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
	)	

REPLY COMMENTS

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Barbara S. Esbin
Elvis Stumbergs
Jacob E. Baldwin
Cinnamon Mueller
1333 New Hampshire Ave, N.W.
2nd Floor
Washington, DC 20036
(202) 872-6881

Attorneys for the American Cable Association

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EXECUTIVE SUMMARY

The American Cable Association ("ACA") reiterates its call for the Commission to ensure that the program access rules continue to preserve and protect competition in the video distribution markets by adopting the measures endorsed by ACA in its comments. In particular, ACA urges the Commission to modify the rules related to buying groups to ensure these entities have the protection under the law that Congress intended, and to adopt additional rebuttable evidentiary presumptions in Section 628(b) complaint cases and standstill requests involving exclusive arrangements with cable-affiliated, satellite-delivered regional sports networks ("RSNs"), national sports networks ("NSNs"), and other cable-affiliated programming whose exclusive arrangement was successfully challenged by an MVPD. Although cable-affiliated programmers and vertically integrated cable operators have advanced a raft of reasons why these reforms should not be adopted, when balanced against the reasons provided by ACA and others for why they should, the public interest mandates their adoption.

Buying Groups

Under consideration are three modifications to the Commission's program access rules related to buying groups proposed by ACA: reform of the Commission's definition of a "buying group" to add a fourth alternative "liability to forward payments" option, consistent with current industry practice; clarification of the standard of comparability for buying group volume discounts; and protection of the right of a buying group member to participate in a master agreement negotiated by the group. No valid objections have been raised against these proposals, which should be adopted by the Commission without delay.

<u>Alternative Liability Option</u>. The definition of "buying group" in the Commission's rules currently requires a buying group to assume a level of liability for amounts due from its members under a master agreement negotiated between the group and a cable-affiliated programmer that is not required in practice today by industry participants. The effect of the rule is to prevent the nation's largest buying group, the National Cable Television Cooperative ("NCTC") from benefiting from the program access protections Congress intended such buying groups to receive under Section 628. The Commission has recognized that this has the effect of thwarting congressional intent, and accordingly tentatively proposed to adopt the fourth alternative "liability to forward payments" option, consistent with industry practice today, that would permit NCTC to avail itself of the Commission's program access complaint process where necessary. In reaching this tentative conclusion, the Commission indicated its belief that revising the definition of buying group in this manner would not subject programmers to greater financial risk when contracting with a buying group than they would be when contracting with an individual MVPD.

This is an undeniably correct conclusion, and none of the objections lodged in the record undermines it in the least.

- ACA has presented evidence that the existing liability alternatives are more costly and less efficient than the proposed "liability to forward payments" option. The fact that NCTC's business model has been freely accepted by almost all small and medium-sized multichannel video programming distributors ("MVPDs") and the programmers that serve them, in preference over business models that satisfy one of the existing liability conditions, constitutes strong evidence that NCTC's current business model is economically efficient and thus less costly to use than the alternatives the parties have declined to use.

- For the same reason, it is incorrect to maintain that NCTC could choose to change its business practices in order to avail itself of program access protections because doing so would be economically inefficient and costly. Congress intended buying groups as they exist in the market to have program access rights.
- It would not be inequitable to compel cable-affiliated programmers to deal with a buying group that only satisfies the "liability to forward payments" alternative while non-cable affiliated programmers are free to insist on more stringent liability requirements. The reality is that unaffiliated programmers generally do not insist on more stringent liability requirements. There is no unfair advantage over cable-affiliated programmers in providing non-cable affiliated programmers with alternatives that they have shown no desire to choose.
- The fact that a cable-affiliated programmer would be required to pursue delinquent buying group members on an individual basis under the "liability to forward payments" option is of minor significance. NCTC member delinquencies are infrequent and NCTC has both the means and strong incentives to ensure payment of amounts due programmers from members under the master agreements it negotiates. In addition, transaction costs to programmers are reduced by the fact that NCTC assumes the entire burden of seeking to resolve non-payment issues with its members in the first instance. Finally, NCTC offers vendors similar advantages and benefits as a single purchaser under its current business model by allowing vendors to deal with a single entity both for purposes of negotiating a contract and for the purposes of managing all billing and collection functions. Furthermore, the Commission has already concluded in the FNPRM that the NCTC's business model does not subject programmers to greater financial risk than when contracting with an individual MPVD.

<u>Clarification of Standard of Comparability</u>. Once the Commission has modified its definition of "buying group" so that the program access rules will provide protection for buying groups as they currently operate, additional modifications will be required to prevent circumvention of these rules by cable-affiliated programmers. ACA has recommended that the Commission clarify that under the program access rules, cable-affiliated programmers are required to extend to buying groups the same volume discounts or other advantageous terms and conditions based on the number of subscribers that they would ordinarily extend to individual MVPDs providing the same number of subscribers, controlling for the other factors that the rules permit satellite-delivered, cable-affiliated programmers to consider in setting the pricing, terms, and conditions for programming.

This approach is fully consistent with Section 628(c)(2)(B) because it takes account of all of the same factors listed in the statute for evaluating the reasonableness of the prices, terms and conditions that programmers offer to buying groups through the phrase "controlling for the other factors." Although ACA agrees with the Commission that this standard is arguably already clear in the rules, ACA believes that its proposed clarification should be adopted because it will make it *unarguably* clear, reducing regulatory uncertainty and needless litigation costs. The fact that NCTC members decide whether or not to opt-in to a Master Agreement after the agreement is negotiated does not invalidate this standard of comparability. Buying group subscription levels are extremely predictable, as evidenced by comments by cable-affiliated programmers in this proceeding, due in large part to the fact that most new master agreements are renewals of existing agreements.

Protections of the Right of Buying Group Members to Participate in Master Agreements Negotiated by the Group. In order to prevent cable-affiliated programmers from circumventing the program access protections Congress intended to be available to buying groups such as NCTC ACA has also recommended that the Commission establish standards that determine when members of buying groups have the presumptive right to participate in master agreements. Specifically, it supports establishment of a "safe harbor" subscriber level such than an MVPD with no more than the safe harbor level of subscribers that is a member of the buying group is presumptively entitled to participate in master agreements between the buying group and cable-affiliated programmers, and that the safe harbor level be set at 3 million subscribers.

Cable-affiliated programmers and vertically integrated cable operators raise seven objections to the safe harbor proposal. None has merit.

- ACA has explained that the proposed 3 million subscriber safe harbor level will simply preserve the *status quo* and not, as programmers have suggested, create new participation rights, because the set of MVPDs eligible to purchase programming through the buying group will be identical to the set of MVPDs that currently a purchase a substantial share of their programming through the NCTC. Although this safe harbor level is higher than that used by the Commission in setting recent license transfer conditions, it is based on the same fundamental approach of preservation of the status quo for buying group members who purchase a substantial amount of their programming through the NCTC. By raising the level to the higher range of values, the Commission will simply avoid creating a disincentive for MVPD growth.
- The lack of evidence that cable-affiliated programmers currently seek to exclude NCTC members from agreements is not probative of the need to establish protections against rule evasion once NCTC is permitted to avail itself of program access protections.
- The proposal will not put cable-affiliated programmers at a disadvantage relative to non-cable affiliated programmers. Both groups today generally welcome NCTC members that satisfy the safe harbor to participate in master agreements and there is no reason to believe that the incentives of non-cable affiliated programmers will change if the Commission requires cable-affiliated programmers to allow MVPDs that satisfy the safe harbor to participate through master agreements negotiated by their buying group.
- Nothing in the proposed safe harbor will prevent cable-affiliated programmers from negotiating an individual deal with an MVPD when they each determine this would be efficient. It simply gives the MVPD the right to insist on being allowed to opt-in to a master agreement if the programmer is unable or unwilling to offer it a better deal than the MVPD could obtain otherwise.
- ACA agrees that the result of the proposed safe harbor protection will be to guarantee that any individual deal a buying group member signs will make it at least as well off as it would be if it were to opt-in to the master agreement. ACA also agrees that cable-affiliated programmers might view this as a "problem' in the sense that it will constrain their ability to disadvantage other MPVDs and

thereby increase their profits. However, while this may be a "problem" from the perspective of cable affiliated programmers,, it is actually the intended result of program access rules from a public policy perspective.

- Protection of the right of buying group members to participate in master agreements will not contravene the First Amendment rights of cable-affiliated programmers. The proposal is a content-neutral economic regulation that does not "compel" the speech of cable-affiliated programmers. It would only require cable-affiliated programmers to refrain from engaging in discriminatory practices in the licensing of programming, rather than associate themselves with views or messages they do not hold. Accordingly, the courts would apply an intermediate level of scrutiny in responding to a First Amendment challenge, which the proposal, aimed at preserving and protecting competition in the video distribution marketplace easily satisfies.

Rebuttable Presumptions for Section 628 Complaints

The Commission's recent elimination of the exclusive contract prohibition was a very significant change in law favoring exclusive arrangements involving cable-affiliated programmers. Pre-sunset, exclusive contracts were presumptively unlawful for all cable-affiliated, satellite-delivered programming. All a complainant had to show under the categorical presumption of Section 628(c)(2)(D) was that the cable-affiliated programmer had in fact entered into an exclusive contract and that such contract did not satisfy the public interest exception. Post-sunset, all exclusive contracts are considered permitted, and the only means of protection for unaffiliated MVPDs denied access on the basis of an exclusive contract are case-by-case challenges under Section 628(b). These complaints require the complainant to produce evidence and persuade the Commission that a particular exclusive contract for cable affiliated, satellite-delivered programming is unfair and a significant hindrance to competition in order to prevail. The Commission has recognized that this approach imposes burdens for litigants and the Commission, and accordingly proposed the use of rebuttable presumptions in appropriate cases to reduce these burdens.

In any decision-making process where the Commission has already determined that one fact is true (the "proved fact") and is attempting to determine if an additional fact is true (the "inferred fact"), it is legally permissible for the Commission to adopt the rebuttable presumption that the inferred fact is true. The Commission has relied on this principle to create (i) the rebuttable presumption that acts of exerting undue influence, discrimination, and exclusive contracting satisfy the significant hindrance standard when taken with respect to terrestrially-delivered, cable-affiliated programming, and (ii) the rebuttable presumption that acts of exclusive contracting over satellite-delivered, cable-affiliated RSNs also satisfy the significant hindrance standard.

Consistent with the rationale underlying these determinations, in its comments, ACA supported adoption of the following rebuttable evidentiary presumptions:

- The presumption that the unfair act standard is met for the case of exclusive contracts with respect to cable-affiliated RSNs (satellite and terrestrial delivered).
- The presumption that both the significant hindrance standard and the unfair act standard are satisfied for the case of exclusive contracts over satellite delivered, cable-affiliated National Sports Network ("NSN") programming.

- The presumption that both the significant hindrance standard and the unfair act standard are satisfied for the case of other satellite delivered, cable-affiliated programming whose exclusive arrangement was successfully challenged by an MVPD.

None of the arguments advanced by cable-affiliated programmers and vertically integrated cable operators should prevent the Commission from adopting every one of the proposed rebuttable presumptions.

The Presumptions Will Not Recreate the Per Se Ban on Exclusives. The effect of the presumptions is only to shift the burden of production, not the burden of persuasion. The Commission will still undertake a careful and fact-specific case-by-case analysis of exclusive contracts alleged to violate Section 628(b). The presumptions will merely reduce burdens on the complainant and Commission, thereby increasing the utility and efficiency of the case-by-case process, in a limited class of cases.

The Presumptions of Unfairness and Significant Hindrance With Respect to Satellite Delivered, Cable-Affiliated NSNs Are Justified by the Key Economic Characteristics of Sports Programming. The record shows that sports programming exhibits the key economic characteristics of being highly valued and non-replicable, and that this is true regardless of whether this programming is distributed on a regional or national basis. Accordingly, the Commission should establish the same rebuttable presumptions for complaint proceedings involving exclusive contracts for cable-affiliated NSNs as for complaint proceedings involving cable-affiliated RSNs. For this purpose, ACA recommended that the Commission define an NSN to be a network that meets the same minimum requirement of amount and type of live sports programming carried that applies to RSNs, with the exception of the requirement that the programming be distributed within a limited geographic area.

Given the proven popularity and non-replicability of live sports programming, the Commission may reasonably predict this programming to exhibit the same two key economic characteristics when distributed nationally. Accordingly, based on proven facts about the competitive significance of live sports content distributed on a regional basis, it is rational and logical for the Commission to adopt the rebuttable presumption than an exclusive contract to distribute the same type and quantity of sports programming on a national basis is an "unfair act" that will significant hinder competing MVPD in the market, until such time as the presumption is rebutted by the respondent cable-affiliated programmer.

Objections raised to the adoption of these presumptions lack merit and should not stand in the way of adoption of the rebuttable presumptions concerning cable-affiliated exclusive NSN contracts.

- The rationale supporting adoption of the rebuttable presumptions for RSNs is fully applicable to NSNs. Opponents take an incorrectly narrow view that the Commission's findings concerning the non-replicability of RSNs was largely based on their programming being offered to regional sports fans. The key factor in the Commission's prior findings, upheld by the courts, is that the sports programming is highly valued and non-replicable, not that it was regionally distributed. Regional audiences may value their regional sports programming, but regional audiences similarly value the non-regional sports programming presented by national sports networks to national audiences. The competitive impact of withholding may therefore be presumed to be the same for each type of network.

- For the same reasons, adoption of the NSN presumptions would not run afoul of the APA. There is an adequate evidentiary basis from which to rebuttably presume that withholding of an NSN will unfairly and significantly hinder the ability of an MVPD to compete in the marketplace. The Commission has sufficient evidence on the impact of withholding sports programming on a regional basis to permissibly exercise its predictive judgment to conclude that withholding a nationally distributed sports network will have a similar effect.
- Neither prior Commission precedent nor recent factual findings imply that the Commission has no basis for adopting the rebuttable presumptions concerning NSNs. The Commission's earlier findings concerning DirecTV's exclusive arrangement for the NFL Sunday Ticket are inapposite. The Commission had declined to expand the program access rules' prohibition on exclusives to non-cable affiliated programmers because the evidence necessary to prove adverse competitive impact was lacking, and not that the arrangement does not in fact impact competition. The Commission's more recent decision to permit the exclusivity ban to sunset poses no obstacle either. For the very reason that the Commission found no more than a "mixed picture" on programmer incentives, it is seeking comment on whether to make its case-by-case analysis approach to unfair acts by cable-affiliated programmers less burdensome through adoption of additional rebuttable presumptions.
- The fact that very few existing cable-affiliated networks may qualify as NSNs does not imply that there is no need for Commission action. The number of such networks is irrelevant to the need to maintain adequate program access protections for non-affiliated MVPDs for networks, such as these, that are uniquely likely to significantly impact the MVPD in the market if withheld.

<u>Use of a Rebuttable Presumption in Favor of Standstill Relief is both Necessary and Fully Justified by the Record</u>. The Commission's previous determinations that RSN programming exhibits the two key characteristics that it is highly valued by consumers and that is non-replicable in turn imply that the four conditions sufficient to justify standstill are all very likely to be met, thus justifying adoption of the rebuttable presumption that these conditions are met with respect to complaints involving RSN programming.

- The fact that injunctive relief is considered "extraordinary relief" does not undermine use of a rebuttable presumption in evaluating requests for standstill relief regarding exclusive RSNs contracts. Each case will still receive the appropriate particularized consideration by the Commission that it deserves. The effect of the presumption is simply to streamline and render more efficient the Commission's case-by-case approach to determining whether an act violates Section 628(b). The presumption that the four factors necessary to obtain standstill relief are met with respect to an exclusive cable-affiliated RSN will hold only so long as it remains unrebutted by the respondent cable-affiliated programmer.
- The use of the rebuttable presumption will not deprive the respondent cable-affiliated programmer of an appropriately particularized examination of the request for standstill. The presumption will do no more than help the complainant with its burden of production by relieving its need to produce

evidence (that the Commission expects to exist) concerning each of the four standstill factors in light of the likely competitively harmful effects of exclusive cable-affiliated RSN arrangements and will in no way relieve it of its burden of proving that standstill relief is justified in the particular circumstances presented.

- A "balancing of the hardships" analysis will produce the same result as a factor-by-factor analysis and show that complainants challenging exclusive cable-affiliated RSN contracts are more likely than not to satisfy all four standstill factors.
    - Specifically, it is reasonable to presume that the MVPD complainant will suffer greater harm if a standstill is denied than the respondent programmer and MVPD with whom it has negotiated an exclusive contract, would suffer if the standstill is granted.
    - Given that the status quo is likely to be that the complainant MVPD has an on-going non-exclusive contract with the cable-affiliated RSN programmer, allowing the programmer to immediately withdraw the programming upon expiration of its contract, even for a temporary period, will likely cause significant and irreparable harm to the complainant in cases where it is ultimately determined that the programmer should not have been allowed to withdraw the programming.
    - The significant and irreparable harm caused by such a dramatic change in the status quo will far outweigh any harm experienced by the cable-affiliated programmer and MVPD (and its subscribers) with whom it has negotiated the exclusive contract in simply continuing the status quo under the prices, terms and conditions of the expiring contract for a few months longer.
    - For this reason, in a balancing of the hardships analysis with regard to a standstill request related to an exclusive cable-affiliated RSN, the equities will typically overwhelmingly favor the complainant.
- A rebuttable presumption in favor of a standstill of an existing RSN contract will not adversely affect the First Amendment interests of the respondent cable-affiliated programmer. Maintenance of the status quo under an existing but expiring programming contract does not impermissibly "compel" speech and is fully consistent with the First Amendment protections granted cable-affiliated programmers. To the extent that the First Amendment may be implicated, the standstill would be viewed as content-neutral, economic regulation and easily withstand intermediate scrutiny given the Commission's significant interest in ensuring competition in the video distribution marketplace and minimal, if any, effects on a programmer's speech in continuing distribution of their existing programming. Nor would use of the presumptions increase the risk of erroneous grant of a standstill because the respondent will have every opportunity to present rebuttal evidence for Commission staff to weigh and evaluate.

<u>Adoption of a Rebuttable Presumption in Cases Involving Previously Challenged Contracts Where the Complainant had Prevailed is Justified</u>. The primary factors that determine whether or not an MVPD filing a complaint challenging an exclusive contract under Section 628(b) would be met will generally be the characteristics of the programming, such as whether the programming is highly valued by subscribers and whether the programming is non-replicable. Accordingly, if one MVPD has been able to establish that it will be significantly harmed by withholding of the programming and that the competitive benefits from this

withholding are unlikely to exceed the competitive harms, it is then very probable that another MVPD will be able to establish the same set of facts.

- Contrary to claims of the cable-affiliated programmers, variations between MVPDs and markets do not undermine the legal basis for such a presumption. the single most important issue in evaluating the justification for use of a rebuttable presumption in such cases lies in the economic characteristics of the programming at issue, and not the characteristics of the either the MVPD or the geographic market. The fact that the first complainant was able to persuade the Commission that an exclusive contract involving the dispute programming was both an unfair act and a significant hindrance to their ability to compete in the market, it is very likely that a subsequent MVPD will be able to make a similar showing, thus providing a rational basis for the rebuttable presumption that a subsequent exclusive contract for the same programming will also violate Section 628(b).
- Nor is would the due process rights of the cable-affiliated programmers be affected by the presumption. Adoption of a rebuttable presumption is a small change that in no way interferes with a cable-affiliated programmer or vertically integrated cable operator's rights or abilities to provide a complete defense of its practices. It simply shifts the obligation to provide initial evidence. Both the Commission and the courts have already determined that it is both reasonable and fair for the Commission to adopt the presumption that an inferred fact is true based on the fact that "proved fact" has been established (i) "if there is a sound and rationale 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." The fact that the programmer's use of an exclusive contract for exactly the same programming has already been found to be violate Section 628(b) provides exactly such a rationale because it is characteristics of the programming such as its popularity and whether it is replicable or has good substitutes that largely determine whether the significant hindrance and unfairness conditions will be satisfied and these characteristics will generally not vary widely across different regions of the country.

