ 30-31 (2012) (“*Sunset Order*”).

⁵ See Comcast Comments at 6-7 & nn.14-16 (noting that the Comcast-controlled networks are already subject to specific restrictions on their licensing practices, and that the number of other vertically integrated networks that would be subject to the *Further Notice*’s proposed presumptions would be very limited).

⁶ TWC Comments at 2.

⁷ *Sunset Order* ¶¶ 29-31.

⁸ NCTA Comments at 4; *see also* TWC Comments at 10-11.

legitimate business practice,”⁹ and the Commission and the courts have repeatedly underscored the pro-consumer and procompetitive benefits that can flow from exclusive agreements, such as promoting investment in new programming, expanding the distribution footprint of existing programming, and incorporating new technology and capabilities into existing programming.¹⁰

II. THE COMMISSION SHOULD REJECT THE PROPOSED REBUTTABLE PRESUMPTIONS AND OTHER PROPOSALS THAT WOULD UNLAWFULLY SKEW THE PROGRAM ACCESS COMPLAINT PROCESS.

The *Sunset Order* established a path for complainants to bring cases under Section 628(b). However, as NCTA explained, even assuming that an exclusive agreement arguably might be unfair and significantly hinder an MVPD from competing in a particular market, a complainant would still “bear the burden of presenting evidence that this is the case before imposing the burdensome costs and procedures of evidence production, discovery and an administrative proceeding on a cable program network.”¹¹ Advocates of new rebuttable presumptions in Section 628(b) complaints would turn this balanced approach on its head and effectively skew the complaint process in favor of complainants, contrary to the Administrative Procedure Act (“APA”), the requirements for evidentiary presumptions set forth in the *Cablevision* decision, and the First Amendment.¹²

There is simply no evidentiary support justifying the adoption of new rebuttable presumptions in program access complaints. As MSG noted with respect to a presumption of

⁹ TWC Comments at 10 (citation omitted).

¹⁰ See *Cablevision* Comments at 5-6; see also *Sunset Order* ¶¶ 35-37; *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 720-22 (D.C. Cir. 2011) (noting that “Congress’s framework accords with the generally accepted view in antitrust and other areas that exclusive contracts may have both procompetitive and anticompetitive purposes and effects”); Comcast Comments at 8-9.

¹¹ NCTA Comments at 4-5.

¹² The D.C. Circuit’s test permits evidentiary presumptions only 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.” *Cablevision Sys. Corp.*, 649 F.3d at 716.

unfairness for RSNs, “[t]he Commission has conducted no empirical analysis to attempt to support a presumption of unfairness for all exclusive RSN contracts, nor undertaken any assessment of whether, in a competitive environment where cable operators compete against [DBS] providers, telephone companies offering video services, and a growing array of online video platforms, anticompetitive harms resulting from any RSN exclusivity will outweigh procompetitive benefits of exclusivity with such regularity that a presumption is warranted.”¹³

Similarly, there is no evidence to support the other proposals, including the proposed rebuttable presumption that an exclusive contract involving a “national sports network” is unfair or significantly hinders an MVPD from providing video programming.¹⁴ Very few cable-affiliated national sports networks exist, and the ones that do have little incentive to enter into exclusives.¹⁵ Nor is this a pressing real-world issue; indeed, none of the proponents of the presumption pointed to any incidents of cable-affiliated national sports networks being withheld from competing MVPDs. Adopting such a presumption in the absence of any evidentiary support would plainly violate the APA and conflict with the *Cablevision* standard for evidentiary presumptions.¹⁶

The proposed rebuttable presumptions would also violate the APA “by causing the Commission to prejudge the competitive effects of a particular exclusivity arrangement

¹³ MSG Comments at 7; *see also* Comcast Comments at 14-15. As MSG further explained, where the Commission previously adopted rebuttable presumptions, it did so only after attempting to establish some evidentiary basis for the change. *See* MSG Comments at 14 (citing *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp., Assignor & Transferor, to Time Warner Cable Inc. & Comcast Corp., Assignees & Transferees*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 ¶ 124 & app. D (2006)). While the regression analysis the Commission relied on in *Adelphia* was flawed, it at least provided some claimed evidentiary basis for the new rules. No similar evidence is provided for the current proposals.

