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Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07–198; FCC 10–17]

Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The FCC establishes rules, policies, and procedures for the consideration of complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming in violation of Section 628(b) of the Communications Act of 1934, as amended. This action will provide competitors to incumbent cable operators with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer their subscribers, thereby promoting competition in the delivery of video to consumers.

DATES: Effective April 2, 2010, except for §§ 76.1001(b)(2) and 76.1003(l), and the amendment to § 76.1003(c)(3), which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact David Konczal, *David.Konczal@fcc.gov;* or Diana Sokolow, *Diana.Sokolow@fcc.gov;* of the Media Bureau, Policy Division, (202) 418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *First Report and Order* ("*Order*"), FCC 10–17, adopted and released on January 20, 2010, and the Erratum thereto, FCC 10–30, adopted on February 5, 2010 and released on February 16, 2010. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Paperwork Reduction Act of 1995 Analysis

This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis ("FRFA") below.

Summary of the Report and Order

I. Introduction

1. In this *Order,* we take an important step to further promote competition in the video distribution market. We establish rules to address unfair acts, including exclusive contracts, involving terrestrially delivered, cable-affiliated programming. Throughout this *Order,* we use the terms "cable-affiliated programming" and "cable-affiliated programmer" to refer to a cable programming vendor in which a cable operator has an attributable interest, as defined by the Commission's cable attribution rules. *See* 47 CFR 76.1000(b); *see also* 47 CFR 76.501, Notes 1–5.

2. The rules established herein will provide competitors to incumbent cable operators with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer to their subscribers, thereby promoting competition in the delivery of video to consumers. Our existing program access rules have been a boon to such competition, and we anticipate that the rules we adopt today will have similar procompetitive effects. Our efforts to spur competition in the marketplace for video programming are also aimed at increasing consumer benefits, including better services, innovations in technology, and lower prices. Moreover, we believe broadband adoption to be a further benefit from increased competition and diversity in video programming distribution. Specifically, today we adopt rules permitting complainants to pursue program access claims involving terrestrially delivered, cable-affiliated programming similar to the claims that they may pursue with respect to satellite-delivered, cable-affiliated programming, where the purpose or effect of the challenged act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming. The types of claims potentially involved include challenges to: (i) Exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; (ii) discrimination in the prices, terms, and conditions for the sale of programming among multichannel video programming distributors ("MVPDs") by a provider of terrestrially delivered programming that is wholly owned by, controlled by, or under common control with one or more of the following: a cable operator or operators, a satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or a satellite broadcast programming vendor or vendors; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated provider of terrestrially delivered programming to sell its programming to a competitor.

3. The Commission has previously established goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and

within nine months for all other program access complaints, such as price discrimination cases. *See 2007 Program Access Order,* 72 FR 56645, October 4, 2007, *appeal pending sub nom. Cablevision Systems Corp. et al* v. *FCC,* No. 07–1425 et al (D.C. Cir). These goals will also apply to complaints filed pursuant to the rules established in this *Order.*

4. MVPDs seeking to compete with incumbent cable operators have provided the Commission with examples of actions by cable operators involving terrestrially delivered, cable-affiliated programming that they allege have harmed competition in the video distribution market. In light of these claims, the Commission adopted a Notice of Proposed Rulemaking (the "*NPRM*") in September 2007 seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming. *See* 72 FR 61590, October 31, 2007. In the *NPRM,* the Commission stated its belief that unfair acts involving terrestrially delivered, cable-affiliated programming are a significant concern because they can adversely impact competition. Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming. This *Order* addresses only the issues of terrestrially delivered, cable-affiliated programming and a temporary standstill of an existing contract pending resolution of a program access complaint. This *Order* does not address the other issues raised in the *NPRM.*