<u>The Proposed Rebuttable Presumptions Concerning Sports Programming Are Fully Consistent with Programmers' First Amendment Rights</u>. Many of the First Amendment arguments advanced by cable-affiliated programmers in opposition to adoption of the rebuttable presumptions concerning sports programming networks have been repeatedly rejected by the D.C. Circuit, and they all generally suffer from a lack of support in First Amendment jurisprudence. Specifically, previous claims that a rebuttable presumption of significant hindrance in the case of terrestrially delivered RSNs is a content-based regulation subject to "strict scrutiny" have been dismissed as "meritless." Commenters therefore err in suggesting that the presumptions at issue should be subject to strict scrutiny review because a cable-affiliated programmer's speech is somehow "compelled" as a result of a regulation requiring it to license its content to distributors whom it may not have licensed otherwise. Such "compulsion" is nothing more than content-neutral economic regulation and subject only to intermediate scrutiny.

The presumptions would easily pass intermediate scrutiny for the same reasons the presumptions with respect to terrestrially-delivered RSNs did – the Commission has substantial interest unrelated to speech in regulating the economic relationship between cable-affiliated programmers and distributors. Nor do the presumptions suffer from either over-breadth or under-inclusiveness for the same reasons the presumption concerning terrestrially-delivered RSNs were found to be adequately narrowly tailored and justified despite the fact that it did not reach non-cable affiliated programmers.

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REPLY COMMENTS

American Cable Association

I. INTRODUCTION

The American Cable Association ("ACA") submits these comments replying to comments filed in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] As ACA and other non-affiliated multichannel video programming distributors ("MVPDs") have fully established in the record of this proceeding, it is imperative that the Commission ensure that the program access rules continue to preserve and protect competition in the video distribution markets. To this end, the Commission must (i) adopt the reforms under consideration concerning buying groups that are endorsed by ACA, and (ii)

[1] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et. al.; 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 in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29 (rel. Oct. 5, 2012) ("2012 Program Access Order" and "FNPRM").

ensure that non-vertically integrated MVPDs can make use of the proposed rebuttable evidentiary presumptions in their standstill requests and complaint cases brought against cable-affiliated programmers and cable operators arising under Section 628(b) of the Act. Although cable-affiliated programmers and vertically integrated cable operators have advanced a plethora of reasons why these reforms should not be adopted, none of the arguments raised by the vertically-integrated cable operators or their affiliated cable-programming networks should deter the Commission from adopting these needed sets of reforms.

II. THE COMMISSION SHOULD ADOPT THREE MODIFICATIONS TO ITS PROGRAM ACCESS RULES RELATED TO BUYING GROUPS

In its initial comments, ACA recommended that the Commission adopt three modifications to program access rules related to buying groups and explained the justification for adopting these modifications.[2] In the FNPRM, the Commission tentatively concluded that ACA's proposed alternate liability should be adopted, and sought comment on that proposal, together with ACA's proposals concerning the appropriate standard of comparability for buying group volume discounts and protection of the right of a buying group member to participate in a master agreement negotiated by the group.[3] Comcast and AMC offered arguments why the Commission should decline to adopt any of the three modifications.[4] All of the counter-arguments made by Comcast and AMC are without merit and should be rejected by the Commission.

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[2] *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, Comments of the American Cable Association at 11-33 (filed June 22, 2012) ("ACA NPRM Comments").

[3] FNPRM ¶¶ 82-100.

[4] *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of Comcast Corporation and NBCUniversal Media, LLC at 3-21, 23-24 (filed Dec. 14, 2012) ("Comcast Comments"); *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of AMC Networks, Inc. at 1-12 (filed Dec. 14, 2012) ("AMC Comments").

A. The Proposed Alternate Liability Option Should Be Adopted Because it Reflects Current Industry Practice and Provides Adequate Protection Against Excessive Financial Risk for Cable-Affiliated Programmers.

1. The Commission's current buying group liability conditions fail to reflect current industry practice.

Current Liability Conditions. The Commission has determined that a buying group or its members must satisfy one of three liability conditions in order for the buying group to be eligible to avail itself of the non-discrimination protections afforded to MVPDs under program access rules.[5] The conditions may be summarized as follows:

> (i) The "full liability" option: The buying group agrees to be financially liable for any fees due pursuant to a programming contract which it signs as a contracting party as a representative of its members.
>
> (ii) The "joint and several liability" option: The members of the buying group agree to joint and several liability.
>
> (iii) The "cash reserve" option: The buying group must maintain liquid cash or credit reserves equal to the cost of one month's programming fees for all buying group members and each member of the buying group must remain liable for its pro rata share.[6]

Current Industry Practice. As ACA has previously explained, the National Cable Television Cooperative ("NCTC") is by far the largest and most prominent buying group used by MVPDs to license programming.[7] The NCTC has master agreements with the vast majority of networks including 45 of the top 50 networks.[8] Furthermore, almost all small and medium sized

[5] FNPRM ¶ 84; *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359 ¶ 115 ("1993 Program Access Order"); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822 ¶ 78 (1998) ("1998 Ameritech Order").

[6] *See* 47 C.F.R. § 76.1000(c).

[7] ACA NPRM Comments at 16-17; ACA NPRM Comments, Appendix B, Declaration of Frank Hughes, Senior Vice President of Member Services for National Cable Television Cooperative, Inc. ¶ 5 ("Hughes Declaration"); *see also* FNPRM ¶ 85.

[8] ACA NPRM Comments at 17; William P. Rogerson, Professor of Economics, Northwestern University,

MVPDs are members of the NCTC and license a substantial share of the programming they distribute through the NCTC.[9]

NCTC negotiates master agreements with programmers that essentially contain a standardized contract with the programmer that members of the NCTC may opt-in to if they wish.[10] Therefore, when a member of the NCTC opts into a master agreement, this creates a legally enforceable contractual agreement between the MVPD and the programmer that both the MVPD and the programmer must abide by. In particular, the MVPD commits to purchase programming at specified terms for a specified duration of time and the programmer commits to provide this programming at the specified terms for the specified duration. The NCTC is also a party to the contract in that it promises to perform various intermediation functions between the MVPD and programmer such as managing the billing and fee collection process. However, the NCTC does not assume any liability for the contractual promises that its members make to the programmer. Rather, the only liability that the NCTC assumes is the liability to forward all payments due and received from its members on to the programmer. Furthermore, individual MVPDs do not assume joint and several liability for one another's contractual commitments. Finally, the NCTC does not assume any obligation to maintain minimum cash balances of any particular size. Therefore the contractual arrangements that NCTC and programmers have chosen to operate under do not satisfy any of the three liability conditions.

It is important to note that the NCTC and programmers, both non-cable-affiliated and cable-affiliated, freely enter into the deals that they sign, and that the current NCTC business model, including the amount of liability it assumes on behalf of its members, has been accepted

"Proposed Revisions to Program Access Rules to Better Address the Potential Competitive Harms Created by Cable-Affiliated Programmers," Table 1 (June 22, 2012) ("Rogerson").

[9] ACA NPRM Comments at 17; Hughes Declaration ¶ 5.

[10] Appendix A, Declaration of Jeff Nourse, Senior Vice President, Legal & Regulatory Affairs of the National Cable Television Cooperative, Inc. ¶ 4 ("Nourse Declaration"); ACA NPRM Comments at 16.

by essentially all programmers in the industry.[11] Furthermore, the programmers and the NCTC could clearly enter into arrangements where the NCTC assumed greater liability on behalf of its members if they wished. Accordingly, as ACA had noted, there is no reason to believe that the NCTC and programmers have failed to negotiate an efficient contractual arrangement.[12] In particular, if the value to programmers of having the NCTC assume greater liability on behalf of its members generally exceeded the costs to the NCTC of so doing, one would have expected such contractual arrangements to have emerged in practice. It is therefore reasonable for the Commission to conclude that having the NCTC assume greater liability on behalf of its members would not be an efficient economic arrangement, and should not be required by its program access rules.

Furthermore, the business model that NCTC and programmers have agreed upon makes good economic sense. The main economic function that the NCTC performs for programmers is to save them the transactions costs of dealing with hundreds of individual MVPDs. It does this by negotiating a single standardized agreement on behalf of all of its members and by acting as an interface between the programmer and its members for all billing and collection functions. The NCTC business model accomplishes this function in a very simple and low cost manner. Business models that conformed to any of the three liability conditions specified by program access rules would all involve significant additional costs.[13] A model where the NCTC directly licensed programming on behalf of its members and assumed full liability would require enormous amounts of extra coordination and communication between the NCTC and its membership. An arrangement where members assumed joint and several liability

[11] Nourse Declaration ¶ 4.

[12] ACA NPRM Comments at 24-25; Rogerson at 13.

[13] *See* Hughes Declaration ¶ 7 (explaining that NCTC found that the options of maintaining escrow accounts became an impediment to participation by smaller members and the assumption of joint and several liability by member companies proved impracticable because it interfered with some members' loan agreements).

for one another's contractual commitments would also create serious costs and difficulties. It is likely that any potential member of the NCTC would find it highly undesirable to be exposed to the unpredictable risk of being potentially responsible for the failure to pay of all other members of the organization. Furthermore, programmers would likely target recovery efforts on the largest and financially strongest members, with the result that these MVPDs would be particularly unwilling to join the organization in the first place. Thus, it seems very likely that a buying group that attempted to impose joint and several liability on its membership would simply not be viable. It would also be costly to require all members to maintain a deposit with the NCTC equal to one month's programming fees.

2. The Commission has correctly determined that adoption of the alternative liability modification is necessary to effectuate the intent of Congress and that it provides adequate protection to programmers against excessive financial risk in contracting with a buying group.

In the FNPRM the Commission tentatively concludes that it should adopt the NCTC's current practice as a fourth alternative condition that a buying group may satisfy in order to avail itself of the protections provided by program access rules.[14] That is, it tentatively concludes that it should modify its definition of "buying group" to add the following fourth alternative liability condition to the three currently available conditions:

> (iv) The "liability to forward payments" option: The buying group agrees to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.

ACA strongly supports the Commission's tentative conclusion that this fourth alternative should be adopted and added to the definition of "buying group" in the Commission's rules.

The Commission provides two rationales justifying its conclusion.[15] ACA agrees with both justifications. The first justification is simply that current rules contravene the clear intent of

[14] FNPRM ¶ 87.

[15] FNPRM ¶¶ 87-88.

Congress that buying groups receive protection under program access rules.[16] Section 628(c)(2)(B) specifically includes buying groups as entities that are protected by program access rules.[17] The business model of the NCTC has found near-complete acceptance among the small and medium sized MVPDs that have a need to use buying groups and the programmers that sell to them. The fact that all parties have freely chosen to use this model for two decades suggests that it is efficient. A set of rules that do not apply to the business model for a buying group that has found near-universal acceptance among all parties that have a need to use buying groups cannot reasonably be interpreted as providing protection to buying groups. The FNPRM summarizes its conclusion on this point as follows:

> [I]t appears that our existing definition of 'buying group' set forth in Section 76.1000(c)(1) does not reflect accepted industry practices and thus may have the unintended effect of barring some buying groups from availing themselves of the protections of the non-discrimination provision of the program access rules, in contravention of Congress's express intent in enacting Section 628(c)(2)(B) of the Act.[18]

The second justification is that programmers dealing with a buying group satisfying alternative (iv) would continue to receive a level of protection against default that is similar to the level they would receive when dealing with an individual MVPD.[19] As ACA has explained, a programmer's legal rights to terminate service or to attempt to compel payment are essentially the same regardless of whether a defaulting MVPD has purchased service on an individual basis or through a buying group.[20] Furthermore, the payment lags are very similar in either case with the result that, in either case, if an MVPD defaults on an existing contract it would at

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[16] FNPRM ¶ 87.

[17] 47 U.S.C. § 548(c)(2)(B).

[18] FNPRM ¶ 87.

[19] FNPRM ¶ 88.

[20] ACA NPRM Comments at 25-26; Rogerson at 11-12

most be able to avoid paying for 30 to 60 days of service before its service was terminated.[21] Finally, the fact that the NCTC has the right to terminate all the master agreements of an MVPD that defaults on any individual agreement and generally exercises this right means that there is a stronger penalty associated with defaulting on an agreement made through the NCTC than is associated with defaulting on an individual agreement.[22] In the former case the defaulting MVPD will lose access to all of the programming that it purchases through the NCTC while in the latter case the defaulting MVPD only lose access to the specific programming that it defaults on. The FNPRM summarizes its conclusion on this point as follows:

> We do not believe that revising the definition of buying group as discussed above would subject programmers to greater financial risk when contracting with a buying group than they would be when contracting with an individual MVPD.[23]

3. Programming vendors' arguments opposing adoption of this rule modification all lack merit.

Comcast and AMC offer several arguments opposing adoption of the alternative liability requirement. All are without merit and should be rejected by the Commission.

Argument #1: ACA has not presented any evidence that the existing alternatives are more costly or less efficient than alternative (iv).[24]

This argument appears to purposefully ignore a key point that ACA has stressed in the record of this proceeding. As ACA demonstrated, the fact that the NCTC business model has been freely adopted by almost all small and medium sized MPVDs and the programmers that serve them, in preference over business models that satisfy one of the existing liability conditions, constitutes strong evidence that the NCTCs current business model is economically

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[21] ACA NPRM Comments at 25-26; Rogerson at 11-12.

[22] ACA NPRM Comments at 26-27; Rogerson at 13-14.

[23] FNPRM ¶ 88.

[24] AMC Comments at 7 ("Moreover, ACA's proposal seeks to solve a 'problem' that does not exist. Even ACA does not argue that the existing rule is overly burdensome or that existing market conditions prevent buying groups from electing one of the three available options.")

efficient and thus less costly to the parties to use than the alternatives they have declined to use.

Argument #2: NCTC is provided protection by the program access rules because NCTC could choose to change its business practices and adopt one of the existing three alternatives if it wished.[25]

This argument would only be valid if the other alternatives were equally efficient and thus no more costly for parties to use than the proposed fourth option of the buying group assuming liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer. However as discussed above, both programmers and MVPDs have clearly demonstrated by their own freely chosen actions that they believe that this alternative "liability to forward payments" option is more efficient and less costly than other alternatives. Moreover, Congress intended buying groups to have rights to use the program access rules, and it is most appropriate to define a buying group in the way that such entities actually operate in the market. Had Congress intended that buying groups meet some higher and more costly standard than what they do in their regular course of business, then presumably Congress would have explicitly said so.

Argument #3: It would be inequitable to compel cable-affiliated programmers to deal with a buying group that only satisfies the liability to forward payments alternative while non-cable-affiliated programmers are free to insist on more stringent liability requirements.[26]

The reality of the situation, as ACA has extensively explained, is that programmers

[25] AMC Comments at 7 ("Indeed ACA's posited problem - that NCTC has *chosen* not to take on its members' liabilities and so cannot bring a program access complaint on their behalf - is already addressed by existing rules which have served their purpose as intended and in no way prevented any entity from taking advantage of program access rules. If NCTC wishes to, it may avail itself of the program access rules at any time by satisfying the liability requirements of Section 76.1000(c)(1) - as may any individual MVPD at any time it believes its rights have been violated.") (emphasis in original); Comcast Comments at 19 ("If NCTC wants the benefit of litigating under the rules, it should assume the liability responsibilities associated with its contracts.").

[26] AMC Comments at 6 ("It would be particularly inequitable to compel cable-affiliated programmers to deal with such an entity, while their unaffiliated programmer competitors remain free to insist upon firmer financial guarantees as a condition of doing business.").

generally do not insist on more stringent liability requirements. In particular, essentially all non-cable-affiliated programmers choose to deal with the NCTC under its current business model where it operates under the liability to forward payments alternative, even though they could insist on more stringent liability requirements. From ACA's perspective, it is difficult to imagine how providing non-cable-affiliated operators with the opportunity to choose alternatives that they have already demonstrated that they have no desire to choose will provide them with an advantage over cable-affiliated programming vendors.

Argument #4: The Liability to Forward Payments Alternative would require a programmer to pursue delinquent MVPDs on an individual basis.[27]

While this is a correct observation, it is of minor significance because delinquencies are very rare. NCTC reports that in 2011, which is the most recent year for which complete data is available, only five of its members ultimately defaulted on any payments. Furthermore, the five defaulting members had a total of only 661 subscribers and the monthly payments of the two defaulting members represented approximately 0.01% (i.e., 1/10,000) of NCTC's average monthly payments to programmers on behalf of its members.[28]

As ACA has previously explained, under the way NCTC manages its operations, there is at most a 60-day lag between when programming is delivered and when payment is required, and a programmer can generally terminate service to a member as soon as a default in payment occurs.[29] The member needs the programming to continue in business and will almost immediately lose the programming if it defaults on its payments. Therefore, so long as a member is not going out of business, there is really no incentive to default. Furthermore, the fact the NCTC has the right terminate all of its agreements with a member that defaults on any

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[27] AMC Comments at 6 ("The primary benefit of dealing with a buying group is lost if the programmer is forced to pursue every delinquent MVPD on an individual basis.").

[28] Nourse Declaration ¶ 9.

[29] ACA NPRM Comments at 25-26; Rogerson at 11-12.

individual agreement and generally exercises this right creates even more powerful incentives for members not to default so long as they have any plan to continue in business. Many NCTC members obtain a substantial share of their programming from the NCTC and could not feasibly continue in operations if all of this programming became unavailable. As Jeff Nourse, NCTC's Senior Vice President, Legal & Regulatory Affairs, explains:

> The primary leverage that NCTC exerts over its members to pay obligations that are due is that NCTC has the right to terminate a member from participation in all NCTC master agreements if that member is delinquent on any single payment to a programmer. Most members of the NCTC purchase a substantial share of their programming through the NCTC and the loss of all this programming would likely cause considerable disruption to their business, including significant subscriber defections. Therefore, delays or defaults in payments are very rare events that generally occur only when a member is faced with serious enough cash flow problems that it is likely to go out of business entirely.[30]

Furthermore, when a payment first becomes overdue, the NCTC assumes the entire burden of contacting the member and determining if there is a temporary cash flow problem of some sort that can be resolved, or if the problem is more serious and is likely to lead to complete default and termination.[31] Thus, transaction costs associated with delayed payments that are ultimately received are borne by the NCTC and are not borne by the programmers. Mr. Nourse explains that:

> Under this business model, at the end of each month the NCTC invoices each member participating in a master agreement for fees due for programming provided in that month. Payment of the invoice to NCTC is due on the 15th day of the following month, subject to an additional ten-day cure period allowed under the NCTC Member Agreement. Upon the expiration of the ten-day cure period NCTC's routine and standard procedure is to send a notice to the member that its membership and access to programming under the NCTC Master Agreements will be terminated unless immediate arrangements are made to deal with the default. At this point in the process, the NCTC often devotes

[30] Nourse Declaration ¶ 5.

[31] Nourse Declaration ¶ 6.