¹⁴ *See* Comcast Comments at 13-15; MSG Comments at 14-15; NCTA Comments at 7-8; TWC Comments at 14-15.

¹⁵ *See, e.g.*, TWC Comments at 15 (noting that concerns regarding national sports networks are entirely hypothetical and that, under any definition, the number of cable-affiliated national sports networks is very small).

¹⁶ *See* TWC Comments at 15; Comcast Comments at 14-15.

irrespective of the specific facts presented.”¹⁷ The Commission and the courts have recognized that Section 628(b) complaints require an individualized assessment of the case at hand.¹⁸

Advocates for new presumptions would have the Commission dispense with this approach. In the case of cable-affiliated RSNs, a presumption of unfairness would, as Cablevision noted, “contravene both the D.C. Circuit’s admonition against preemptively treating all withholding of terrestrial programming as inherently ‘unfair,’ and the Commission’s decision to opt for a case-by-case assessment of unfairness in response to the court’s decision.”¹⁹ There would be similar legal infirmities with respect to the other proposed presumptions. For example, many commenters explained how adopting a rebuttable presumption favoring standstills in complaints challenging an RSN exclusive would conflict with court jurisprudence that standstills are an “extraordinary remedy” and that the complainant must bear the burden of proving each element in favor of a standstill.²⁰

The proposed presumptions, taken together, would effectively reinstate the *per se* ban on exclusive contracts.²¹ They would cause the Commission to “prejudge a number of key issues

¹⁷ TWC Comments at 9.

¹⁸ In fact, the Commission has stated that, in Section 628(b) cases, “the complainant will have the burden to establish that the exclusive contract is ‘unfair’ based on *the facts and circumstances presented*.” *Sunset Order* ¶ 53 (emphasis added).

¹⁹ Cablevision Comments at 2; *see also* TWC Comments at 9.

²⁰ *See, e.g.*, Cablevision Comments at 7-8; NCTA Comments at 9-10; TWC Comments at 12-13; MSG Comments at 8. The American Cable Association (“ACA”) made an even more one-sided standstill proposal, suggesting that there should be an *automatic* standstill in program access complaints for 14 days, during which the Commission must act on a standstill request. ACA Comments at 40. There is no justification whatsoever for adopting such a proposal. The program access rules include a standstill request process. *See* 47 C.F.R. § 76.10003(l). Although complainants are free to request a standstill, defendants are granted the right to oppose such a request, and due process – as well as the First Amendment – requires that the Commission analyze such a request under the relevant standards in its rules before granting relief.

²¹ *See, e.g.*, TWC Comments at 3 (“[T]he proposed presumptions . . . would simply replace the prior *de jure* prohibition on exclusive arrangements with a *de facto* one[.]”); MSG Comments at 1 (“The Commission should reject these entreaties to use presumptions to effectively reconstruct a *per se* prohibition of exclusivity for cable-affiliated programming, particularly sports-related networks.”); NCTA Comments at 5 (explaining that the presumptions amount to an attempt by the Coalition for Competitive Access to Content to “recreate the regulatory advantages enjoyed under the *per se* ban regime even after the Commission opted for a case-by-case approach”).

relevant to assessing the competitive impact of exclusive programming contracts in the complainants' favor, putting cable operators and their affiliated programmers at a significant disadvantage in their efforts to defend arrangements that are likely to be procompetitive and pro-consumer."²² The net effect would be to discourage cable-affiliated programmers from entering into exclusive agreements, thereby placing those programmers at a competitive disadvantage relative to the hundreds of other programmers that face no similar restrictions. Singling out vertically-integrated programmers in this way would raise significant First Amendment concerns.²³ Instead, the Commission should rely on the existing case-by-case process, which "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).²⁴

The Commission should also reject the additional rule changes suggested by a handful of commenters. Some of these proposals have nothing to do with vertically integrated operators and programmers and are thus outside the scope of the proceeding, and all of the proposals are solutions in search of a problem. Cox and Mediacom, for example, asked the Commission to interpret Section 628(b) to ban unfair practices regardless of whether the programmer is cable-affiliated.²⁵ Although this proposal has the virtue of eliminating a no-longer-defensible distinction between how cable-affiliated programmers and non-cable-affiliated programmers are

²² TWC Comments at 3; *see also id.* at 1 ("[T]he Commission should focus on scaling back program access mandates to account for today's competitive marketplace, rather than adopting additional presumptions that would unreasonably (and unlawfully) tilt the complaint process against cable operators and their affiliated programming vendors.").