5. We find below that Section 628 of the Communications Act of 1934, as amended (the "Act"), grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming. Section 628 was passed as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). *See* Cable Television Consumer Protection and Competition Act of 1992, Public Law 102–385, 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 102–628 (1992); S. Rep. No. 102–92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133; H.R. Rep. No. 102–862 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231. Congress expressly declared that a purpose of Section 628 was "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market. * * *" *See* 47 U.S.C. 548(a). Congress found that the "cable industry has become vertically integrated" and that "[v]ertically integrated program suppliers * * * have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies." *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 2, *reprinted in* 1992 U.S.C.C.A.N. 1231. Congress "expect[s] the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies." *See id.* at 93, *reprinted in* 1992 U.S.C.C.A.N. at 1275. To arm the Commission for that effort, Congress granted the Commission broad authority in Sections 628(b) and 628(c)(1) of the Act to prohibit unfair acts of cable operators that significantly hinder or prevent their competitors from providing video programming to consumers.

6. Section 628(b) provides that it shall be unlawful for a cable operator to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." *See* 47 U.S.C. 548(b). Section 628(c)(1) authorizes the Commission to prescribe regulations to specify the particular conduct prohibited by Section 628(b). *See* 47 U.S.C. 548(c)(1). Throughout this *Order,* we use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices."

7. In addition to the broad grant of authority, Congress in Section 628(c)(2) required the Commission to adopt specific regulations partly implementing Section 628(b) by prohibiting cable operators or affiliates from engaging in unfair acts involving cable-affiliated programming that is delivered to cable operators via satellite ("satellite-delivered programming"). *See* 47 U.S.C. 548(c)(2). Section 628(c)(2) pertains only to "satellite cable programming" and "satellite broadcast programming." *See* 47 U.S.C. 548(c)(2)(A)–(D). Both terms are defined to include only programming transmitted or retransmitted by satellite for reception by cable operators. *See* 47 U.S.C. 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. 605); *id.* 548(i)(3).

8. The three unfair acts Congress required the Commission to address were: (i) Exclusive contracts between a cable operator and a cable-affiliated programmer; (ii) discrimination by a cable-affiliated programmer in the prices, terms, and conditions for sale of programming among MVPDs; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to competitors. *See* 47 U.S.C. 548(c)(2)(A)–(D). The Commission has adopted rules to carry out that congressional command (the "program access rules"). *See* 47 CFR 76.1000–1004. Those rules are a success. While competitors to incumbent cable operators served less than five percent of video subscribers nationwide when the program access provision of the 1992 Cable Act was passed (*see Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, 17326 (2001)), that percentage has increased to over 30 percent today. Competitors to incumbent cable operators widely credit the program access rules for this increase in competition.

9. An outgrowth of this increase in competition is an increase in employment in the video programming sector of the economy. The relationship between competition and employment in an industry is an obvious one. Firms maximize profits in a concentrated industry by reducing output in order to increase prices. This exertion of market power has, as a natural outcome, a negative effect on industry employment. Increasing the level of competition in an industry increases output, reduces prices, and increases employment. This intuitive result has been shown to hold in practice. Christoph Weiss found a negative relationship between the long-run equilibrium level of employment and the level of concentration in U.S. industries. *See* Christoph Weiss, "Is Imperfect Competition in the Product Market Relevant for Labour Markets?" *Labour,* Vol. 12 No. 3, at 451–71 (1998).

10. Congress did not require the Commission to adopt program access rules for cable-affiliated programming that is delivered to cable operators via terrestrial means, such as programming transmitted to cable operators by fiber ("terrestrially delivered programming"). While an earlier version of the legislation that became Section 628(c)(2) would have encompassed terrestrially delivered programming, Congress did not explain why the final version of its bill removed this provision. This gap in the coverage of Section 628(c)(2) is commonly referred to as the "terrestrial loophole." *See, e.g., 2002 Program Access Order,* 67 FR 49247, July 30, 2002. Under Sections 628(b) and 628(c)(1), however, Congress granted the Commission broad authority to address

this "loophole" by adopting additional regulations beyond those listed in Section 628(c)(2) to address unfair acts of cable operators.