> considerable resources and time communicating with the member and fact-finding to determine if there is only a temporary problem that likely can be resolved, such as a temporary cash flow shortage, or if there are more serious problems that likely cannot be resolved. The programmer is typically unaware of any issue unless the member communicates an issue independently and therefore, programmers rely almost entirely on NCTC to work with the member to attempt to resolve the situation during this period. When the situation can be successfully resolved the programmer is often completely unaware that there was even a problem and certainly is spared the trouble and cost of helping resolve the situation.[32]

Finally, it is important to note that, although it is not directly responsible for its members' defaults, the NCTC is keenly aware of the need to maintain its reputation with programmers that NCTC deals do not involve significant default problems. This is a key part of its overall business strategy. NCTC is conscious of the fact that programmers would become unwilling to deal with the buying group, or at least would insist on significantly higher fees, if they believed that NCTC was not taking an active role in ensuring that its members do not default on master agreements. According to Mr. Nourse, "NCTC recognizes that aggressive use of the threat of termination and actual termination to enforce members' contractual commitments is in the long-run interests of all members because it makes the NCTC a much more desirable business partner in the eye of programmers."[33]

One recent example of the how NCTC has taken measures to ensure that its members live up to their contractual commitments is recounted by Mr. Nourse:

> A good example of the NCTC's commitment to help ensure that its members live up to the contractual promises they make when they enter into master agreements is the recent case of Broadstripe Communications ("Broadstripe"). On January 2, 2009, Broadstripe experienced financial difficulties and filed for Chapter 11 bankruptcy protection leaving NCTC with a pre-petition debt of approximately $3.4 million owed primarily to programmers. Broadstripe attempted to opt-in to new NCTC master agreements,

[32] Nourse Declaration ¶ 6.

[33] Nourse Declaration ¶ 7.

> despite the fact that it was still in default on its existing obligations. NCTC objected citing that Broadstripe's Member Agreement allowed NCTC to prohibit a member's participation in its sole discretion and Broadstripe sued. NCTC incurred significant legal costs and successfully defended its right to prohibit Broadstripe from entering into new master agreements. The ultimate result was that Broadstripe agreed to pay all fees under NCTC master agreements upon which it had defaulted[34]

The foregoing demonstrates sharply that AMC's claim that the "[t]he primary benefit of dealing with a buying group is lost if the programmer is forced to pursue every delinquent MVPD on an individual basis"[35] is completely false. The primary benefit to a programmer of dealing with a buying group is that the programmer is able to conduct a single negotiation with the buying group instead of hundreds of separate negotiations and that the buying group manages all billing and collection activities so that the programmer also deals with a single entity for purposes of billing and collection. Defaults rarely happen because payments for programming are due very soon after programming is delivered, and a programmer can terminate an MVPD as soon as it quits paying its bills. Furthermore, the fact that the NCTC will generally terminate the membership (and thus all of the master agreements) of a member that defaults on any individual master agreement creates even stronger incentives for members to avoid default. Therefore the fact that programmers must ultimately file separate legal actions with individual MVPDs if they decide to take formal legal action represents a very insignificant cost to programmers.

Argument #5: "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, obtain the advantages of 'unitary treatment' without 'offer[ing] vendors similar advantages or benefits as a single purchaser.'"[36]

This argument can be broken down into three separate statements: (i) the proposed

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[34] Nourse Declaration ¶ 8.

[35] *See* AMC Comments at 6.

[36] Comcast Comments at 19.

alternative “liability to forward payment” option is “in direct contradiction” to the Communications Act; (ii) the proposed alternative “liability to forward payment” option is in “direct contradiction” to existing Commission rules; and (iii) the proposed alternative “liability to forward payment” option is “in direct contradiction” to the principle that the Commission enunciated in its 1993 Program Access Order that the program access rules should only provide buying groups with protection if they “offer vendors similar advantages or benefits as a single purchaser.”[37]

Each of these statements will be considered in turn. Statement (i) is completely incorrect. The only mention of buying groups in the Act occurs in Section 628(2)(B) which states that the prohibition on discrimination applies not only to discrimination against MPVDs but also to discrimination against “their agents or buying groups.”[38] In particular, there is no direct mention of liability requirements or any other type of requirements that a buying group must satisfy. Thus, this statement is incorrect. Comcast’s claim that adoption of the alternative “liability to forward payment” option would be in “direct contraction” to the Communications Act is obviously nothing more than an empty and incorrect rhetorical flourish.

In statement (ii), Comcast appears to be making the observation that the proposed “liability to forward payment” alternative is weaker than any of the three existing liability alternatives and that, as written, the current regulations do not state that satisfaction of this alternative is sufficient to allow a buying group to avail itself of the protections of program access rules. ACA obviously agrees with Comcast. This is of course why ACA is recommending, and the Commission has tentatively concluded, that the regulations should be changed. This statement is therefore not quite as flawed as statement (i). Rather than being an empty and incorrect rhetorical flourish, it is an empty and correct rhetorical flourish.

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[37] *See* 1993 Program Access Order ¶¶ 114-115.

[38] 47 U.S.C. § 548(c)(2)(B); *see also* ACA NPRM Comments at 13-14 n. 44 (discussing references to buying groups in the legislative history of Section 628).

Finally, unlike the previous two statements, statement (iii) at least appears to be attempting to make a serious point. However, ACA also believes that it is incorrect. NCTC does "offer vendors similar advantages or benefits as a single purchaser" under its current business model. It does this by allowing vendors to deal with a single entity both for purposes of negotiating a contract and for purposes of managing all billing and collection functions. Furthermore, the Commission has already concluded in the FNPRM that the NCTC's business model does not subject programmers to greater financial risk than when contracting with an individual MVPD for two reasons: (i) the individual legal commitments that MVPDs make when they opt in master agreements provide programmers with essentially the same legal rights as when MVPDs enter into individual deals with them; and (ii) the NCTC's general practice of terminating membership, and thus all master agreements, of a member that defaults on any individual master agreement provides programmers with further protection.[39]

B. The Commission Should Clarify the Standard of Comparability for Buying Groups Regarding Volume Discounts.

1. ACA's Proposed Clarification Will Reduce Regulatory Uncertainty and Needless Litigation Costs.

ACA has recommended that the Commission clarify in its order in this proceeding, that under the program access rules, cable-affiliated programmers are required to extend to buying groups the same volume discounts or other advantageous terms and conditions based on the number of subscribers that they would ordinarily extend to individual MVPDs providing the same number of subscribers, controlling for the other factors that the rules permit satellite-delivered, cable-affiliated programmers to consider in setting the pricing, terms, and conditions for programming.[40] ACA agrees with the Commission's observation in the FNPRM that under

[39] FNPRM ¶ 88.

[40] *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of the American Cable Association at 13-14 (filed Dec. 14, 2012) ("ACA Comments").

Section 628 and the orders adopted by the Commission implementing Section 628 that it is "arguably already clear that a buying group would be compared to an individual MVPD providing the same number of subscribers to the programmer" and that there may therefore be no need for a formal modification to program access rules.[41] However, as ACA has explained, it would still be useful to for Commission to make a clear and explicit statement to this effect on the occasion of issuing an order discussing the application of program access rules to buying groups.[42] This would make it *unarguably* clear that this requirement holds and would leave no room for cable-affiliated programmers to attempt to argue the opposite when a complaint is filed. This would reduce needless litigation costs. Furthermore the reduction in regulatory uncertainty and the reduction in potential litigation costs would make it more likely that harmed parties would be willing to file complaints in the first place.[43]

It is important to distinguish between ACA's proposal and the proposal advocated by Cox and Mediacom that the Commission should place greater limits on the extent to which cable-affiliated programmers are allowed to offer volume discounts to MPVDs.[44] These proposals are completely distinct and separable. ACA's proposal is essentially that, regardless of what the standard is for determining the legitimacy of volume discounts, that the Commission should clarify that the same standard applies to buying groups as to MPVDs in the sense that cable-affiliated programmers are required to extend to buying groups the same volume discounts or other advantageous terms and conditions based on the number of subscribers that they would ordinarily extend to individual MPVDs providing the same number of subscribers,

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[41] FNPRM ¶ 97.

[42] ACA Comments at 12-15.

[43] ACA Comments at 13.

[44] *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of Cox Communications, Inc. at 2-6 (filed Dec. 14, 2012) ("Cox Comments"); *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of Mediacom Communications Corporation at 2-4, n.10 (filed Dec. 14, 2012) ("Mediacom Comments").

controlling for other factors that the rules permit satellite-delivered cable-affiliated programmers to consider in setting the pricing, terms, and conditions for programming. ACA agrees with Cox and Mediacom that, in the longer run, it would be worthwhile for the Commission to additionally consider the issue of whether it or not it should place additional limits on the extent to which cable-affiliated programmers are allowed to charge small and medium sized MVPDs higher prices than they charge to large MPVDs. However, ACA is not seeking such relief here, and only suggests that the Commission should immediately clarify that the same standard applies to volume discounts offered by cable-affiliated programmers to MVPDs and buying groups, regardless of how it decides to proceed on the issue of whether the standard should be altered.

2. ACA Agrees that the Standard of Comparability Should Only Apply Controlling For All Other factors that the Rules Permit Satellite-Delivered, Cable-Affiliated Programmers to Consider in Setting the Pricing, Terms, and Conditions for Programming.

Under Section 628(c)(2)(B), there are a range of other factors besides the number of subscribers that programmers may legitimately consider when setting pricing, terms and conditions for programming.[45] Both AMC and Comcast argue that program access rules require that these same factors need to be taken into account when evaluating the reasonableness of the prices, terms and conditions that programmers offer to buying groups.[46] ACA agrees with this. In ACA's recommended clarification, stated above, the phrase "controlling for other factors that the rules permit satellite-delivered cable-affiliated programmers to consider in setting the

[45] 47 U.S.C. § 548(c)(2)(B)(i)-(iv).

[46] AMC Comments at 11-12 ("The Commission has repeatedly made clear there are many factors that go into the assessment of similarity other than the number of subscribers. Factors such as the geographic region in which an MVPD operates, whether the services purchases and offered are similar, and whether the relevant MVPDs have the same ability to offer various benefits and services to the programmer all play a role in a programmer's analysis of the value of a particular agreement."); Comcast Comments at 22 ("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.").

pricing, terms and conditions for programming" is meant to explicitly make this point.

3. The Fact that NCTC Members Decide Whether or Not to Opt Into a Master Agreement After the Agreement is Negotiated Does Not Invalidate this Standard of Comparability.

When NCTC negotiates a master agreement with a programmer, the master agreement essentially provides a standardized contract that members may choose to opt-in to. Only after the master agreement is negotiated do individual members decide whether or not to opt-in to it. And, as explained above, this arrangement makes good economic sense. The main economic function that the NCTC performs for programmers is to save them the transaction costs of dealing with multiple MVPDs. It does this by negotiating a single standardized agreement on behalf of all of its members and by acting as an interface between the programmer and its members for all billing and collection functions. The business model of the NCTC accomplishes this function in a very simple and low cost manner. A model where the NCTC directly licensed programming on behalf of its members would require enormous amounts of extra coordination and communication between the NCTC and its membership.

Comcast has argued that the fact that members of the NCTC do not opt-in to master agreements at the instant they are signed but instead wait until after the master agreement is signed to make their decision, means that the programmer cannot reliably predict the number of subscribers that the buying group will provide and that this should invalidate the standard of comparability between buying groups and MVPDs. Specifically, Comcast states:

> 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 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 with 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."[47]

ACA submits that Comcast has wildly overblown the extent to which the number of subscribers that will be provided by a buying group is unpredictable. Although its fellow programmer, AMC, is also generally opposed to ACA's proposals, it has not argued against the standard of comparability on the grounds that the buying group subscriber levels are unpredictable.[48] In fact, in the context of discussing another issue in this proceeding, it quite vigorously argues that buying group subscription levels are actually extremely predictable. This is because most new master agreements are simply renewals of existing master agreements. In such a case, the number of subscribers under the existing agreement that is about to expire is an extremely good predictor of the number of subscribers that the new deal will produce. Specifically, AMC states "NCTC and its members enjoy long-standing relationships with numerous programmers, including AMC's networks, and past participation in master agreements for particular programming has been, and continues to be, a reliable indicator of which buying group members are likely to opt into future agreements."[49] Accordingly, Comcast's argument should not deter the Commission from making this necessary clarification of the standard of comparability for buying group volume discounts in its order in this proceeding.

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[47] Comcast Comments at 20-21 (emphasis in original).

[48] As discussed above, AMC's only potential concern with the standard of comparability is that it take account of other factors that prices are allowed to depend on. *See* AMC Comments at 11-12.

[49] AMC Comments at 14.

C. The Commission Should Adopt the Proposed Protections for the Rights of Buying Group Members to Participate in Master Agreements Negotiated by the Group.

1. Once the Commission has modified its definition of "buying group" so that the program access rules will provide protection to NCTC, additional modifications will be required to prevent circumvention of the rules by cable-affiliated programmers.

ACA has explained that, once the definition of a buying group is modified so that the program access rules provide protection to the NCTC as it currently operates, cable-affiliated programmers will still potentially have the opportunity to circumvent these protections if they can arbitrarily prohibit members of the NCTC from participating in master agreements.[50] Therefore it is clear that the Commission will need to establish standards that determine when members of buying groups have the presumptive right to participate in master agreements.

To this end, ACA has recommended that the Commission establish a "safe harbor" subscriber level such that an MVPD with no more than the safe harbor number of subscribers that is a member of a buying group is presumptively entitled to participate in master agreements between the buying group and cable-affiliated programmers. Further, it has recommended that the safe harbor level be set at 3 million subscribers.[51]

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[50] ACA Comments at 21-25; ACA NPRM Comments at 27-29.

[51] ACA has recommended, additionally, that the Commission should: (i) provide that MVPDs with more than the safe harbor number of subscribers also have the presumptive right to participate if they can show that the share of programming they purchase through the buying group is not significantly smaller than the average share of programming that other buying group members purchase through the buying group; (ii) provide that when an expiring master agreement is being renewed, members participating in the expiring agreement should have the right to participate in the renewed agreement even if they have more than the safe harbor number of subscribers; and (iii) provide that members of a buying group that have an existing direct deal with a programmer that the buying group has a master agreement with must have the right to opt into the remaining terms of the master agreement when their existing direct deal expires. ACA Comments at 21-25. No comments opposing these proposals have been filed. However, ACA would like to clarify with respect to point (iii) that the right for a member of a buying group that has an existing direct deal with a programmer that the buying group has a master agreement with to opt-in to the remaining term of the master agreement once the individual deal has expired should of course be contingent on the MVPD satisfying the safe harbor standard (or alternatively, satisfying the condition listed in (i) above.) Although Cox and Mediacom have suggested that the Commission should adopt versions of proposal (iii), their proposals do not restrict the opt-in right to MPVDs that satisfy the safe-harbor standard (or alternatively, that satisfy condition (i) above). Cox Comments at 13 ("This prohibition on refusals to deal

ACA has identified 3 million subscribers as the correct level for a safe harbor on the following basis. Appendix B, Table 1, presents subscriber data for the largest 25 MVPDs and indicates which of these MVPDs are NCTC members. It is noteworthy that Cequel (Suddenlink) Communications ("Suddenlink") is the 11th largest MVPD with 1.23 million subscribers and that Suddenlink and all MVPDs smaller than Suddenlink on the list of top-25 MVPDs are NCTC members. Four of the larger MVPDs on the list are also members of the NCTC. These are Cox Communications, Inc., Verizon Communications Inc., Charter Communications, Inc., and Cablevision Systems, Inc., each with at least 3.26 million subscribers. NCTC has already reported that while these four largest members do not purchase a substantial share of their programming through the NCTC, all of its other members generally do purchase a substantial share of their programming through the NCTC.[52]

It is also significant that there is only one MVPD intermediate in size between Cablevision, ranked as 9th largest MVPD with 3.26 million subscribers and Suddenlink, ranked as 11th largest MVPD with 1.23 million subscribers. This is Bright House Networks, LLC ("Bright House"), with 2.06 million subscribers. Bright House, however, is a somewhat unusual case. It is not a member of the NCTC and is highly unlikely to ever become a member of the NCTC or any other organized buying group because it is partly owned and managed by Time Warner Cable, the 4th largest MVPD with 12.48 million subscribers. Bright House purchases most of its programming through deals negotiated by Time Warner Cable at rates that are presumably much lower than the rates that any buying group would ever be able to negotiate because

should explicitly require a programmer to permit a cable service provider to opt into a master agreement entered into by a buying group after its commencement date if that provider had been party to an individual agreement with programmer that expires after the buying group agreement commences."); *see also* Mediacom Comments at 13 (the Commission should clarify] "that when an MVPD with an existing program carriage agreement with a particular vendor joins a buying group, the MVPD remains bound by the existing agreement until it expires, but upon such expiration can opt in to the remaining term of the buying group's master agreement with the program vendor.")

[52] Hughes Declaration ¶ 5.

together, the two cable multiple system operators represent 14.54 million subscribers.

Therefore, if the safe harbor level was set larger than 1.23 million subscribers but lower than 3.26 million subscribers, MVPDs would be included in the safe harbor essentially if and only if they currently purchase a substantial share of their programming through a buying group.[53] ACA believes that the safe harbor level should be set near the higher end of this range to permit existing members to grow, either organically or through acquisitions, without fear of loss of ability to participate in buying groups master agreements with cable-affiliated programmers. This is why ACA recommends the specific level of 3 million subscribers for the safe harbor level.

It follows, then, that setting the safe harbor subscriber level at any value between 1.23 million and 3.26 million will simply preserve the status quo in the sense that the set of MVPDs eligible to purchase programming through the a buying group will be identical to the set of MVPDs that currently purchase a substantial share of their programming through a buying group. This is the most important point to recognize about the ACA safe harbor proposal. It is not intended or designed to create new participation rights for any MVPDs that currently do not purchase a substantial share of their programming through the NCTC. Rather it is simply intended and designed to preserve the status quo in the sense that it guarantees that MVPDs that are in the size range that currently purchase a substantial share of programming through the NCTC will still be presumptively permitted to do so after the Commission revises its definition of a buying group so that it applies to NCTC.[54]

[53] If the safe harbor was set higher than 2.06 million, then Bright House would be included in the safe harbor, even though Bright House is not a member of the NCTC or any other organized buying group. However, as explained above, it is highly unlikely that Bright House would ever wish to become a member of the NCTC or any other organized buying group because it is owned by Time Warner and purchases it programming through deals negotiated by Time Warner at rates that are presumably much lower than the rates that any buying group would ever be able to negotiate.

[54] Cox and Mediacom have both proposed that the safe harbor be raised to 6 million subscribers or eliminated entirely. Cox Comments at 7-11; Mediacom Comments at 7-10. While ACA does not object to

2. None of the objections to this protection of a member's right to participate in buying group master agreements has merit.

Comcast and AMC offer seven arguments against adoption of the proposed safeguards for the rights of MVPD members to participate in the master agreements negotiated by their buying group.

Argument #1: ACA's Proposal Will Change the Status Quo and Will Significantly Increase the Extent to Which MVPDs Are Able to Participate in Master Agreements Between Buying Groups and Cable-Affiliated Programmers.[55]

This argument is completely false. As explained above, ACA's proposal is quite purposefully designed to *not* provide any new participation rights to MVPDs that do not currently purchase a substantial share of their programming through a buying group. Setting the safe harbor value at any level between 1.23 million subscribers and 3.26 million subscribers will simply preserve the status quo in the sense that the set of MVPDs eligible to purchase programming through a buying group after the buying group definition is modified will be identical to the set of MVPDs that currently purchase a substantial share of their programming through a buying group.