²³ *See, e.g.,* MSG Comments at 15-16 ("In the wake of its recognition of both the competitiveness of the video programming marketplace and the adequacy of a case-by-case litigation under Section 628(b) . . . adopting any of the presumptions proposed here would not pass First Amendment muster. Singling out cable-affiliated RSNs for heightened curbs on their ability to use exclusivity represents a content-based restriction that would be subject to strict scrutiny."); TWC Comments at 6 ("But rules that single out cable operators and treat them differently from other speakers – based on legacy classifications rather than any empirical finding of market power – raise particularly grave constitutional concerns.").

²⁴ *Sunset Order* ¶ 69.

²⁵ Cox Communications, Inc. ("Cox") Comments at 3-5; Mediacom Communications Corp. Comments at 15.

regulated, it would solve the disparity in precisely the wrong way, and in all events, the plain fact is that the Commission has no statutory authority to adopt the proposal.²⁶ This proposal is entirely untethered from the text, structure, and history of Section 628.

III. THE RECORD MAKES PLAIN THAT THERE IS NO EVIDENTIARY SUPPORT FOR THE BUYING GROUP PROPOSALS.

The comments in response to the three buying group proposals in the *Further Notice* demonstrate that there is no evidence of any marketplace harms that would justify the adoption of these proposals.²⁷ Even those few commenters that filed in support of these proposals did not put forth any reliable theory of marketplace harm or evidence in support of their positions. The proposals merely reflect the pre-existing agenda of their original proponent – the American Cable Association (“ACA”) – and have nothing to do with cable-affiliated programmers.

Advocates of new buying group rules fail to provide any justification for giving a buying group standing under the program access rules when it refuses to assume any liability under a master agreement. As Comcast and other commenters pointed out, the program access rules already protect MVPDs that might be harmed by a cable-affiliated programmer’s discriminatory practices and afford buying groups the ability to bring complaints where they agree to stand in

²⁶ Other parties sought rule changes that would not solve any marketplace problems, but rather would give MVPDs further advantages in the complaint process. ACA proposed that the Commission adopt a per se rule that an exclusive agreement is unfair under Section 628(b) if it falls outside the four exceptions for discriminatory conduct set forth in Section 628(c)(2)(B). *See* ACA Comments at 58-60. The United States Telecom Association (“USTelecom”) recommended that the Commission adopt new complaint procedures to protect new MVPD entrants, including a 60-day shot clock for resolving program access complaints and a mechanism for new entrants to gain access to programming during a complaint proceeding. *See* USTelecom Comments at 25. Dish Network and the Independent Telephone & Telecommunications Alliance (“ITTA”) called for rebuttable presumptions for cable-affiliated networks in the Top 20 national networks. *See* Dish Network Comments at 5; ITTA Comments at 12. There is no evidence supporting any of these proposals, and the Commission should reject them.

²⁷ The *Further Notice* proposed that: (1) buying groups qualify to bring program access claims without assuming any financial responsibility under the contract; (2) buying groups be treated as similarly situated to an MVPD based on the total number of potential subscribers that could be delivered by the buying groups; and (3) programmers be restricted from preventing some MVPDs from opting into a particular master agreement with a buying group. *Further Notice* ¶¶ 82-100.

the shoes of their member MVPDs.²⁸ However, a buying group should *not* have standing to file a complaint when it can simply walk away from a contract without assuming liability for its members.²⁹ ACA, Mediacom, and Cox – the lone supporters of the buying group proposals – did not explain why the current rules are insufficient. Their claims that the proposals would align with their view of “current industry practice” are irrelevant and not remotely sufficient to justify a rule change that would so markedly depart from the Commission’s reasoned and balanced practice.³⁰

Likewise, ACA fails to provide a basis for adopting the proposed rule for treating a buying group as similarly situated to an MVPD based on the potential (as opposed to actual) number of subscribers the buying group might conceivably provide for a network. Programmers will typically negotiate with individual MVPDs over specific subscriber guarantees and penetration levels under the agreement. But, in negotiations with certain buying groups, programmers often have no idea how many subscribers might be included in a master agreement.³¹ There is absolutely no statutory or policy basis for requiring a programmer to

²⁸ See Comcast Comments at 18; see also AMC Networks, Inc. (“AMC”) Comments at 7.