11. As discussed below, we take action pursuant to Sections 628(b) and 628(c)(1) of the Act to facilitate competition in the video distribution market by establishing rules for the consideration of complaints alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming. Our action today attempts to chart a middle course between two extremes proposed by commenters. On one hand, vertically integrated cable operators argue that there is no need and no statutory authority for the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming. In their view, exclusive arrangements for terrestrially delivered, cable-affiliated programming should be permitted because they enhance innovation, programming diversity, and competition. On the other hand, competing MVPDs urge the Commission to adopt a per se prohibition on exclusive arrangements involving most, if not all, terrestrially delivered, cable-affiliated programming. In their view, all such exclusive arrangements should be prohibited because they hamper competition. The case-by-case approach we adopt today establishes a fair process to address those situations in which MVPDs may be significantly hindered from competing, while at the same time allowing cable operators to use exclusive arrangements in cases where competition is not significantly harmed.

12. We begin by analyzing the statutory language and legislative history of Section 628 as well as the Commission's program access rules. We discuss our statutory authority under that section to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. We then discuss the bases for our conclusion that there is a need for Commission action to address such complaints: Cable operators have an incentive and ability to engage in unfair acts involving their affiliated programming; record evidence indicates that cable operators have engaged in unfair acts involving certain terrestrially delivered, cable-affiliated programming; and these unfair acts have impacted competition in the video distribution market in certain cases. We conclude, however, that there is insufficient record evidence to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming will have the purpose or effect set forth in Section 628(b) in every case. Accordingly, we adopt a case-by-case approach rather than a per se rule for addressing these unfair acts. We then explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.

13. We next set forth the requirements for complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. A complainant alleging such an unfair act will have the burden of proof that the defendant's activities have the purpose or effect set forth in Section 628(b). We conclude that a complainant is unlikely to satisfy this burden when seeking access to readily replicable programming, such as local news and local community or educational programming. We also explain, however, that some programming may be non-replicable and sufficiently valuable to consumers that an unfair act regarding this programming presumptively—but not conclusively—has the purpose or effect set forth in Section 628(b). Based on Commission precedent in which the Commission has considered certain Regional Sports Networks ("RSNs") and the record in this proceeding, we find that such networks fall within this category. In program access cases alleging an unfair act involving such programming, the defendant will be required to overcome the presumption that arises from our precedent and the record evidence here. In all program access cases involving terrestrially delivered, cable-affiliated programming, we provide the defendant with 45 days—rather than the usual 20 days—from the date of service of the complaint to file an Answer to ensure that the defendant has adequate time to develop a full, case-specific response.

14. This distinction between replicable and non-replicable programming will promote innovation and continued investment in programming. If particular programming is replicable, our policies should encourage MVPDs or others to create competing programming, rather than relying on the efforts of others, thereby encouraging investment and innovation in programming and adding to the diversity of programming in the marketplace. Conversely, when programming is non-replicable and valuable to consumers, such as regional sports programming, 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. In addition, in light of the growing importance of high definition ("HD") programming in the marketplace today and its distinctive characteristics, we will analyze the HD version of a network separately from the standard definition ("SD") version with similar content for purposes of the statutory analysis. Thus, the fact that a complainant offers the SD version of a network to subscribers will not alone be sufficient to refute the complainant's showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b). Similarly, in cases involving the category of RSN programming addressed by our precedent and the evidence here, withholding the HD feed will be rebuttably presumed to cause significant hindrance even if an SD version of the network is made available to competitors.

15. We next describe how the rules applicable to terrestrially delivered, cable-affiliated programming will differ from the rules applicable to satellite-delivered, cable-affiliated programming. We also discuss how these rules will be applied to common carriers and terrestrially delivered programming that is subject to the program access rules as a result of merger conditions. In addition, we explain that the new rules will apply to existing contracts, but not to the unfair acts of cable operators involving terrestrially delivered, cable-affiliated programming that preceded the effective date of these rules. With respect to pending complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming, complainants may continue to prosecute these complaints pursuant to Section 628(d) of the Communications Act. In addition, a complainant that wants a currently pending complaint considered under the new rules can submit a supplemental filing alleging that the defendant has engaged in an unfair act after the effective date of the rules. Finally, we establish procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

II. Background

A. Section 628

16. Congress enacted Section 628 as part of the 1992 Cable Act to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video

programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." 47 U.S.C. 548(a). The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. 605). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. 548(i)(3).