Argument #2: The safe harbor level of 3 million is significantly higher that the safe harbor level of 400,000 chosen in conditions imposed on the News Corp.-DirecTV transaction or the level of 1.5 million chosen in conditions imposed on the Comcast-NBCU transaction.[56]

In its recent Comcast-NBCU Order the Commission permitted any MVPD with 1.5 million or fewer subscribers to appoint a bargaining agent for purposes of arbitrating program access disputes

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this modification, it acknowledges that this modification would significantly increase the extent to which MPVDs are able to participate in master agreements between buying groups and cable-affiliated programmers relative to the status quo.

[55] Comcast Comments at 23 ("[ACA's] proposal seems aimed at encouraging NCTC's largest members to participate in master agreements."); AMC Comments at 9 ("If any MVPD is permitted to opt into a master agreement, buying group membership will swell as even the largest MVPDs join. Indeed, ACA's proposed three million subscriber safe harbor threshold includes many of the nation's largest MVPDs.").

[56] Comcast Comments at 24 ("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. 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.")

under the conditions imposed on the license transfers.[57] The situation when the Commission made this decision in 2011 is very similar to the situation today. In both cases, ACA explained that: (i) the four largest NCTC members each have more than 3.26 million subscribers and generally do not purchase a substantial share of programming through the NCTC; (ii) all other NCTC members have 1.23 million or fewer subscribers and generally do purchase a substantial share of programming through the NCTC; and (iii) therefore any size limit between 1.23 million and 3.26 million subscribers would guarantee that NCTC members that currently license a substantial share of programming through the NCTC would be able to access the remedy under consideration.

In response to this evidence, the Commission chose a size limit of 1.5 million subscribers in defining a "small MVPD" entitled to appoint a bargaining agent, which is near the lower end of the range of values that would maintain the status quo. ACA is now asking the Commission to consider choosing a higher value within the range that would maintain the status quo in order to avoid creating disincentives for the largest members of the NCTC to pursue strategies that might cause them to grow, either organically or through mergers and acquisitions. However, the basic fact that the safe harbor level needs to be chosen somewhere between 1.23 million and 3.26 million subscribers in order that the group of MVPDs that meet the safe harbor standard is precisely equal to the group of MVPDs that currently purchase substantial shares of programming through the NCTC has not changed.

Argument #3: There is no evidence that cable-affiliated programmers currently exclude MVPDs from participating in NCTC agreements.[58]

As ACA has previously explained, given that program access rules do not currently apply to the NCTC, there is no reason to expect that cable-affiliated programmers would currently have any

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[57] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 ¶ 58, Appendix A, Section VII.D (2011) ("Comcast-NBCU Order").

[58] Comcast Comments at 23 ("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.")

reason to attempt to avoid dealing with the NCTC in order to avoid regulatory constraints.[59] ACA's concern is that once the Commission amends its definition of a buying group so that the protections of program access rules come into play, cable affiliated programmers will then have the incentive to avoid dealing with the NCTC (and thus evade the regulations) by not allowing members of the NCTC to opt-in to master agreements in the first place. Thus the fact that cable-affiliated programmers may not currently attempt to exclude MVPDs from participating in NCTC agreements should in no way be interpreted as suggesting that there is no need for participation rights to be guaranteed.

Argument #4: The proposed modification will place cable-affiliated programmers at a disadvantage to non-cable-affiliated programmers because non-cable-affiliated programmers will be able to exclude MVPDs below the safe harbor level from opting into master agreements while cable-affiliated programmers will not be able to do so.[60]

It is currently the case, as indicated above, that today MVPDs that would satisfy the safe harbor subscriber level recommended by ACA generally do purchase a substantial share of their programming through the NCTC. In particular, today, both cable-affiliated and non-cable-affiliated programmers generally welcome MVPDs that satisfy the safe harbor constraint to license programming from them through the NCTC. There is no reason to believe that the incentives of unaffiliated cable programmers will change if the Commission requires cable-affiliated programmers to allow MVPDs that satisfy the safe harbor to license programming through master agreements negotiated by their buying group. Thus, far from forcing cable-affiliated programmers to act differently than non-cable-affiliated programmers, the regulations will simply require cable-affiliated operators to act in the same way that unaffiliated programmers choose to act.

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[59] ACA Comments at 24-25.

[60] AMC Comments at 10 ("Forced to grant any MVPD a default right to opt-in into a buying group agreement, cable-affiliated programmers would be faced with a shrinking base of licensing entities and effectively relegated to a monopsony marketplace. Meanwhile, unaffiliated programmers would continue to reap the benefits and rewards attendant to competing in a marketplace with a broader range of purchasing entities, and without any constraints on their ability to insist upon an individual license agreement with certain key MVPDs.").

Argument #5: In some cases due to differing circumstances, it may be efficient for an MVPD below the safe harbor threshold to negotiate an individual deal with a programmer.[61]

ACA agrees completely with the observation that, in some cases, it may be efficient for MVPDs below the safe harbor threshold to negotiate individual deals. However, nothing in ACA's proposed safe harbor will prevent cable-affiliated programmers and MVPDs from negotiating an individual deal when they each determine that this would be efficient. The proposed safe harbor does not *require* MVPDs below the safe harbor subscriber level threshold to license programming through a buying group; rather it simply gives them the right to insist on being allowed to opt-in if the programmer is unable or unwilling to offer them a better deal than they could obtain by opting into their buying group's master agreement. If it is more efficient for the MVPD to enter into an individual deal, then, by definition, there a set of terms that the programmer can offer the MVPD for an individual deal will exist that will make *both* the programmer and the MVPD better off than they would be if the MVPD opted into the master agreement.

Argument #6: A problem with the ACA proposal is that, when members of the NCTC that are below the safe harbor threshold bargain with a cable-affiliated programmer, they will take advantage of the fact that they have the right to opt-in to the master agreement and thus will be able to guarantee that any individual deal they sign makes them at least as well off as they would be if they opted into the master agreement.[62]

ACA agrees that the result of ACA's proposed safe harbor protection will be to guarantee that any individual deal a buying group member signs will make them at least as well off as they would be if they were to opt-in to the master agreement. That is, if a cable-affiliated programmer has negotiated a master agreement with a buying group, then any member of the

[61] AMC Comments at 8 ("[C]able-affiliated programmers have legitimate pro-competitive reasons for seeking to enter into an individualized, bilateral license agreement with an MVPD. Program carriage agreements are not one-size-fits-all, and there are many terms and provisions that will vary according to an MVPD's individual circumstances.").

[62] AMC Comments at 8 ("If an MVPD is permitted to opt into a buying group's master agreement, regardless of the MPVD's individual circumstances, the terms of that master agreement necessarily become the *de facto* starting point for all individual negotiations. MVPDs will have all the leverage in those negotiations because they face no threat of being deprived of the programming: any MPVD that cannot secure what it perceives to be a better deal than given to a buying group may simply fall back on the master agreement in order to avoid a programming disruption.")

buying group will be guaranteed that the cable-affiliated programmer will not be able to force it to accept terms in an individual negotiation that would make it any worse off than it would be by opting-in to the master agreement. ACA also agrees that cable-affiliated programmers might view this as a "problem" in the sense that it will constrain their ability to disadvantage other MVPDs and thereby increase their profits. However, while this may be a "problem" from the perspective of cable-affiliated programmers, it is actually the intended result of program access rules from a public policy perspective.

Argument #7: ACA's proposal will contravene programmers' First Amendment rights.[63]

AMC advances the argument that ACA's proposed protections for buying group member master agreement participation are compelled speech because it would mandate speech that a speaker would not otherwise choose to make. AMC argues that the proposal is a form of "content-based" regulation subject to the "strict scrutiny," and that the record in this proceeding does not permit the government to demonstrate that the burden on speech serves a compelling governmental interest and is narrowly tailored to achieve that end.[64] This argument is fatally flawed for several reasons, and should be rejected by the Commission.

As an initial matter, the proposed protection for master agreement participation is a content neutral rule that seeks to regulate the economic relationship between programmers and distributors and therefore a court would only apply "intermediate scrutiny" in evaluating it.[65] Ensuring an opportunity for buying group members to opt-in to a master agreement negotiated by their buying group "compels" no more speech from programmers than a prohibition on exclusive contracts might

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[63] AMC Comments at 7, 10-11 ("[F]orcing cable programmers to speak through mediums not of their choosing would contravene the First Amendment rights of cable affiliated programmers … [Y]et ACA's proposal would require AMC to speak in a way that undermines its own business strategy and to the public in a manner not of its own choosing").

[64] AMC Comments at 10-11.

[65] AMC acknowledges the economic nature of the regulation as it explains that ACA's proposal would "undermine its … business strategy." AMC Comments at 10-11.

"compel" a programmer to speak by requiring them to license their content to a distributor they may not have otherwise licensed.[66] The D.C. Circuit's recent holding in *Cablevision II* is instructive on this point. The court in *Cablevision II* declined to apply strict scrutiny in the context of evaluating the rebuttable presumption of significant hindrance concerning unfair acts with regard to terrestrially-delivered regional sports networks ("RSN") programming in large part because "there [was] absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas."[67] ACA's proposal similarly does not implicate any preference for messages or ideas, but rather only seeks to ensure that distributors have a fair opportunity to access competitively critical programming and effectively compete in the marketplace.

AMC's claim that ACA's proposal would somehow impermissibly "compel" speech by programmers and therefore invite strict scrutiny is also unavailing because the authority upon which AMC relies for its theory is easily distinguished. Each of the cases that AMC cites involves a speaker being forced to engage in some novel or unique speech that directly implicates the content of those expressions, instead of merely repeating their already publicly distributed speech through a different channel, as a programmer would when distributing their content through a buying group. For example, AMC cites *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*[68] to support its assertion that the proposal "would require AMC to speak in a way that undermines its own business strategy and to distribute its content to the public in a manner not of its choosing."[69] However, *Pacific Gas* concerns the inclusion of a controversial political newsletter in an electric utility bill envelope and reflects the Court's protection of speakers from "forced association with potentially hostile views" and a

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[66] *See infra* Part VII (explaining that the Commission's proposed presumptions concerning sports programming are fully consistent with programmers' First Amendment rights).

[67] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 718 (D.C. Cir. 2011) ("*Cablevision II*").

[68] *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 18 (1986) ("*Pacific Gas*").

[69] AMC Comments at 10-11.

compulsion for speech when the speaker may prefer to be silent.[70] In contrast, a programmer whose unaltered content is merely transmitted to a wider audience of consumers through a commercial cable distributor faces little risk of being forced to "associate" with potentially hostile views.[71] In much the same way, AMC's reliance on *Riley v. National Fed'n of the Blind*[72] for the proposition that "[m]andating speech that a speaker would not otherwise make" is a content-based restriction falls short because *Riley* involves a state statute requiring non-profits to make specific additional disclosures regarding their use of charitable donations.[73] Again ACA's proposal is easily distinguished because it would not amount to a programmer disseminating some additional, unique or otherwise offensive speech.[74] Rather, a programmer would only be licensing the same programming that it sells to other distributors.

ACA's proposal also "compels" no more speech from cable-affiliated programmers than Congress deemed appropriate when enacting Section 628 and directing the Commission to implement its provisions. As a result of the program access rules, cable-affiliated programmers are generally prohibited from discriminating, including engaging in selective refusals to deal, against MVPDs, which by definition includes buying groups.[75] ACA's proposal would only

[70] *Pacific Gas*, 475 U.S. at 18.

[71] Indeed, there is likely no such risk since the only conceivable "hostility" that a programmer could have to a distributor's "views" would be an opposition to their editorial choice of a channel line-up, and such a situation would be highly unlikely to occur with respect to commercial cable television operators.

[72] *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("Riley").

[73] *See* AMC Comments at 11; *Riley*, 487 U.S. at 795.

[74] The Supreme Court has explained how its compelled speech jurisprudence is not applicable to certain economic regulation. *See, e.g.*, *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470-471 (1997) (rejecting a First Amendment challenge to economic regulation that implicates dissemination of creative material, i.e., advertising, because "[t]he use of assessments to pay for advertising does not require respondents to repeat an objectional [sic] message out of their own mouths, … require them to use their own property to convey an antagonistic ideological message, … force them to respond to a hostile message when they would prefer to remain silent, … or require them to be publicly identified or associated with another's message.") (citations and internal quotations omitted).

[75] *See* 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1000(e) (definition of "MVPD" includes "buying groups"); 2012 Program Access Order ¶¶ 60-62 (discussing ability of MVPDs post-sunset to bring complaints involving exclusive contracts under Section 628(c)(2)(B) as a form of non-price discrimination or "selective

require these programmers to not engage in discriminatory licensing practices when negotiating with buying groups as these entities now operate in the market. Given that the program access rules themselves do not infringe upon the First Amendment, ACA's proposal would not either.[76] Instead the proposal would be properly evaluated as economic regulation, which is supported by the government's policy judgment, as enabled by the Commerce Clause, and which will "enjoy a strong presumption of validity."[77]

Accordingly, when applying the appropriate intermediate scrutiny test, ACA's proposal easily passes muster. A regulation will withstand intermediate scrutiny if (i) it furthers an important or substantial governmental interest that is unrelated to the suppression of free expression; and (ii) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[78]

First, the government's interest in protecting buying groups who purchase cable-affiliated programming for their MVPD members is not difficult to conceive — the Commission has a substantial interest in ensuring healthy competition in the video distribution marketplace and, to further this interest, it must protect buying groups and their members from the disproportionate market power of cable-affiliated programmers.[79] Without these protections, cable-affiliated programmers will likely expand their practice of seeking to exclude certain larger NCTC members from master agreements, and prevent even those NCTC members whose subscriber

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refusal to license").

[76] *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979 (D.C.Cir. 1996) (holding that the "'program access' provision and the prohibition against exclusive contracts … satisfy the intermediate scrutiny test's 'narrow tailoring' requirement").

[77] *See Glickman v. Wileman Bros. & Elliott*, 521 U.S. at 477.

[78] *Cablevision II*, 649 F.3d at 710.

[79] See *Cablevision I*, 597 F.3d at 1314 (program access exclusivity ban justified by the government's interest in preserving and protecting competition in video distribution market); *Time Warner Entertainment Co.*, 93 F.3d at 978 (economic characteristics of vertically integrated programmers and their unique power in the MVPD market justify exclusivity prohibition). Moreover, in no sense could the Commission's interest in protecting buying groups be related to the suppression of free expression.

levels fall within the safe harbor from participating once the Commission adopts full protection of the program access rules for buying groups.[80] In addition, the fact that the court in *Cablevision II* sustained the Commission's interest in regulating the video programming marketplace under the program access rules after an extensive analysis of the Commission's economic findings and predictive judgments, and this support, combined with the additional facts about the market as it currently exists offered by the Commission, further demonstrates the lack of merit in AMC's argument.[81]

Second, the "incidental restriction" on speech from the proposal is minimal, at best, considering that programmers' content is not being altered, but merely more widely disseminated. AMC has not offered any empirical evidence illustrating how ACA's proposal might influence its speech and its contention therefore must be dismissed.[82]

III. PROGRAMMING VENDORS ARE WRONG THAT MAKING AVAILABLE ADDITIONAL REBUTTABLE PRESUMPTIONS FOR USE IN SECTION 628(b) COMPLAINT CASES WOULD IMPROPERLY RE-CREATE THE PER SE PROHIBITION ON EXCLUSIVES

The vertically integrated cable operators and cable-affiliated programmers argue that the proposed rebuttable presumptions involving RSNs, national sports networks ("NSNs") and other cable-affiliated programming whose exclusive arrangement was successfully challenged would effectively re-create the *per se* prohibition that the Commission recently let sunset. They assert that rebuttable presumptions unfairly shift to the respondent programmers the evidentiary burden of proof that a particular exclusive contract is neither an unfair act nor a significant

[80] ACA NPRM Comments, Appendix B, Declaration of Frank Hughes, Senior Vice President of Member Services for National Cable Television Cooperative, Inc., MB Doc. Nos. 12-68, 07-18, 05-192, ¶ 5 (filed June 22, 2012); ACA Comments at 25.

[81] *See Cablevision II*, 649 F.3d at 711-13; 2012 Program Access Order ¶ 67.

[82] *See Time Warner Entertainment Co.*, 93 F.3d at 979 (rejecting Timer Warner's conjectural arguments about the program access rule's effect on its speech).

hindrance to competition before there is any evidence produced by the complainant that it is.[83] They claim this is inconsistent with the Commission's decision to now take a case-by-case approach to exclusive contracts under Section 628(b).[84] Comcast, for example, argues that "the proposals would effectively result in a *de facto* ban on exclusive sports programming contracts, and at minimum, a shift in the burden of proof – both impermissible results."[85]

ACA submits that commenters vastly overstate the effect of permitting complainants to use the proposed rebuttable evidentiary presumptions when challenging certain categories of exclusive cable-affiliated programming. The Commission would neither be forgoing a careful case-by-case analysis of the facts and circumstances presented, nor shifting the burden of proof to the programmer, but rather increasing utility and efficiency of the process.

It is important to examine the context in which the Commission's proposal to adopt rebuttable presumptions for exclusive arrangements involving certain categories of programming is set. The Commission's recent elimination of the exclusive contract prohibition

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[83] Comcast Comments at 1-2, 7-8; *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.; 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, Comments of Time Warner Cable, Inc. at 10-11 (filed Dec. 14, 2012) ("TWC Comments"); *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of National Cable & Telecommunications Association at 5 (filed Dec. 14, 2012) ("NCTA Comments"); *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of the Madison Square Garden Company at 4-6 (filed Dec. 14, 2012) ("MSG Comments"); *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of Cablevision Systems Corporation at 4-8 (filed Dec. 14, 2012) ("Cablevision Comments") (case-by-case approach would be undermined by adoption of the rebuttable presumptions that an exclusive RSN is unfair and significantly hinders competition; adoption of rebuttable presumption of standstill in cases challenging exclusive RSN would substantially diminish, if not extinguish, the value of the sunset of the per se prohibition).

[84] Comcast Comments at 7-8; TWC Comments at 3 (a "central disconnect exists between decision to sunset per se ban and proposal to adopt the rebuttable presumptions"); MSG Comments at 4-6 (Commission should not negate its decision to move from case-by-case evaluation of exclusive contracts by presuming such agreements involving RSNs are both unfair and a significant hindrance to competition).

[85] Comcast Comments at 2.

was a very significant change in law to now favor exclusive arrangements involving cable-affiliated programmers whereas before they were categorically prohibited.[86] Pre-sunset, exclusive contracts were presumptively unlawful for all cable-affiliated, satellite-delivered programming. All a complainant had to show under the categorical presumption of Section 628(c)(2)(D) was that the cable-affiliated programmer had in fact entered into an exclusive contract and that such contract did not satisfy the public interest exception.[87]

Post-sunset, all exclusive contracts are considered permitted, and the only means of

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[86] *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.; 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, Comments of the Independent Telephone & Telecommunications Alliance at 2 (filed Dec. 14, 2012) (decision to lift the exclusive contract prohibition "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"); *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of AT&T Inc. at 1-4 (filed Dec. 14, 2012) ("AT&T Comments") ("a complaint process will be a poor substitute for the exclusivity ban" particularly in light of the "paucity of record evidence that the kinds of exclusive contracts at issue provide any benefits at all to competition or consumers;" the Commission's own "alarming observations" in the 2012 Program Access Order that RSNs "are almost always non-replicable and highly valued by consumers;" and acknowledgement of "recent real-world examples of RSN withholding continue to demonstrate a strong potential for cable operator exploitation of those unique RSN attributes"); *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.; 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, Comments of the United States Telecom Association at 3 (filed Dec. 14, 2012) (decision to lift exclusivity would impede video and broadband competition by making building and operating broadband networks difficult).