²⁹ See Comcast Comments at 18-20. Although the Commission has noted that buying groups “can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts,” it has also stressed that, “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.” *Implementation of Sections 12 & 19 of the Cable Television Consumer Protection & Competition Act of 1992*, First Report & Order, 8 FCC Rcd. 3359 ¶ 114 (1993).

³⁰ While ACA argues that “common industry practice” justifies changing the rules regarding buying group liability, it takes the opposite view about the effect of “common industry practice” in other contexts. In particular, ACA observes that it is the National Cable Television Cooperative’s (“NCTC’s”) common practice to terminate the membership of any member that becomes delinquent for payments due under a master agreement. However, according to ACA, NCTC’s common practice is no reason to require – by regulation – that practice. ACA Comments at 5-6. ACA fails to explain why “common industry practice” should justify new rules on buying group liability but not new rules on buying group membership.

³¹ See Comcast Comments at 20 (noting that then-President and CEO of NCTC Jeff Abbas candidly admitted that programmers will “say we can’t make subscriber commitments, but that’s not true – we can; we’ve chosen not to”).

negotiate with – or provide rate cards to – a buying group based on a theoretical number of subscribers that the buying group’s members might someday serve.³²

Lastly, there is no record evidence of any marketplace failure that would justify restricting a cable-affiliated programmer’s ability to determine which MVPDs it will deal with under a master agreement.³³ ACA’s proposal, again, merely reflects the National Cable Television Cooperative’s business preferences.³⁴ As AMC Networks explained, “cable-affiliated programmers have legitimate pro-competitive reasons for seeking to enter into an individualized bilateral license agreement with an MVPD.”³⁵ In contrast, “[i]f an MVPD is permitted to opt into a buying group’s master agreement, regardless of that MVPD’s individual circumstances, the terms of that master agreement necessarily become the *de facto* starting point for all individual negotiations.”³⁶ It also bears noting that, where an MVPD is unable to reach an individual agreement with a cable-affiliated programmer, the MVPD still has the option of bringing a program access claim.

³² See AMC Comments at 9-10, 13-14; Comcast Comments at 21-22.

³³ As Comcast noted in its initial comments, these issues are not unique to cable-affiliated programmers, so there is no rational basis for placing restrictions solely on these programmers. See Comcast Comments at 21 n.65.

³⁴ ACA’s proposal would establish a safe harbor for MVPDs with less than three million subscribers to participate in a master agreement, thereby excluding NCTC’s four largest members. Cox, one of those four largest members, objected to that threshold, arguing instead that the Commission should presumptively allow all “small and mid-sized” operators to participate in buying groups, but alternatively urged the Commission to adopt a safe harbor of six million subscribers, which is, not coincidentally, just high enough to include Cox. Cox Comments at 10-11. Cox provided no rationale for setting subscribership at this level, which would enable all but the four largest MVPDs nationwide to participate in master agreements. As Comcast and NBCUniversal made clear, MVPDs with even 1.5 million subscribers are not “small” MVPDs and are perfectly capable of negotiating successfully on their own. Comcast Comments at 23-24.

³⁵ AMC Comments at 8.

³⁶ *Id.* AMC also noted that, if programmers are required to deal with individual MVPDs via buying groups, this requirement would inevitably lead to the consolidation of power among a few large buying groups, raising serious antitrust concerns. See *id.* at 9-10.

IV. CONCLUSION

There is no conceivable justification for expanding monopoly-era regulations in the competitive marketplace of today. For the reasons discussed above and in Comcast's initial comments, the Commission should not further expand the program access rules by adopting rebuttable presumptions or expanding its rules governing buying groups.

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