17. To advance Congress' goals, Sections 628(b) and 628(c)(1) grant the Commission broad authority to adopt rules to prohibit unfair acts of cable operators that have the purpose or effect of preventing or hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. *See* 47 U.S.C. 548(b), (c)(1). Section 628(b) provides that:

> [I]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. 548(b). Section 628(c)(1) provides that "the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by" Section 628(b). 47 U.S.C. 548(c)(1). A federal court of appeals recently held that Section 628(b) is written in "broad and sweeping terms" and therefore "should be given broad, sweeping application." *Nat'l Cable & Telecomm. Ass'n* v. *FCC,* 567 F.3d 659, 664 (D.C. Cir. 2009) (quoting *Consumer Elecs. Ass'n* v. *FCC,* 347 F.3d 291, 298 (D.C. Cir. 2003)).

18. We find no merit in Cablevision's argument that the Commission cannot rely on Section 628(c)(1) because that provision "limits" rulemaking authority to the 180 days after the date of enactment of Section 628(c)(1). The Commission has an obligation to consider, on an on-going basis, whether its rules should be modified in response to changed circumstances. As the Supreme Court has observed: "'An initial agency interpretation is not instantly carved in stone. On the contrary, the agency * * * must consider varying interpretations and the wisdom of its policy on a continuing basis,' *Chevron, supra,* at 863–864, 104 S.Ct. 2778, for example, in response to changed factual circumstances, or a change in administrations. * * *" *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) (*quoting Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863–64 (1984)). That is precisely what the Commission is doing in this *Order.* Cablevision's interpretation would prevent the Commission from fulfilling its obligation to consider whether its rules should be revised based on new evidence that has come to light. There is no evidence that Congress intended to tie the Commission's hands in this manner by carving its initial regulations, which were adopted back in 1993, "in stone." *See 1993 Program Access Order,* 8 FCC Rcd 3359 (1993), *recon.,* 10 FCC Rcd 1902 (1994), *further recon.,* 10 FCC Rcd 3105 (1994). Nor is there any indication Congress intended to strip the Commission of its rulemaking power under Sections 4(i) and 303(r) after 180 days. *See* 47 U.S.C. 154(i), 303(r).

19. Moreover, Cablevision's interpretation is at odds with judicial precedent regarding statutory deadlines. Statutory deadlines are generally considered directory, rather than mandatory, and even where an agency has failed to meet such a deadline—which is not the case here—it has not been found to remove an agency's authority to act or impose any other penalty, unless the statute delineates a specific remedy for agency inaction. *See Thomas* v. *Barry,* 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984) (*quoting Fort Worth Nat'l Corp.* v. *Fed. Savings & Loan Ins. Corp.,* 469 F.2d 47, 58 (5th Cir. 1972)); *see also Brock* v. *Pierce County,* 476 U.S. 253, 260, 262 (1986) (mere use of the word "shall" not enough to remove Secretary of Labor's power to act after lapse of a deadline, and "[w]hen * * * there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act"); *Gottlieb* v. *Peña,* 41 F.3d 730 (D.C. Cir. 1994) (statute mandating Secretary of Transportation to act by certain deadline was directory, not mandatory); *Ralpho* v. *Bell,* 569 F.2d 607, 627 (D.C. Cir. 1977) ("Statutes that, for guidance of a government official's discharge of duties, propose 'to secure order, system, and dispatch in proceedings' are usually construed as directory, whether or not worded in the imperative, especially when the alternative is harshness or absurdity." (citations omitted)). Here, there is no indication in the statute that Congress intended the Commission's rulemaking authority to lapse after the 180-day deadline.