[87] The Commission recognizes that in cases where it has not adopted specific evidentiary presumptions with respect to the significant hindrance standard, a complainant challenging an exclusive contract for satellite-delivered cable affiliated programming may satisfy this standard with evidence that could include "(i) an appropriately crafted regression analysis that estimates what the complainant's market share in the MPVD would be if it had access to the programming and how that compares to its actual market share; or (ii) statistically reliable survey data indicating the likelihood that customers would choose not to subscribe or not to switch to an MVPD that did not carry the withheld programming." 2012 Program Access Order ¶ 54.

protection for unaffiliated MVPDs denied access on the basis of an exclusive contract are case-by-case challenges under Section 628(b).[88] These complaints require the complainant to produce evidence and persuade the Commission that a particular exclusive contract for cable affiliated, satellite-delivered programming is unfair and a significant hindrance to competition in order to prevail.[89] The Commission has recognized that this approach "may impose some burdens for litigants and the Commission," and accordingly proposed the use of rebuttable presumptions in appropriate cases to reduce these burdens for both the complainants and defendants.[90]

In its Terrestrial Loophole Order, the Commission both established a complaint process under Section 628(b) to consider the facts and circumstances of each case and, to improve the efficiency of this case-by-case approach, permitted complainants to invoke a rebuttable presumption that an unfair act involving a terrestrially-delivered RSN has the purpose or effect of significantly hindering or preventing an MVPD from providing satellite-delivered cable or broadcast programming as required by Section 628(b).[91] The key difference in cases in which a

[88] 2012 Program Access Order ¶ 51 (abandoning "current approach of a preemptive prohibition on exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers" in favor of consideration of these exclusive contracts "on a case-by-case basis in response to complaints alleging a violation of Section 628(b)" in addition to claims alleging undue influence under Section 628(c)(2)(A) and claims alleging discrimination under Section (c)(2)(B)).

[89] 2012 Program Access Order ¶ 53.

[90] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc, Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner cable Inc. (subsidiaries), Assignees, et al.*, Notice of Proposed Rulemaking, MB Docket Nos. 12-68, 07-18, 05-192, 27 FCC Rcd 3413 ¶¶ 55-56 (2012) ("2012 Program Access NPRM") ("For example, rather than requiring litigants and the Commission staff to undertake repetitive examinations of the same network, we seek comment on whether the Commission could establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a satellite-delivered, cable-affiliated programming network violates Section 628(b)(or potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network violates Section 628(b)(or potentially, Section 628(c)(2)(B)).")

[91] *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 52 (2010) ("Terrestrial Loophole Order").

rebuttable presumption is available is that the complainant and Commission staff will be relieved of the need to continually re-examine established evidence concerning the harmful effects of lack of access to the challenged programming on the basis of exclusivity.[92] This use of rebuttable presumptions in complaint cases arising under Section 628(b) has been upheld by the courts.[93]

In the 2012 Program Access Order, the Commission followed this approach again by adopting rebuttable presumptions that an exclusive contract involving cable-affiliated RSNs would cause a significant hindrance to another MVPD's ability to compete in the market.[94] Now the Commission is considering expanding the use of rebuttable presumptions to a few additional categories of programming.

Contrary to the inflated suggestions of the cable-affiliated programmers and vertically integrated cable operators, the Commission's adoption of rebuttable presumptions would neither result in the agency deviating from its case-by-case approach for determining whether exclusive contracts are permitted by re-creating the categorical prohibition that was just lifted, nor would it shift the burden of proof from the complainant to the respondent.

First, the adoption of additional rebuttable presumptions does not change the extraordinary decision of the Commission in its 2012 Program Access Order to fundamentally alter the program access rules by abandoning the *per se* prohibition on exclusive arrangements involving all cable-affiliated programming in favor of determining whether an exclusive arrangement involving such programming is permissible on a case-by-case basis.

Second, the Commission is only considering expanding the use of rebuttable presumptions to a limited category of cable-affiliated programming, involving RSNs, NSNs, and

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[92] 2012 Program Access NPRM ¶ 56; Terrestrial Loophole Order ¶ 52.

[93] *Cablevision II*, 649 F.3d at 717.

[94] 2012 Program Access Order ¶ 55.

other programming whose exclusive arrangement was successfully challenged. Complainants will not have the right to use rebuttable presumption for any other cable-affiliated satellite-delivered programming. As opponents to adoption of these new rebuttable presumptions have pointed out, there are over 900 cable networks in the marketplace.[95] The proposed presumptions will be able to be used with regard to only a few dozen of them.

Third, in the instances where the rebuttable presumption is available, complainants will retain the ultimate burden of proof (persuasion) on the issues of unfairness and significant hindrance. Complainants are only relieved of the initial burden of producing evidence in cases in which the Commission has already determined that one fact is true (the "proved fact") and is attempting to determine if an additional fact is true (the "inferred fact"). During this process respondent programming vendors will have every opportunity to support their arguments – the same arguments they now advance in their comments for not adopting the rebuttable presumptions – as to why the rebuttable presumption fails to account for factual differences allegedly relevant to their particular exclusive contract. In every instance, the presumptions fail if the Commission finds that the respondent has produced evidence sufficient to rebut them.[96] The complainant will only win in such cases if it can then produce evidence (in response to the respondent's evidence) sufficient to persuade the Commission that the particular exclusive

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[95] *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, Comments of Cablevision Systems Corporation at 5 (filed June 22, 2012); *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, Comments of Comcast Corporation and NBCUniversal Media, LLC at 11-12 (filed June 22, 2012).

[96] *Cablevision II*, 649 F.3d at 716 (an evidentiary presumption stands only "until the adversary disproves it").

contract is an unfair act that significantly hinders its ability to compete in the distribution market. In every instance, Commission decision-makers will undertake their usual complete and searching evaluation of the facts and circumstances presented by the evidence of record, analyzed in accordance with relevant precedent.

For these reasons, use of the proposed rebuttable presumptions will in no way prejudice rights of cable-affiliated programming vendors to fact-specific, case-by-case evaluation by the Commission. Rather they will simply reduce the burdens of the Section 628(b) process for the complainant and the Commission. Accordingly, programmers' argument that adoption of the rebuttable presumptions under consideration would inappropriately reinstate the per se prohibition on exclusive contracts should be accorded little credence.

IV. THE COMMISSION SHOULD ESTABLISH REBUTTABLE PRESUMPTIONS THAT EXCLUSIVE CONTRACTS INVOLVING CABLE-AFFILIATED NSNs SATISFY THE UNFAIR ACT AND SIGNIFICANT HINDRANCE STANDARDS OF SECTION 628(b)

A. The Key Characteristics of Sports Programming Do Not Vary Whether the Programming is Distributed On a Regional or National Basis and Provide the Empirical Basis for Adoption of Rebuttable Presumptions Concerning National Sports Networks

In their comments, ACA and other MVPDs demonstrated that sports programming exhibits the key characteristics of being highly valued and non-replicable, regardless of whether this programming is distributed on a regional or national basis, and urged the Commission to establish the same rebuttable presumptions for complaint proceedings involving cable-affiliated NSNs as for complaint proceedings involving cable-affiliated RSNs.[97] For this purpose, ACA recommended that the Commission define an NSN to be a network that meets the same minimum requirement of amount and type of live sports programming carried that applies to RSNs, with the exception of the requirement that the programming be distributed within a limited

[97] ACA Comments at 34-38; AT&T Comments at 20-21; *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of DIRECTV, LLC at 7-13 (filed Dec. 14, 2012) ("DirecTV Comments").

geographic area.[98] Given the proven popularity and non-replicability of live sports programming, the Commission may reasonably predict this content to exhibit the same two key characteristics when distributed nationally. Accordingly, based on proven facts about the competitive significance of live sports content distributed on a regional basis, it is rational and logical for the Commission to adopt the rebuttable presumption than an exclusive contract to distribute the same type and quantity of sports programming on a national basis is an "unfair act" that will significant hinder competing MVPD in the market, until such time as the presumption is rebutted by the respondent cable-affiliated programmer.[99] Cable-affiliated programmers and vertically integrated cable operators raise a number of objections to adoption of the proposed rebuttable presumptions for national sports programming networks. As demonstrated below, none of the objections raised are meritorious.

B. Arguments Made by Opponents of the Proposed Rebuttable Presumptions for NSN Programming Lack Merit and Should Be Rejected.

Argument #1: Evidence that withholding live sports programming carried on regional sports networks is not relevant because local viewers value local sports programming much more highly than national sports programming.

Arguments that the rationale supporting the adoption of rebuttable presumptions for RSNs is inapplicable to NSNs are incorrect and should be rejected. The vertically integrated cable programmers argue that the rationale in support of rebuttable presumptions concerning RSNs has no applicability to NSNs, based on their narrow view that the Commission's finding concerning the non-replicability of RSNs was largely based on regional sports programming being offered to regional

[98] ACA Comments at 35. *See also* AT&T Comments at 20 (the Commission should define "national sports network" in the same manner as it defined an RSN in the 2012 Program Access Order, except for deletion of the reference to limited geographic regions).

[99] ACA Comments at 36; *see also* AT&T Comments at 20-21 (given non-replicability and popularity of sports programming, the Commission can apply its predictive judgment to conclude that exclusive contracts involving NSNs are "unfair acts' that cause "significant hindrance" to competing MVPDs); DirecTV Comments at 10 (national sports networks have sports programming just as non-replicable and highly valued and time-sensitive as RSNs).

sports fans.[100] In particular, MSG suggests that "the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: . . . sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game," and therefore this rationale is inapposite to NSNs because "they are not, by definition, concentrating on games that appeal to specific local markets."[101]

First, commenters' arguments are based on an erroneously narrow reading of the relevant precedents. The Commission's decision in the Terrestrial Loophole Order to create the rebuttable presumption of significant hindrance for unfair acts involving terrestrially-delivered RSNs was based on the two key economic characteristics of live sports programming that it is highly valued by consumers and non-replicable.[102] The fact that such programming was regionally distributed was not the key factor, as commenters suggest, in the Commission's decision making. In explaining the basis for its decision upholding the Commission's action, the D.C. Circuit in *Cablevision II* cited only the two economic characteristics of sports programming – that it is highly valued and non-replicable.[103] Again, the fact that this type of content happened to be distributed on a regional basis did not factor in any way in the court's determination on the rebuttable presumption.[104] Accordingly, arguments suggesting that the regional nature of sports fans or teams had decisional import in the creating the rebuttable presumptions concerning RSNs are overstated.

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[100] Comcast Comments at 14, n.40 (the logic that RSN programming is highly desired within the local teams' home territories and is non-replicable "is irrelevant to *national* sports programming"); NCTA Comments at 7-9 (no reason to expect games shown by NSNs to be as unique and non-replicable as the Commission has found RSNs to be or that they have fan bases so large that non-carriage would unfairly or significantly hinder the MVPD's ability to compete); MSG Comments at 14-15 (NSNs are not, by definition, concentrating on games that appeal to specific local markets); TWC Comments at 14 (no basis for singling out NSN programming for adverse treatment).

[101] MSG Comments at 14.

[102] Terrestrial Loophole Order ¶ 52.

[103] *Cablevision II*, 649 F.3d at 709.

[104] The fact that the programming was distributed terrestrially, in contrast, was a factor in the court's analysis of the Commission's jurisdiction to subject the programming to the Section 628(b) prohibition on unfair acts concerning cable-affiliated programming. *Cablevision II*, 649 F.3d at 708-710.

Second, there is ample evidence in the record that lack of access to the same types and amounts of sports programming (as defined for RSNs) when distributed on a national basis via satellite by a cable-affiliated programmer will unfairly and significantly hinder the ability of non-affiliated MVPDs to compete.[105] The Commission has recognized that sports programming is non-replicable for the reason that "no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace.[106] The Commission has also recognized that the airing of important professional sporting events, such as opening days and playoffs are time-sensitive events that set sports programming apart from general entertainment programming.[107]

As ACA explained in its comments, marquee professional sporting events are carried by NSNs:

> Although none of these [national sports] networks typically focus on airing the regular season games of only one sports team of a league, these networks often feature the most competitive matchups of the week from the leagues, and matchups involving popular teams. In some instances, the leagues do not schedule any other games on the same day and time as these nationally distributed games to increase their desirability. Furthermore, the sports leagues, including Major League Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association ("NCAA") distribute the majority of their playoff, tournament and bowl games on these national cable networks, which are often the most desired games to view of the season.[108]

[105] ACA Comments at 34-38; DirecTV Comments at 7-13; AT&T Comments at 20-21.

[106] Terrestrial Loophole Order ¶ 9.

[107] *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶ 148 (2008).

[108] ACA Comments at 34. *See also* DirecTV Comments at 8 ("The characteristics that make RSNs critical to viewers (and thus ideal tools for anticompetitive acts) are related not [to] the fact that they are "regional" but rather to the fact that they carry "sports" – i.e, programming that is non-replicable and for which there is no close substitute. *National* sports networks have these same essential qualities, and should enjoy the same presumptions…. Moreover, NSNs carry a large slate of MLB, NBA, NHL playoff games every year, which are not reflected on these schedules but are likely some of the most compelling

ACA does not disagree with the vertically integrated programmers that regional audiences highly value their regional sports programming, but regional audiences similarly value the non-regional sports programming presented by national sports networks to national audiences. As ACA explained in its comments, the national ratings for national sports networks exceed the regional ratings for most regional sports networks:

> SNL Kagan ratings data indicates that the ratings of NSNs like ESPN, TNT, and TBS would be among the top rated RSNs. During 2011, among 98 national cable networks with ratings information, ESPN was the second most watched network with a 1.84 average prime time rating, TNT was the fourth most watched network with a 1.49 average prime time rating, and TBS was the tenth most watched network with a 1.07 average prime time rating. In comparison, among the 34 regional sports networks with ratings information, the only RSNs with higher average prime time ratings than TBS were Root Sports Pittsburgh (2.48), Comcast SportsNet Philadelphia (2.41), Fox Sports Detroit (2.20), Fox Sports North (1.81), New England Sports Network (1.58), and FOX Sports Midwest (1.22). The remaining 26 regional sports networks each had an average prime time rating below .96, and the overall industry average for all 34 regional sports networks was .73. As the NPRM notes, the Commission recognized in its Comcast-NBCU Order that "'certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming.'"[109]

It is evident that the live sporting events that air on NSNs that would be considered competitively significant by the Commission if they were aired on RSNs, therefore

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programming that they show.")

[109] ACA Comments at 36-37 (internal footnotes omitted). *See also* DirecTV Comments at 8-9 ("national networks with significant sports programming have content that is just as non-replicable, highly valued, and time-sensitive as sports programming that is carried by RSNs. For example, ESPN carries (among other things) Monday Night Football, Sunday Night Baseball, a full slate of over 75 National Basketball Association games per season, a wide array of NCAA Division I football and basketball games, and the NASCAR Sprint Cup Series. As a result the network commands one of the highest per-subscriber carriage fees in the industry yet still achieves near-universal distribution. Similarly, TNT will carry over 50 NBA regular season games this season, not including playoffs and the All-Star Game, as well as NASCAR on TNT Summer Series, and is one of the most widely distributed and highest rated cable networks.") (internal footnotes omitted).

demonstrating that the programming does not lose its value when distributed nationally.[110]

Accordingly, the rationale for adopting the rebuttable presumptions of unfairness and significant hindrance applicable to RSNs is fully applicable to NSNs.

Argument #2: The Commission is constrained by the APA from imposing rebuttable presumptions concerning NSNs because they are not supported by an evidentiary basis.

Comcast's argument that the Commission is constrained by the APA from imposing rebuttable presumptions concerning NSNs because they are not supported by an evidentiary basis must fail for three reasons.[111]

First, as should be obvious, the Commission has not previously found any evidence of a problem with MVPD access to satellite-delivered, *cable-affiliated* national programming networks – the only networks at issue here – because they have been subject to the exclusivity prohibition for 20 years. Accordingly, no useful inference may be drawn from this factor.

Second, it is well-established that the Commission may keep in place or extend prophylactic program access rules on the basis of its predictive judgment concerning the competitive impact of removing or failing to adopt these protections. For example, the Commission's 2002 and 2007 decisions to extend the exclusivity ban for a five year period was based, not on specific examples of withholding satellite delivered, cable-affiliated programming, but on just such predictive judgments, and was upheld on review.[112] Similarly, the

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[110] *See* ACA Comments at 37, n.85 ("Demonstrating the point that sporting events are popular even when distributed on national cable programming networks, Monday Night Football on ESPN topped cable viewership for the week ending September 23, 2012 with 15.515 million viewers. Thursday Night Football on the NFL Network was second. Other popular sporting events on national cable networks include College Football Primetime on ESPN (#11) and NASCAR Sprint Cup on ESPN (#15).") (citation omitted).

[111] Comcast Comments at 13 ("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.")

[112] *See In the Matter of: Implementation of the Cable Television Consumer Protection And Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 ¶ 25 (2002); *In the Matter of Implementation of the Cable Television Consumer*

Commission's decision in the 2012 Program Access Order to establish a rebuttable presumption of significant hindrance for unfair acts involving cable-affiliated, *satellite-distributed* RSNs rests upon the same foundation of empirical evidence concerning the competitive significance of the sports programming at stake, rather than examples of specific problems involving MVPD access to such programming.

Third, there is an empirical basis to justify the Commission's action. As ACA has previously explained, the empirical basis supporting rebuttable presumptions of unfairness and significant hindrance for exclusive contracts involving sports programming distributed on a national basis is identical to that supporting these presumptions with respect to the type and quantity of live sports programming distributed on a regional basis: the proven facts that sports programming of this type and quantity is highly valued and non-replicable. Contrary to the suggestion of the cable-affiliated programmers and the affiliated cable operators, there is no reason to believe that a major league sports event will lose these key economic characteristics if shown on an NSN rather than an RSN. The Commission has sufficient evidence on the impact of withholding sports on a regional basis to permissibly exercise its predictive judgment to conclude that withholding a nationally distributed sports network will have a similar effect.

Argument #3: The fact that no evidence has been presented that the DirecTV exclusive arrangement for national sports programming harms rival MVPDs implies that the Commission has no basis for adopting rebuttable presumptions concerning NSNs.

Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 14 (2007) ("2007 Program Access Order"); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010); *see also Cablevision II*, 649 F.3d at 717 (the Commission's predictive judgments concerning the unique competitive effects of withholding of RSN programming, based on its findings concerning desirability and non-replicability, are entitled to "substantial deference"). The Commission also exercised predictive judgment about the impacts of blocking and degrading Internet traffic in establishing its net neutrality protections. *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, 25 FCC Rcd 17905 ¶¶ 20-34, 147 (2010) (citing only isolated instances of interference and projecting need for protections). Here, the Commission has far more empirical evidence concerning the harmful effects of withholding cable-affiliated professional sports programming from MVPD competitors on which to base its predictions.

In the FNPRM, the Commission notes that in two previous proceedings where parties have complained about the adverse effects of DirecTV's exclusive deals for national sports programming, the Commission has found that the complaining parties did not present any evidence supporting their claims.[113] The Commission now asks whether or not these previous findings are relevant to the issue of whether or not the Commission should adopt a rebuttable presumption with regard to exclusive arrangements involving cable-affiliated NSNs.[114] Comcast argues that these previous findings imply that the Commission has no basis for adopting rebuttable presumptions for NSNs.[115]

ACA disagrees completely with this position. Irrespective of the impact on competition of DirecTV's exclusive arrangement with the NFL Sunday Ticket, it should come as no surprise that there was a lack of evidence to prove the point. In order to demonstrate that there was an adverse competitive impact one would have had to have the ability to compare the level of competition between DirecTV and cable operators in markets where DirecTV offered Sunday Ticket and markets where it did not offer Sunday Ticket. However, given that DirecTV is a national provider that distributes Sunday Ticket on a national basis, the evidence needed to demonstrate that DirecTV's Sunday Ticket exclusive adversely impacts competition is not available. The Commission's decision not to expand the program access rules' prohibition on exclusives to non-cable affiliated programmers in this case merely reflects the fact that the

[113] FNPRM ¶ 80 & n. 317 (citing Terrestrial Loophole Order ¶ 77 n. 182 (discussing exclusive arrangements for "out-of-market, non-regional sports programming" and concluding that commenters failed to provide evidence in the record of this proceeding of any harm to competition arising from these arrangements)); 2007 Program Access Order ¶ 77 & n. 380 (discussing non-affiliated national sports programming networks and concluding that "[u]nlike in the case of cable-affiliated regional sports programming, we have no evidence that the inability to access this sports programming has impacted MVPD subscribership.").

[114] FNPRM ¶ 80.

[115] Comcast Comments at 13-15 (citing 2007 Program Access Order ¶ 77 n. 380 (examining exclusive arrangements for "out-of-market," non-regional sports programming [DirecTV's exclusive deals for certain national sports programming] and concluding that commenters failed to provide evidence in the record of this proceeding of any harm to competition arising from these arrangements)).

evidence necessary to prove adverse competitive impact was lacking, and not that the arrangement does not in fact impact competition. It is interesting to note that some of the same commenters that argue DirecTV's exclusive arrangement for Sunday Ticket harmed competition in 2007 today suggest that an exclusive arrangement involving a national sports network would not impact competition without any evidence to support their changed position.[116]

Argument #4: The Commission's recent findings constrain the Commission from adopting a rebuttable presumption with regard to exclusive arrangements involving national sports networks.

Comcast argues that the Commission's recent findings that cable operators have reduced incentives to enter into exclusive contracts stand in the way of adopting the proposed rebuttable presumption concerning national sports programming.[117] ACA disagrees that the Commission's findings constrain the Commission in this way.

The Commission did not find that cable affiliated programmers lack incentive and ability to enter into exclusive contracts for nationally distributed networks generally, it merely found that such incentives were *reduced* as compared to its findings in 2007.[118] In light of its findings of reduced incentives, the Commission felt comfortable permitting the categorical ban against

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[116] *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Comments of Comcast Corporation at 24 (filed Apr. 2, 2007); ("[T]o the extent that MVPDs cannot survive without access to certain programming, it is irrelevant whether that programming is 'affiliated;' what matters is whether the programming is 'must have' in order to compete."); *see also In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Comments of Cablevision Systems Corp. at 27 n.97 (filed Apr. 2, 2007) ("Differences between local and out-of-market games do not automatically justify different treatment of sports programming exclusivity. Out-of-market games are highly popular; the 2.3 million fans subscribing to either 'Extra Innings' or 'Sunday Ticket'" is comparable to, or larger than, several RSNs. For viewers in many states, out-of-market games feature the most popular and closely followed teams in a particular area.").

[117] Comcast Comments at 14 ("And the Commission recently found that cable operators have a reduced incentive to enter into exclusive contracts, especially for national programming.") (citing the 2012 Program Access Order ¶ 17 & n.64).

[118] 2012 Program Access Order ¶ 17.

exclusives to sunset, and rely instead on a case-by-case approach to address unfair acts by cable-affiliated programmers that had the purpose or effect of significantly hindering the ability of non-affiliated MVPDs to compete in the marketplace. At the same time, it adopted a rebuttable presumption with regard to exclusive contracts involving regional sports networks on the basis that this programming is likely to cause significant hindrance to competition if withheld. This is all perfectly consistent with the Commission's primary finding that "the record here shows a mixed picture, indicating that vertically integrated cable programmers may still have an incentive to enter into exclusive contracts for satellite-delivered programming in many markets."[119] For the very reason that the Commission found no more than a "mixed picture" on programmer incentives, it is seeking comment on whether to make its case-by-case approach to unfair acts by cable-affiliated programmers less burdensome through the adoption of additional rebuttable presumptions, including the proposed presumptions concerning NSNs. Accordingly, adoption of the proposed NSN presumptions can hardly be considered to be inconsistent with recent Commission findings.

Argument #5: The fact that very few existing cable-affiliated networks may qualify as NSNs implies that there is no need for Commission action.

Comcast and TWC argue that the presumptions are unnecessary because today there are very few cable-affiliated networks fall into the NSN category, and that there is no basis for singling out cable-affiliated NSNs.[120] The fact, however, that only a small number of networks qualify as "NSNs" today under ACA's proposed definition is irrelevant to the need to maintain adequate program access protections for non-affiliated MVPDs for networks, such as these, that are uniquely likely to significantly impact the MVPD market if withheld. As discussed above, the economic characteristics of the programming provide the basis for singling out cable-affiliated

[119] 2012 Program Access Order ¶ 17.

[120] Comcast Comments at 15 (very few vertically integrated services could even qualify as "national sports networks" using any definition); TWC Comments at 15.

RSNs from other cable-affiliated general entertainment networks.

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Accordingly, the record reveals no impediment to the Commission's adoption of the proposed rebuttable presumptions of unfairness and significant hindrance with respect to cable-affiliated national sports programming networks.[121]

V. COMMENTERS PRESENT NO ARGUMENTS THAT SHOULD PRECLUDE THE COMMISSION FROM ADOPTING REBUTTABLE PRESUMPTIONS IN CASES INVOLVING REQUESTS FOR STANDSTILL RELIEF

A program access complainant seeking renewal of an existing programming contract is entitled to a temporary standstill of the price, terms and other conditions of the existing contract pending resolution of the complaint if the Commission determines that the four factors it has established for obtaining program access standstill relief are met by the complainant.[122] Given the Commission's previous determinations that RSN programming exhibits the two key characteristics of being highly valued by consumers and non-replicable, ACA and other MVPDs have demonstrated that in cases involving challenges to exclusive arrangements involving RSNs, the four factors sufficient to justify grant of a standstill are all likely to be met, thus justifying adoption of rebuttable presumptions for each of them.[123]

Four principal arguments are advanced in opposition to the proposal to adopt the rebuttable presumptions for each of the four factors in cases involving challenges to exclusive cable-affiliated RSNs: (i) injunctive relief, which would be provided by the standstill relief, is

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[121] Opponents' First Amendment challenges concerning NSNs are addressed separately, in Part VII, *infra*, and shown to be equally lacking in merit.

[122] Terrestrial Loophole Order ¶¶ 71-75; 47 C.F.R. § 76.1003(l) (the four factors are: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other parties; and (iv) the public interest favors the grant of a stay).

[123] ACA Comments at 39-48; AT&T Comments at 7-10; DirecTV Comments at 13-15; *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of Verizon and Verizon Wireless at 11-14 (filed Dec. 14, 2012) ("Verizon Comments").

considered "extraordinary relief" so that use of presumptions is particularly inappropriate;[124] (ii) use of the presumption would deprive the respondent programming vendor of the particularized examination to which it is entitled in standstill cases;[125] (iii) a "balancing of the hardships" evaluation will not always come out in favor of the complainant;[126] and (iv) standstill relief effectively compels speech in contravention of the First Amendment rights of the cable-affiliated programmers.[127] None of these arguments has merit.

A. The Fact that Injunctive Relief Is Considered "Extraordinary Relief" Does Not Undermine the Use of a Rebuttable Presumption in Evaluating Requests for Standstill Relief Regarding Exclusive RSN Contracts.

Opponents of the proposed standstill related rebuttable presumptions argue that use of a presumption is particularly inappropriate with respect to the facts necessary to obtain a standstill in a program access proceeding because injunctive relief is considered "'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries

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[124] All of the cable-affiliated programmers and vertically integrated operators vigorously argue against adoption of a rebuttable presumption in favor of standstill relief in cases challenging exclusive RSNs on the ground that such injunctive relief is "extraordinary relief" that should not be "lightly given" and does not permit presuming that any of the four factors will be met by the complainant. Comcast Comments at 11-13; NCTA Comments at 9-10; MSG Comments at 9-12; Cablevision Comments at 7-8; TWC Comments at 12-14.

[125] MSG Comments at 8, 12 (a rebuttable presumption must be rejected in this case because it fails to provide the careful and particularized analysis that the complainant seeking such extraordinary relief "is likely to prevail on the merits, that absent a standstill it will be irreparably harmed, and the balance of that harm against harms to the programmer and the public interest warrant a standstill order"); TWC Comments at 13; Comcast Comments at 12.

[126] MSG Comments at 9-10 (there is no reason to believe that, under a "balancing of hardships" analysis, the harm to the complainant will always outweigh the harms to the programmer and the public interest because "there is no reason to automatically presume that the harm to the complaining MVPD in the absence of standstill will always be greater than the harm of a standstill to the programmer or to the cable operator that is a party to the challenged agreement").

[127] NCTA Comments at 9-10 (evidentiary presumptions are particularly inappropriate with respect to standstill relief in cases involving RSNs because standstills directly and adversely affect the First Amendment interests of by compelling them to make their programming available to distributors with which they would otherwise choose not to deal); TWC Comments at 13 (by making standstills easier to obtain, the presumption dramatically raises the risk of erroneous grant of a standstill, presenting "grave First Amendment implications, as it would involve compelling the speech of cable-affiliated RSNs without any specific justification").

the burden of persuasion'" on each of the four factors.[128] According to MSG and Cablevision, MVPDs should not be afforded access to this relief lightly and each of the criteria necessary to be met for entitlement to the relief should never be presumed, but rather subject to an individualized analysis.[129]

First, ACA agrees that standstill relief would be inappropriate if the complainant failed to carry its burden of proof (persuasion) demonstrating that it was entitled to a standstill. But that could only occur if the effect of the presumption were to relieve the complainant of its burden of persuasion on each of the four factors. However, the effect of the proposed rebuttable presumption that a standstill is warranted with respect to exclusive RSN contracting is solely to relieve the complainant of the burden of production that it is entitled to standstill relief in the particular case. That is, as discussed previously, the effect of a rebuttable presumption is only to streamline and render more efficient the Commission's case-by-case approach to determining whether an act violates Section 628(b). At all times, the ultimate burden of persuasion in such cases will remain with the complainant. In such a case, where the complainant challenging an exclusive RSN contract is unable to carry the burden of persuasion in face of the respondent's rebuttal evidence, the Commission will decline to order a standstill, and the existing contract will be permitted to expire under its terms.[130]

Second, the fact that injunctive relief is described as "extraordinary relief" by the courts, standing alone, presents no obstacle to Commission adoption of the rebuttable presumption that standstill relief is warranted in cases challenging exclusive RSN contracts. Opponents of the

[128] See, e.g., MSG Comments at 8 (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)); NCTA Comments at 9; Comcast Comments at 11 ("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.").

[129] MSG Comments at 12; Cablevision Comments at 7.

[130] Consistent with its views that the key characteristics of sports programming do not change whether distributed on a regional or national basis, ACA also supports expansion of the rebuttable presumption in favor of standstill relief for complainants challenging exclusive NSNs. *See* FNPRM ¶ 80.

standstill presumption have cited no authority expressly prohibiting the use of rebuttable presumptions in standstill cases by administrative agencies where warranted by the facts.[131] None of the authorities cited by opponents stands as a bar to the Commission adopting rebuttable presumptions for each of the four factors related to obtaining standstill relief in cases involving exclusive cable-affiliated RSN programming contracts. These, and other injunctive relief cases do nothing more than establish the need for a party seeking injunctive relief to demonstrate that it in fact satisfies each of the elements of the four-factor test, and the need for courts and administrative agencies to apply "traditional equitable principles" rather than categorical rules (for example excluding whole classes of claims) in injunctive relief cases.[132]

Finally, ACA and the other MVPDs are not suggesting this relief should be categorically

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[131] *See* Comcast Comments at 11-12 (citing *Va. Petroleum Jobbers Ass'n. v. Fed. Power Comm'n*, 259 F. 2d 921, 925 (D.C. Cir. 1958) (establishing four-part test for "extraordinary" injunctive relief)); MSG Comments at 8-12 ("The Supreme Court has observed that a standstill order 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'") (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)); Cablevision Comments at 7 (the "requirements for a carriage standstill are stringent because, like all injunctive relief, a standstill is an extraordinary measure"); TWC Comments at 12-14 (the general rule is that standstill relief "is an 'extraordinary' remedy") (citing *In the Matter of Sky Angel U.S., LLC; Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879 ¶ 10 (MB 2010) ("Sky Angel Order")); NCTA Comments at 9-10 (in program access proceedings, the bar for injunctive relief is "particularly high because a standstill directly and adversely affects the First Amendment interests of program networks by compelling them to make their programming available to distributors with which they would otherwise choose not to deal"). ACA addresses the merits of the many "compelled speech" First Amendment claims elsewhere, demonstrating that they are all fatally flawed. *See supra* Section II.C.2 (7); *infra* Sections V.D, VII. . For the same reasons, NCTA's suggestion that the First Amendment would pose an obstacle to adoption of the rebuttable presumption in favor of a standstill should be given little credence.

[132] *See, e.g.*, Sky Angel Order ¶ 10 (denying program access standstill relief on the threshold grounds that the complainant was not an MVPD entitled to program access protections); *Va. Petroleum Jobbers Ass'n. v. Fed. Power Comm'n*, 259 F. 2d 921, 924 (D.C. Cir. 1958) (a petitioner that has shown a probability of success on the merits, but failed to make an adequate showing on the other factors, including irreparable harm, is not entitled to injunctive relief); *Mazurek v. Armstrong*, 520 U.S. 968, 972-76 (1997) (injunctive relief inappropriate where the movant had failed to make a clear showing that it was likely to prevail on the merits and is therefore entitled to such relief); *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) ("preliminary injunction is an extraordinary remedy never awarded as of right;" lower courts erred by granting injunctive relief in a case where the plaintiff established a strong likelihood of prevailing on the merits, but only a "possibility" of irreparable harm); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393-94 (2006) (Supreme Court rejected attempts in a patent permanent injunction case to depart from "traditional equitable principles" through the adoption of categorical rules foreclosing use of injunctive relief "in a broad swath of cases," and reiterated the need for parties seeking injunctive relief to satisfy the four-part test).

presumed or given lightly – they seek only rebuttable presumptions for each of the four standstill factors in cases challenging exclusive programming contracts for cable-affiliated RSNs. ACA recognizes, as opponents have noted, that courts developed the four-factor test for injunctive relief because it thought such relief should not be commonly granted by courts sitting in equity. Moreover, that the bar for obtaining injunctive relief is high. However, it bears repeating, that the presumptions at issue are not categorical presumptions for each of the four standstill factors – each is rebuttable, and holds only so long as it remains un-rebutted by the respondent programmer. It is not intended to modify the obligation on the party seeking relief to prove that it meets the four-factor test, or for the Commission to assume before being presented with a complete record that standstill relief should be granted. As with other rebuttable presumptions, the Commission is required to carefully weigh the facts and circumstances presented, giving due effect to the rebuttable presumption, and the respondent programmer retains the right to present evidence rebutting the presumption, thus avoiding standstill of an existing contract pending resolution of the complaint. Moreover, the rebuttable presumptions would not apply to all cable-affiliated, satellite-delivered programming, but only to complaints challenging exclusive contracts for cable-affiliated RSN programming in cases where the Commission has also provided for use of rebuttable presumptions of unfairness and significant hindrance.[133] Accordingly, to the extent the record, as it does here, demonstrates how each of the four factors will very likely be satisfied with respect to an exclusive cable-affiliated RSN, there is no bar to the Commission establishing presumptions for each of them.

B. Use of Rebuttable Presumptions Will Not Deprive the Respondent Cable-Affiliated Programming Vendor of an Appropriately Particularized Examination of the Request for Standstill.

As indicated above, opponents of adopting rebuttable presumptions for each of the four

[133] As noted elsewhere, ACA recommends that should the Commission adopt such rebuttable presumptions concerning NSNs, then it would be appropriate to extend the rebuttable presumption in favor of standstill relief to complainants challenging cable-affiliated NSNs as well.

standstill factors generally argue that the presumptions should not be adopted on the grounds that it would unfairly deprive them of a particularized assessment of the fact and circumstances of their specific exclusive contract, and effectively erect a per se regime in the standstill phase of a proceeding.[134] These objections lack merit and should be disregarded by the Commission.

First, MSG vastly overstates the effect of rebuttable evidentiary presumptions for each of the four standstill factors by arguing that would be tantamount to a per se regime in the standstill phase.[135] The presumption will do no more than help the complainant with its burden of production by relieving its need to produce evidence (that the Commission expects to exist) concerning each of the four standstill factors in light of the likely competitively harmful effects of exclusive cable-affiliated RSN arrangements and will in no way relieve it of its burden of proving that standstill relief is justified in the particular circumstances presented.

Next, it is demonstrably false, as opponents claim, that by using rebuttable presumptions, the Commission will fail to provide the careful and particularized analysis on the merits of each underlying factor that such an important decision demands.[136] Nothing about the presumptions will relieve the Commission of its obligation to engage in a fact-specific analysis of each of the four factors in the particular case before it, taking full account of evidence presented

[134] MSG Comments at 8 (an injunction is "extraordinary relief" that should not be not be granted unless the movant, by a clear showing, carries the burden of persuasion'" on each of the four factors). MSG argues further that there is no basis to conclude that a complainant will satisfy the four factor test simply because the complaint involves an RSN; that this would be tantamount to a per se regime; and that it would be patently unfair to judge the merits of a standstill request without considering the particulars of the dispute and impact of exclusivity on the market in question. MSG Comments at 8. TWC similarly asserts that a rebuttable presumption would improperly "turn the exacting standard for injunctive relief on its head enabling, if not requiring the FCC to grant standstills as a matter of course unless the defendant introduces evidence rebutting all four elements." TWC Comments at 13. Similarly, Comcast argues that irreparable harm, impact on other interested parties, and how standstill would affect the public interest are all fact-specific inquiries and cannot be reduced to a presumption. Comcast Comments at 12.

[135] MSG Comments at 8.

[136] Comcast Comments at 12; MSG Comments at 8; Cablevision 7-8 ("In this context, the proposed presumption is tantamount to establishing a presumption that the complainant is likely to succeed on the merits of that challenge and suffer irreparable harm – all without even a cursory examination of the facts and circumstances underlying the proposed complaint. Such an approach would be arbitrary and capricious.").

by the respondent cable-affiliated programmer to rebut the evidentiary presumption.

Finally, MSG's argument that there is no basis for presuming that the mere filing of a challenge to an exclusivity agreement involving a cable-affiliated RSN renders it probable that the complainant would satisfy the Commission's four-part test for a standstill is not well-founded.[137] As ACA has demonstrated, the fact that the Commission has previously determined that RSN programming exhibits the two key characteristics that it is highly valued by consumers and that it is non-replicable, and provided a rebuttable presumption that such programming would cause significant hindrance to another MVPD if withheld, in turn strongly implies that each of the four conditions sufficient to justify grant of a standstill are very likely to be met, thus justifying the adoption of rebuttable presumptions in favor of each of these factors.[138] Moreover, as ACA noted in its comments, the Commission's proposal to establish rebuttable presumptions for each of the four standstill conditions does not imply any presumption concerning the factual question of whether or not the cable-affiliated programmer has engaged in exclusive contracting.[139] In a case where the respondent programmer believes it is not engaging in exclusive contracting for the disputed programming, it should be allowed to present this argument in its standstill rebuttal evidence. That is, no presumption should be made that the cable-affiliated programmer is necessarily engaging in exclusive contracting simply because a complaint has been filed making this allegation.

C. A "Balancing of the Hardships" Analysis Will Produce the Same Result As a Factor-by-Factor Analysis and Show that Complainants Challenging Exclusive Cable-Affiliated RSN Contracts Are More Likely Than Not to Satisfy All Four Standstill Factors.

In its initial comments, ACA demonstrated that providing a rebuttable presumption for

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[137] MSG Comments at 8 (no sound basis to conclude that a complainant will satisfy the four factors in the program access standstill rules simply because it undertook the ministerial act of filing a complainant about an RSN).

[138] ACA Comments at 40-46.

[139] ACA Comments at 41, n.92.

each of the four criteria required to be met in order to be granted a standstill is appropriate when the complainant is challenging an exclusive arrangement involving a cable-affiliated RSN. MSG and Cablevision argued that because the Commission uses a "balance of hardships" analysis, weighing the factors of irreparable harm, harm to other parties, and the public interest together, and giving particular weight to the public interest factor, there is no reason to believe that this weighing will typically result in a decision in favor of standstill relief.[140] This argument should be given little weight because there is ample reason to conclude that conducting this "balance of hardship" analysis with regard to exclusive arrangements involving RSNs would tip sharply in favor of a standstill. Specifically, it is reasonable to presume that the MVPD complainant will suffer greater harm if a standstill is denied than the respondent programmer and MVPD with whom it has negotiated an exclusive contract, would suffer if the standstill is granted. Thus, the "balance of hardships" analysis does not stand as an impediment to the adoption of a rebuttable presumption that each of the four standstill factors are very likely to be met in the case of exclusive cable-affiliated RSNs.

In the case cited by MSG concerning the "balancing of hardships," *AT&T v. Ameritech and Qwest*, the Commission explained that in applying the four factors the relative importance of each of the four factors will vary depending on circumstances and that "no single factor is necessarily dispositive," such that "a very compelling demonstration that the public interest would be irreparably harmed lessens the level of certainty required of a moving party to show that it will prevail on the merits.[141] In that instance, the Commission, applying a balancing of the hardships, found that interim injunctive relief was warranted for the following reasons:

> [T]he balance of hardships, particularly the potential for harm to the public interest, tips sharply in favor of ordering a standstill. Allowing the [challenged] agreement to go forward runs the risk

[140] MSG Comments at 8-9; Cablevision Comments at 7-8.

[141] *AT&T Corp. v. Ameritech Corp*., Memorandum Opinion and Order, 13 FCC Rcd 14508 ¶ 22 (1998).

> that the local and long distance markets will be changed in ways that Congress did not intend, and that will substantially harm the Petitioners, and ultimately the public as well. These factors substantially outweigh any potential harm to Ameritech resulting from a delay in implementing its program."[142]

For precisely analogous reasons, if the Commission were to balance the hardships involved in granting a standstill pending resolution of a complaint involving an exclusive RSN, it would typically find the hardships clearly tip in favor of a standstill. Given that the status quo is likely to be that the complainant MVPD has an on-going non-exclusive contract with the cable-affiliated RSN programmer, allowing the programmer to immediately withdraw the programming upon expiration of its contract, even for a temporary period, will likely cause significant and irreparable harm to the complainant in cases where it is ultimately determined that the programmer should not have been allowed to withdraw the programming. The significant and irreparable harm caused by such a dramatic change in the status quo will far outweigh any harm experienced by the cable-affiliated programmer and MVPD (and its subscribers) with whom it has negotiated the exclusive contract in simply continuing the status quo under the prices, terms and conditions of the expiring contract for a few months longer.[143] Moreover, ACA has demonstrated that the public has a strong interest in the continued availability of programming containing highly valued, non-replicable live sports events pending resolution of the underlying complaint, further weighing in favor of the complainant in the "balancing of hardship" analysis.[144]

As noted above, two of the four conditions that must be satisfied in order for a complainant filing a program access complaint to be granted a standstill are that: (i) the complainant will suffer irreparable harm absent a stay; and (ii) the grant of a stay will not

[142] ATT v. Ameritech ¶ 28.

[143] ACA Comments at 44-45.

[144] ACA Comments at 45-46; *see also, e.g.,* AT&T Comments at 15-16; Verizon Comments at 13-14; DirecTV Comments at 15.

substantially harm other parties.[145] With respect to these two "harms" factors, MSG argues that there is no reason to believe that a "balancing of the hardships" will typically result in a decision in favor of a standstill because the harms to the complainant and other parties will generally be of similar size. Specifically it argues:

> There is no reason, for example, to automatically presume that the harm to the complaining MVPD in the absence of a standstill will always be greater than the harm of a standstill to the programmer or to the cable operator that is party to the challenged agreement. To the contrary, since the proposed standstill presumption here would indefinitely undo the benefits of an exclusive arrangement between the programmer and another distributor and offer no guarantee that, upon resolution of the complaint in favor the defendant-programmer, that distributor would still be interested in resuming the arrangement, there clearly will be ample harm inflicted on both the programmer and the third-party distributor whose exclusivity has been negated by a standstill.[146]

MSG's analysis, however, fails to take proper account of the difference between the cost of mistakenly changing the status quo and the cost of mistakenly delaying a change of the status quo. MSG overlooks the key fact that the only circumstance where the contemplated standstill relief will come into play is the circumstance where an MVPD has an existing, unexpired contract with the cable-affiliated programmer that the MVPD is attempting to renew and the cable-affiliated programmer is not willing to renew. Thus, *there cannot possibly be an existing and ongoing exclusive relationship already in place between the cable-affiliated programmer and some other MVPD at the time that the complaint is being filed and a standstill is being contemplated.*[147]

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[145] 47 C.F.R. § 76.1003(l).

[146] MSG Comments at 9. Cablevision, MSG's affiliated cable operator, advances substantially the same argument. *See* Cablevision Comments at 8, n.18 ("[I]t would be particularly inappropriate to presume that a complainant would prevail on the third factor – whether the standstill would harm other parties – since the relief requested would seek to undo an exclusivity between the defendant-programmer and a third party distributor").

[147] More specifically, there cannot be an exclusive contract in place that applies to the region served by the complaining MVPD and that the standstill would thus disrupt. It is possible that there might be an

Instead, what is likely to occur is that the cable-affiliated programmer that has been distributing its programming to at least two different MVPDs (and more likely is serving a large number of different MVPDs) has apparently decided to change its contracting strategy and move to an exclusive distribution arrangement with one particular MVPD (which is likely its own affiliated cable operator). To effectuate this strategy, it is likely that the programmer will begin to refuse to renew its existing non-exclusive contracts with all MVPDs other than one particular MVPD as they come due. This will permit the programmer to switch to a new regime where it engages in an exclusive contracting relationship with one particular MVPD (again, most likely to be its own affiliated cable operator). The important point is that it is definitely *not* the case that the MVPD who has negotiated the exclusive contract with the cable-affiliated programming vendor already would have an exclusive agreement in place that grant of the standstill would disrupt. Rather, the only effect of a standstill would be to potentially delay the beginning date of an exclusive relationship that was planned to begin at some future point.

Furthermore, given that the exclusive relationship has not even begun and that it is only something that the cable-affiliated programmer is planning on implementing in the future, it is not clear that a standstill would necessarily even delay the beginning of such an undertaking. For example, a cable-affiliated programmer that is currently selling to all MVPDs in a market may announce that it plans to not renew various agreements as they come up for renewal because the programmer has entered into an exclusive arrangement with its own cable-affiliated operator. In this case, the cable-affiliated programmer will not have an exclusive until its non-exclusive contracts with all of the other MVPDs have either expired or been legally terminated. If the complaining MVPD is not the last MVPD with a contract that must be terminated, the

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exclusive contract in place that applies to some other region, but such an “out of region” exclusive would be irrelevant to the analysis since the standstill would not disrupt such an “out of region” exclusive.

programmer will still be unable to enter into an exclusive relationship with its chosen MVPD at the point in time when it refuses to renew the complainant MVPD's non-exclusive agreement. Therefore, any delay in the possible termination of such an MVPD would have no effect at all on the date when the cable-affiliated MVPD was ultimately able to implement an exclusive contracting strategy.

In contrast, given that the status quo is that the complainant MVPD actually has an ongoing programming contract with the programmer, the situation is quite different for the complainant. In particular, if the cable-affiliated programmer is allowed to immediately withdraw the programming and then it is ultimately determined that the cable-affiliated programmer should not have been allowed to withdraw the programming, the temporary change in the status quo will likely cause significant and irreparable harm to the complainant. This is because existing customers are likely to switch when the programming becomes unavailable and then not switch back even if the programming eventually becomes available again.

ACA acknowledges that the balance of harms would be quite different if a cable-affiliated programmer already had an existing and ongoing exclusive relationship with its own affiliated cable operator and another MVPD filed an exclusive contracting complaint asking that the cable-affiliated programmer be required to begin providing the programming to the complaining MVPD. In this case it would be reasonable to presume that the cable-affiliated programmer and its affiliated cable operator might well suffer irreparable harm if the cable-affiliated programmer was required to immediately begin providing service to the complainant MVPD, because this might cause existing customers of the cable-affiliated programmer to switch and then not switch back even if the exclusive was restored. In contrast, the harm to delaying service to the complainant is likely to be small since this only involves delaying the start date of a change instead of implementing a change and then having to reverse the change if it is determined that a mistake was made.[148]

MSG also argues that delaying the start date of an exclusive contracting arrangement might create an irreparable harm if the MVPD that was the contemplated beneficiary of the proposed future exclusive contracting arrangement was only momentarily interested in such a deal and its attention would shift elsewhere if there was a delay of a few months.[149] However, this argument fails to take into account the fact that in all likelihood the contemplated beneficiary of the exclusive will not be some independently owned MVPD that independently makes its own decisions. Rather in all likelihood the contemplated beneficiary will be the affiliated cable operator and in many cases that operator will be under joint control with the programmer. In such a case, if there is a serious business case for proceeding with the exclusive arrangement, it is hard to believe that a delay of a few months would permanently stop the endeavor. For these reasons, MSG's claim that the harms to the complainant are not more likely than not to outweigh the harms to other parties is ill founded and should not prevent the Commission from adopting the proposed rebuttable presumption concerning standstill relief for use in RSN exclusivity cases.

Thus, if the Commission did conduct a "balancing of the hardships" analysis with regard to a standstill request related to an exclusive arrangement involving cable-affiliated RSN, the equities will typically overwhelming favor the complainant. Accordingly, claims that a weighing of the three factors, giving particular weight to the public interest factor will not typically favor standstill should be given little credence. To the contrary, application of this hardship balancing

[148] This assumes that the program access complaint process will be resolved within a reasonable amount of time. In this regard, ACA believes that any possible harm to other parties will be of relatively short duration. The Commission has adopted a six-month decision period for program access complaints. 2012 Program Access Order ¶ 63. The Commission can further limit any potential harm to other parties by adopting ACA's proposal to establish a "TRO-like" for process for immediate 14-day standstill relief, and commit to making decisions on standstill requests within 14 days of filing. *See* ACA Comments at 49-54.

[149] MSG Comments at 10.

filter reveals even more clearly the propriety of establishing rebuttable presumptions for each of the four standstill factors involving loss of access to a cable-affiliated RSN on the basis of a new exclusivity arrangement. Thus, the "balance of hardships" analysis does not stand as an impediment to the adoption of a rebuttable presumption that each of the four standstill criteria are very likely to be met in the case of exclusive RSNs.

D. A Rebuttable Presumption in Favor of Standstill of an Existing RSN Contract Will Not Adversely Affect the First Amendment Interests of the Respondent Cable-Affiliated Programmer.

NCTA and TWC argue that evidentiary presumptions are particularly inappropriate with respect to standstill relief in cases involving exclusive RSNs because standstills directly and adversely affect the First Amendment interests of programmers by compelling them to make their programming available to distributors with which they would otherwise choose not to deal.[150] TWC asserts that the presumption will compound the problem by making standstills easier to obtain, thereby raising the risk of erroneous grants, and compelling the speech of cable-affiliated RSNs without any specific justification.[151]

The First Amendment arguments founder upon inspection and neither argument should stand in the way of the Commission adopting the rebuttable presumption in favor of standstill in exclusive RSN complaint cases. Maintenance of the status quo under an existing but expiring programming contract does not impermissibly "compel" speech and is fully consistent with the First Amendment protections granted cable-affiliated programmers. Not surprisingly, TWC and NCTA offer no authority for their blanket allegations that a standstill "affects First Amendment interests of program networks"[152] or that a risk of a standstill determination error would have

[150] NCTA Comments at 9-10; TWC Comments at 13-14.

[151] TWC Comments at 13 (by making standstills easier to obtain, the presumption dramatically raises the risk of erroneous grant of a standstill, presenting "grave First Amendment implications, as it would involve compelling the speech of cable-affiliated RSNs without any specific justification").

[152] NCTA Comments at 9.

"grave First Amendment implications."[153] This is because none is available to support their theory. To the extent that the First Amendment may be implicated, the standstill would be viewed as content-neutral, economic regulation and easily withstand intermediate scrutiny given the Commission's significant interest in ensuring competition in the video distribution marketplace and minimal, if any, effects on a programmer's speech in continuing distribution of their existing programming.[154] TWC's conjecture that the adoption of the rebuttable presumption would substantially increase the risk of an erroneous grant of a standstill also lacks merit. The proposed presumptions provide the respondent programmer the opportunity to present convincing rebuttal evidence demonstrating that stay of the status quo is not warranted in the particular case and Commission staff will weigh the evidence presented and not grant the standstill if the case for it is not clear and convincing.

VI. THE COMMISSION SHOULD ADOPT A REBUTTABLE PRESUMPTION FOR PREVIOUSLY CHALLENGED EXCLUSIVE CONTRACTS IN CASES WHERE THE COMPLAINANT PREVAILED

In its NPRM and FNPRM, the Commission, recognizing that its case-by-case approach for addressing complaints involving exclusive contracts involving cable-affiliated programming is more burdensome than the categorical prohibition, proposed streamlining its Section 628(b) complaint process by utilizing rebuttable presumptions for the unfair act and significant hindrance standards for a few categories of programming.[155] In its comments, ACA supported this proposal and demonstrated that it would be justifiable and reasonable for the Commission

[153] TWC Comments at 14.

[154] *See supra* Section II.C.2(7) (explaining how regulation of buying group master agreement participation is consistent with the First Amendment); *see also, infra* Part VII (explaining how a presumption against sports programming exclusive contracts is consistent with the First Amendment).

[155] *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 Doc. Nos. 12-68, 07-18, 05-192, Notice of Proposed Rule Making, 27 FCC Rcd 3413 ¶ 56 (2012) ("NPRM"); FNPRM ¶ 81.

to adopt such presumptions.[156] ACA asserted that the primary factors that determine whether an MVPD filing a complaint challenging an exclusive contract under Section 628(b) would be met will generally be the characteristics of the programming, such as whether the programming is highly valued by subscribers and whether the programming is non-replicable. Accordingly, if one MVPD has been able to establish that it will be significantly harmed by withholding of a particular cable-affiliated programming network and that the competitive benefits from this withholding are unlikely to exceed the competitive harms, it is then very probable that another MVPD will be able to establish the same set of facts from the same programming network.[157]

The cable-affiliated programming vendors and their affiliated cable operators oppose adoption of rebuttable presumptions for the unfair act and significant hindrance tests in this circumstance on the basis that: (i) there is no legal foundation for such a presumption due to variations between MVPDs and markets;[158] and (ii) in the case where a cable-affiliated operator licensing a national cable network establishes multiple different regional exclusives with different cable operators serving different regions of the country, it would be "inimical to fundamental fairness and due process" to allow a decision regarding an exclusive contract in one region of the country to determine the nature of the rebuttable presumption that applies to a different

[156] ACA notes that AT&T has proposed a means of narrowing the scope of the rebuttable presumption through the use of three "market factors" identified as "core indicia" by the Commission in making a determination under Section 628(b). AT&T Comments at 22-23. ACA's concern with this proposal is its seemingly counterproductive direction to introduce a potentially complicated set of criteria for evaluation in receiving the benefit of rebuttable presumptions that are themselves intended to streamline the Commission's case-by-case approach to assessing alleged unfair acts under Section 628(b).

[157] ACA Comments at 38-39.

[158] Cablevision Comments at 13 (there is no legal foundation for presumption that the Commission can prejudge the pro-competitive benefits and anti-competitive effects of an exclusive entered into in an urban market in one state based on an exclusivity involving the same network in an entirely different state); Comcast Comments at 16-17 (there are too many variables going into each determination to render such a presumption rational, including the fact that different MVPDs focus on different programming to meet their customers' needs); TWC Comments at 16-17 (a determination in one Section 628(b) is entitled to no more than precedential value in a subsequent case challenging an exclusive between that cable-affiliated vendor and another distributor).

exclusive contract with a different cable operator in a different region of the country.[159]

As ACA has shown, the single most important issue in evaluating the justification for use of rebuttable presumptions in such cases lies in the economic characteristics of the programming at issue, and not the characteristics of either the MVPD or the geographic market.[160] The fact that the first complainant was able to persuade the Commission that an exclusive contract involving the disputed cable-affiliated programming was both an unfair act and a significant hindrance to their ability to compete in the market, makes it very likely that a subsequent MVPD will be able to make a similar showing. This also provides a rational basis for the availability of rebuttable presumptions with respect to the exclusive contract for the same programming found to violate Section 628(b) in a subsequent MVPD's challenge to withholding on the basis of exclusivity for the same programming. ACA agrees with commenters that the strength of this evidence, based upon previously proved facts that an exclusive contract involving the disputed programming is an unfair act that significantly hinders the MVPD's ability to compete, and provides precedential value.

However, this evidence goes further than simply having precedential value in that it is powerful evidence that it is more likely than not that another exclusive contract involving the same programming will have the same effects identified in Section 628(b), thus providing a rational basis for providing the rebuttable presumptions. Further, more than simply providing precedential value, the importance of establishing the rebuttable presumption is that it increases the utility and efficiency of the process, which is particularly important for smaller MVPDs who are often disproportionately burdened by regulatory processes. Thus the value of the rebuttable presumption goes beyond simply establishing the precedential value of a prior ruling, but in making the complaint process where appropriate more efficient and less costly for parties and

[159] *See* Cablevision Comments at 10.

[160] ACA Comments at 28-38.

the Commission.

Cablevision's argument that the proposal would be "inimical to fundamental fairness and due process" is also without merit. Cablevision invites consideration of the case where a cable-affiliated programmer licensing a national cable network adopts the strategy of entering into regional exclusive contracts with multiple incumbent cable operators serving different regions of the country. In all likelihood the cable-affiliated programmer would provide its own affiliated cable operator with an exclusive in the region that it serves, and then provide other incumbent cable operators exclusives in the regions that they serve. The result would be that each incumbent cable operator would be the exclusive provider of the cable-affiliated programming network in its region of the country. Cablevision observes that in such a situation, if the programmer were to lose an exclusive contracting complaint filed against an exclusive contract for the programming with an incumbent MVPD in one region of the country that the Commission would then adopt the rebuttable presumptions that the significant hindrance and unfairness standards are satisfied for complaints against exclusive contracts for the same programming with other incumbent MVPDs in other regions of the country. Cablevision claims that this would be "inimical to fundamental fairness and due process.[161]" This is false for two related reasons.

First, adoption of a rebuttable presumption is a small change that in no way interferes with a cable-affiliated programmer or vertically integrated cable operator's rights or abilities to provide a complete defense of its practices. The adoption of the rebuttable presumption simply shifts the obligation to provide initial evidence. Second, both the Commission and the courts have already determined that it is both reasonable and fair for the Commission to adopt the presumption that an inferred fact is true based on the fact that a "proved fact" has been established (i) "if there is a sound and rationale 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

[161] Cablevision Comments at 10.

sensible and timesaving to assume the truth of [the inferred fact] . . . until the adversary disproves it.[162]" The fact that the programmer's use of an exclusive contract for exactly the same programming has already been found to be violate Section 628(b) provides exactly such a rationale because it is the characteristics of the programming such as its popularity and whether it is replicable or has good substitutes that largely determine whether the significant hindrance and unfairness conditions will be satisfied, and these characteristics will generally not vary widely across different regions of the country. It is inherent in the nature of a rebuttable presumption that it is applied to a particular case without giving the parties to the case a chance to argue whether or not it should be adopted in that situation.

VII. THE PROPOSED PRESUMPTIONS CONCERNING EXCLUSIVE CONTRACTS INVOLVING CABLE-AFFILIATED REGIONAL AND NATIONAL SPORTS PROGRAMMING ARE FULLY CONSISTENT WITH PROGRAMMERS' FIRST AMENDMENT RIGHTS

A few commenters raise First Amendment objections to some or all of the proposed rebuttable presumptions establishing that an exclusive contract for cable-affiliated regional and national sports networks is unfair and constitutes a significant hindrance to MVPD competition. Many of these objections have already been repeatedly rejected by the D.C. Circuit and they all generally suffer from a lack of support in First Amendment jurisprudence. As suggested by AT&T, the Commission should remain comfortable in the conclusion that the "proposed rebuttable presumptions present no First Amendment concerns."[163]

MSG, NCTA, and TWC inexplicably base their arguments on a strict scrutiny test and contend that the proposed rebuttable presumption that an exclusive contract for cable-affiliated regional and national sports networks is unfair and constitutes a hindrance to MVPD competition

[162] *Cablevision II*, 649 F.3d at 717.

[163] AT&T Comments at 23, n.62.

fails this test as a content-based regulation.[164] TWC goes so far as to suggest that this presumption may amount to the government "compelling the speech of cable-affiliated RSNs."[165] These arguments are unavailing because, among other reasons, they ignore the D.C Circuit's recent holding in *Cablevision II* where the court dismissed as "meritless" the claim that a similar rebuttable presumption in the *Terrestrial Loophole Order* was content-based.[166] The court explained that:

> Although the presumptions [regarding exclusive contracts for terrestrially-delivered, cable-affiliated RSNs] might in a formal sense be described as content-based given that they are triggered by whether the programming at issue involves sports, there is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas. The clear and undisputed evidence shows that the Commission established presumptions for RSN programming due to that programming's economic characteristics, not to its communicative impact.[167]

None of these strict scrutiny proponents offer a distinction between the Commission's motives in implementing the rebuttable presumption in the *Terrestrial Loophole Order* for terrestrially delivered, cable-affiliated regional sports networks and the instant proceeding with regard to satellite-delivered, cable-affiliated regional and national sports networks, or attempt to distinguish the *Cablevision II* court's holding. This is not surprising because no such distinction exists. The record clearly illustrates that the Commission's motives in regulating exclusive contracts remain firmly couched in economic rationales, regardless of whether the delivery of programming is accomplished via satellite or terrestrially, or whether the relevant presumption applies to sports programming distributed through regional or national networks.[168]

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[164] *See* MSG Comments at 15-16; NCTA Comments at 8-9; TWC Comments at 6-10, 13-14.

[165] TWC Comments at 6, 14.

[166] *Cablevision II*, 649 F.3d 695; *see also Terrestrial Loophole Order* ¶¶ 50-57.

[167] *Cablevision II*, 649 F.3d at 717-18 (internal quotes omitted).

[168] *See* 2012 Program Access Order ¶ 68.

The *Cablevision II* analysis follows well-established precedent concerning economic regulation of exclusive contracts and correctly applies intermediate scrutiny to analyzing the rebuttable presumption.[169] Commenters therefore err in suggesting that the presumptions at issue should be subject to strict scrutiny review because a cable-affiliated programmer's speech is somehow "compelled" as a result of a regulation requiring it to license its content to distributors whom it may not have licensed otherwise.[170] Such "compulsion" is nothing more than content-neutral economic regulation and subject only to intermediate scrutiny.[171]

For the same reasons the rebuttable presumption that an unfair act regarding a terrestrially-delivered cable-affiliated RSN will constitute a significant hindrance was upheld under intermediate scrutiny in *Cablevision II*, the rebuttable presumptions under discussion concerning RSNs and NSNs in this proceeding would likely be sustained as well.[172] A regulation will withstand intermediate scrutiny if (i) it furthers an important or substantial governmental interest that is unrelated to the suppression of free expression; and (ii) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[173] The court in *Cablevision II* easily sustained the Commission's

[169] *See Time Warner Entm't Co. L.P. v. FCC*, 93 F.3d 957, 977-78 (D.C. Cir. 1996) (rejecting Time Warner's contention that strict scrutiny analysis should apply).

[170] *See, e.g.*, Comcast Comments at 7-8; TWC Comments at 6.

[171] *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) ("regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny"). Moreover, substantial differences exist between commenters' arguments about a programmer being "compelled" to "speak" through licensing its content and traditional First Amendment jurisprudence regarding compelled speech. Precedent regarding compelled speech involves the speaker saying something new or disseminating information that it finds offensive based on its content. *See Riley v. Nat'l Fed. of the Blind, Inc.*, 487 U.S. 781, 795, 798 (1988) (invalidating a statute that required additional disclosures by professional fundraisers regarding their organization's use of charitable contributions); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980) (invalidating a regulator's decision that prohibited the insertion of controversial public policy materials in electric utility customers' monthly bills). In contrast, the instant presumption involving further distribution of a programmer's essentially unaltered content does not compel the programmer to "speak" anything new; it only disseminates their existing "speech" to a wider audience. *See also supra* Sections II.C.2(7), V.D, VII.

[172] *See Cablevision II*, 649 F.3d at 711-13.

[173] *Cablevision II*, 649 F.3d at 710.

interest in regulating exclusive contracts for cable-affiliated, terrestrially-delivered RSN programming after an extensive analysis, and no commenter provides persuasive evidence to contradict these findings or the additional facts about the video programming market offered by the Commission in the R&O.[174] The rationale in *Cablevision II* regarding the Commission's interest applies with equal weight to regulating exclusive contracts for sports programming networks delivered via satellite on a regional and national basis as well — the Commission's key justifications of ensuring availability of this "must have" programming do not change in for any of these scenario. Some commenters nevertheless quarrel with whether the rebuttable presumption burdens more speech than necessary to address the Commission's interest. These challenges are addressed in turn.[175]

NCTA and TWC claim that the rebuttable presumption is overbroad because it is either under- or over-inclusive in its scope, or both. The presumption is allegedly under-inclusive because it would exclude non-cable-affiliated programmers and over-inclusive because it would sweep in cable-affiliated programmers where applying the presumption would be unwarranted.[176]

Cablevision II dismisses the under-inclusiveness argument with respect to the rebuttable presumption concerning cable-affiliated, terrestrially-delivered RSNs and its basis for doing so applies with equal force in the instant proceeding. The court relied on the Commission's

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[174] *See Cablevision II*, 649 F.3d at at 711-13; 2012 Program Access Order ¶ 67. Comcast also acknowledges that policing anticompetitive conduct with regard to RSNs has been recognized as a government interest. Comcast Comments at 10.

[175] We address arguments from MSG, NCTA, and TWC regarding the rebuttable presumption's burden on speech, despite the fact that they have used the inapplicable strict scrutiny framework to analyze the presumptions. We do this to ensure an accurate record in the event that these commenter's arguments may later be used as part of an intermediate scrutiny analysis.

[176] *See* NCTA Comments at 8-9 ("there is certainly no reason to suspect that *all* national sports networks have so many such fans as to warrant a presumption that exclusive contracts regarding such networks will, in fact, be unfair or significantly hinder competing MVPDs") (emphasis in original); TWC Comments at 6-8 (the Commission's "myopic focus on *cable* exclusivity is under-inclusive because it does not even consider, let alone prohibit, other distributors' exclusive programming arrangements that may well entail market power") (emphasis in original).

pending proceeding examining its ability to expand application of the program access rules to reach programmers affiliated with non-cable MVPDs as a basis for declining to strike down the *Terrestrial Loophole Order* "as fatally under-inclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective."[177] Given that the Commission confirmed in the instant proceeding that "the issue of whether to extend certain program access rules to programmers affiliated with non-cable MVPDs" remains pending before it, a court would likely easily dismiss any allegations of under-inclusiveness.[178]

Regarding over-inclusiveness, commenters generally argue that the presumption is too "blunt" a tool to accomplish the Commission's interest in preventing anticompetitive activity and that the Commission is neglecting the case-by-case approach endorsed by *Cablevision II.*[179] Again, as a threshold matter, the commenters ignore the holding in *Cablevision II* that the "argument that the presumptions are too broad to survive even intermediate scrutiny is … meritless."[180] The court explained that "[g]iven the record evidence demonstrating the significant impact of RSN programming withholding, the Commission's presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming."[181] Notwithstanding this finding, the commenters also fail to persuasively explain how the rebuttable presumptions negate the Commission's proposed case-by-case framework for analyzing exclusive RSN agreements already adopted in the 2012 Program Access Order.[182] Instead, Comcast, for one, appears to equate the proposed presumptions with

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[177]*Cablevision II*, 649 F.3d at 718 (internal quotation marks and citations omitted) (emphasis in original).

[178] *See* 2012 Program Access Order ¶ 69 n.278.

[179] *See* Comcast Comments at 10-11; MSG Comments at 15-16; NCTA Comments at 9; TWC Comments at 9-12.

[180] *Cablevision II*, 649 F.3d at 718.

[181] *Id.*

[182] *See* 2012 Program Access Order ¶¶ 51-65.

a “summary conclusion[] regarding ‘unfairness,’”[183] and warns that speech would be “impermissibly chill[ed]” because programmers would be less likely to invest in unique programming in light of these presumptions.[184] Comcast does not, however, provide any empirical evidence to support its claims about the chilling effect that these presumptions would cause. The D.C. Circuit rejected nearly the same argument in *Time Warner* because, without concrete evidence about the effects on speech, any purported impact is “simply too conjectural … to conclude … that the provisions burden substantially more speech than necessary to achieve the government's goal.”[185] As such, Comcast’s contentions lack merit since, as it explains, sound policy cannot be based on arguments that “simply posit a hypothetical harm to be cured” without “record evidence of actual problems.”[186]

VIII. CONCLUSION

For the foregoing reasons, the Commission should adopt ACA’s proposed reforms to the rules concerning buying groups and the modest set of rebuttable presumptions contained in the FNPRM concerning RSNs, NSNs, and other cable-affiliated programming whose exclusive arrangement was successfully challenged by an MVPD.

The proposed measures regarding buying groups will update the Commission’s rules concerning liability to make them consistent with well-established and accepted industry practice, further ensure that buying groups are treated comparably to MVPDs with regard to volume discounts, and prevent discriminatory refusals to deal with buying groups as they are currently constituted. In addition, the proposed rebuttable presumptions will be a modest step in the direction of ameliorating the burden on both complainants and Commission staff of the

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[183] Comcast Comments at 9.

[184] Comcast Comments at 11.

[185] *Time Warner Entm’t Co. L.P. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996).

[186] *See* Comcast Comments at 13.

Section 628(b) case-by-case review process effect of the removal of a valuable safeguard of the exclusivity ban so that MVPDs can continue to obtain critical and non-replicable content from cable-affiliated programmers and vertically-integrated cable operators following the Commission's decision to sunset of the categorical exclusivity prohibition. This will particularly benefit smaller distributors with fewer resources to devote to complex complaint proceedings. Commenters' suggestions that these proposals are somehow unjustified, unnecessary or unconstitutional all lack merit. The Commission should reject the commenters' critiques given established precedent supporting adoption of the presumptions and the substantial evidence provided in the record.

Respectfully submitted,

By: Barbara Esbin

Barbara S. Esbin
Elvis Stumbergs
Jacob E. Baldwin
Cinnamon Mueller
1333 New Hampshire Ave, N.W.
2nd Floor
Washington, DC 20036
(202) 872-6881

Attorneys for the American Cable Association

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

January 14, 2013

Appendix A

Declaration of Jeff Nourse

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
	)	

Declaration of Jeff Nourse, Senior Vice President, Legal & Regulatory Affairs of the National Cable Television Cooperative, Inc.

Declarant hereby states as follows:

1. My name is Jeff Nourse. I serve as Senior Vice President, Legal & Regulatory Affairs to the National Cable Television Cooperative, Inc. ("NCTC.") My business address is 11200 Corporate Avenue, Lenexa, Kansas, 66219.

2. I have been with the NCTC since September 2009.

3. The NCTC was organized as a buying group in 1984 by a dozen small and medium-sized multichannel video programming distributors ("MVPDs") for the purpose of purchasing satellite cable programming. Because programmers offer volume discounts based on the number of subscribers an MVPD brings to the table, NCTC sought to aggregate its members' subscribers to secure volume discounts and other favorable terms and conditions commensurate to those obtained by larger MVPDs serving a similar number of subscribers.

4. NCTC's primary role is that of an interface between its members and the programmer so that the programmer is able to deal with a single entity for functions such as contract negotiations, determining technical standards, billing, collection and payment. More specifically, NCTC negotiates master agreements and their renewals with video programmers. NCTC then allows its members to opt-in to the master agreements, manages the collection of subscriber counts, calculates billing based on the prices in the master agreements and issues a single remittance to the programmer on behalf of those members participating in a master

agreement. Programmers have accepted the role NCTC plays in this manner and NCTC has generally been able to provide lower license fees for its members than its members could obtain by negotiating individually with programmers.

5. The primary leverage that NCTC exerts over its members to pay obligations that are due is that NCTC has the right to terminate a member from participation in all NCTC master agreements if that member is delinquent on any single payment to a programmer. Most members of the NCTC purchase a substantial share of their programming through the NCTC and the loss of all this programming would likely cause considerable disruption to their business, including significant subscriber defections. Therefore, delays or defaults in payments are very rare events that generally occur only when a member is faced with serious enough cash flow problems that it is likely to go out of business entirely.

6. Under this business model, at the end of each month the NCTC invoices each member participating in a master agreement for fees due for programming provided in that month. Payment of the invoice to NCTC is due on the 15th day of the following month, subject to an additional ten-day cure period allowed under the NCTC Member Agreement. Upon the expiration of the ten-day cure period NCTC's routine and standard procedure is to send a notice to the member that its membership and access to programming under the NCTC Master Agreements will be terminated unless immediate arrangements are made to deal with the default. At this point in the process, the NCTC often devotes considerable resources and time communicating with the member and fact-finding to determine if there is only a temporary problem that likely can be resolved, such as a temporary cash flow shortage, or if there are more serious problems that likely cannot be resolved. The programmer is typically unaware of any issue unless the member communicates an issue independently and therefore, programmers rely almost entirely on NCTC to work with the member to attempt to resolve the situation during this period. When the situation can be successfully resolved the programmer is

often completely unaware that there was even a problem and certainly is spared the trouble and cost of helping resolve the situation.

7. Unless an arrangement to quickly pay the delinquent fees can be worked out, the NCTC will generally terminate the delinquent member and report the termination to programmers. NCTC recognizes that aggressive use of the threat of termination and actual termination to enforce members' contractual commitments is in the long run interests of all members because it makes the NCTC a much more desirable business partner in the eyes of the programmers.

8. A good example of the NCTC's commitment to help ensure that its members live up to the contractual promises they make when they enter into master agreements is the recent case of Broadstripe Communications ("Broadstripe"). On January 2, 2009, Broadstripe experienced financial difficulties and filed for Chapter 11 bankruptcy protection leaving NCTC with a pre-petition debt of approximately $3.4 million owed primarily to programmers. Broadstripe attempted to opt-in to new NCTC master agreements, despite the fact that it was still in default on its existing obligations.[1] NCTC objected, citing that Broadstripe's Member Agreement allowed NCTC to prohibit a member's participation in its sole discretion, and Broadstripe sued. NCTC incurred significant legal costs and successfully defended its right to prohibit Broadstripe from entering into new master agreements. The ultimate result was that Broadstripe agreed to pay all fees under NCTC master agreements upon which it had defaulted.

9. In 2011, which is the most recent year for which complete data is available, only five NCTC members ultimately defaulted on any payments. These five members served a total of only 661 subscribers and the monthly payments of the defaulting members constituted less than .01% (*i.e.*, 1/10,000) of NCTC's average monthly payments to programmers on behalf of its

[1] Broadstripe argued that the bankruptcy filing provided it from immunity against punishments for not paying these previous debts. *See Nat'l. Cable TV Coop., Inc. v. Broadstripe, LLC (In re Broadstripe, LLC)*, 2009 U.S. Dist. LEXIS 25690 ¶ 5 (D. Del. Mar. 25, 2009).

members. These are typical values. Thus the total share of NCTC obligations that members default upon is extremely insignificant.

Executed on January 14, 2013

Jeff Nourse

APPENDIX B

Table 1

Top 25 MVPDs

Rank	MVPD	Subscribers
1.	Comcast Corporation	22,118,000
2.	DirecTV	19,915,000
3.	Dish Network Corporation	14,061,000
4.	Time Warner, Cable, Inc.	12,484,000
5.	Cox Communications, Inc.*	4,661,000
6.	Verizon Communications Inc.*	4,473,000
7.	Charter Communications, Inc.*	4,269,000
8.	AT&T, Inc.	4,146,000
9.	Cablevision Systems Inc.*	3,257,000
10.	Bright House Networks LLC	2,059,000
11.	Cequel (Suddenlink) Communications*	1,230,000
12.	Mediacom Communications Corporation*	1,037,000
13.	CableOne, Inc.*	613,000
14.	WideOpenWest Networks, LLC*	456,000
15.	RCN Corp.*	332,000
16.	Knology Corp.*	255,000
17.	Atlantic Broadband Group, LLC*	252,000
18.	Armstrong Cable Service*	237,000
19.	Midcontinent*	229,000
20.	Service Electric Cable TV Inc.*	216,000
21.	MetroCast Cablevision*	178,000
22.	Blue Ridge Communications*	167,000
23.	WaveDivision Holdings, LLC*	159,000
24.	General Communications*	144,000
25.	Buckeye CableSystem*	133,000

* Member of the NCTC