20. In addition to the broad grant of authority, Congress in Section 628(c)(2) directed the Commission to include "minimum contents" in its regulations specifying certain unfair acts, relating to satellite-delivered programming, that are among those prohibited by Section 628(b). *See* 47 U.S.C. 548(c)(2). First, Congress required the Commission to prohibit efforts by cable operators to unduly influence the decision of cable-affiliated programming vendors that provide satellite-delivered programming to sell their programming to competitors ("undue or improper influence"). *See* 47 U.S.C. 548(c)(2)(A).

21. Second, Congress required the Commission to address discrimination by cable-affiliated programming vendors that provide satellite-delivered programming in the prices, terms, and conditions for sale of programming among MVPDs ("discrimination"). *See* 47 U.S.C. 548(c)(2)(B).

22. Third, Congress required the Commission to prohibit exclusive contracts between cable operators and cable-affiliated programming vendors that provide satellite-delivered programming subject to certain exceptions in areas served by a cable operator as of October 5, 1992 (the "exclusive contract prohibition"). *See* 47 U.S.C. 548(c)(2)(D). These exceptions are: (i) Exclusive contracts entered into prior to June 1, 1990 are not subject to the exclusive contract prohibition (*see* 47 U.S.C. 548(h)(1); *see also* 47 CFR 76.1002(e)(1)); (ii) exclusive contracts that the Commission deems to be in the public interest based on the factors set forth in the statute are not subject to the exclusive contract prohibition (*see* 47 U.S.C. 548(c)(4); *see also* 47 CFR 76.1002(c)(4)); and (iii) the exclusive contract prohibition will cease to be effective after October 5, 2002 unless the Commission finds that it "continues to be necessary to preserve and protect

competition and diversity in the distribution of video programming" (*see* 47 U.S.C. 548(c)(5); *see also* 47 CFR 76.1002(c)(6)). The public interest factors are: (i) The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (ii) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable; (iii) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (iv) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and (v) the duration of the exclusive contract. *See* 47 U.S.C. 548(c)(4); *see also* 47 CFR 76.1002(c)(4). In areas that were not served by a cable operator as of October 5, 1992, the exclusive contract prohibition is absolute and is not subject to exceptions. *See* 47 U.S.C. 548(c)(2)(C).

23. Section 628 was intended to address Congress' concern that cable operators or their affiliates would engage in unfair acts, including acts involving programming they own, that impede competition in the video distribution market. *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275; S. Rep. No. 102–92 (1991), at 26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159.

24. The 1992 Cable Act and its legislative history reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical integration of cable operators and program suppliers, created an imbalance of power between incumbent cable operators and their multichannel competitors. *See* 1992 Cable Act § 2(a)(4); *id.* section 2(a)(5); S. Rep. No. 102–92 (1991), at 24–29, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1157–62; H.R. Rep. No. 102–628 (1992), at 41–43. Congress concluded that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, including direct broadcast satellite ("DBS") providers. *See* 1992 Cable Act section 2(a)(5); S. Rep. No. 102–92 (1991), at 26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159; *1993 Program Access Order,* 8 FCC Rcd at 3365–67, ¶ 21.

25. Through Section 628, Congress intended to encourage entry and facilitate competition in the video distribution market by existing or potential competitors to traditional cable systems by, among other things, making available to those entities the programming they need to compete in the video distribution market. *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275; S. Rep. No. 102–92 (1991), at 28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161. As discussed above, competitors to incumbent cable operators credit the program access rules promulgated under Sections 628(b) and (c) for the increased competition to incumbent cable operators that has emerged since passage of the 1992 Cable Act.

B. Program Access Rules Applicable to Satellite-Delivered, Cable-Affiliated Programming

26. As required by Section 628(c)(2), the Commission has adopted program access rules which specifically prohibit undue or improper influence (*see* 47 CFR 76.1002(a)), discrimination (*see* 47 CFR 76.1002(b)), and exclusive contracts (*see* 47 CFR 76.1002(c)-(e)) involving cable operators and cable-affiliated programmers that provide satellite-delivered programming. The Commission has also established a complaint process to address claims that a cable operator or a cable-affiliated programmer that provides satellite-delivered programming has violated the program access rules. *See* 47 CFR 76.7, 76.1003. Consistent with the definitions in the 1992 Cable Act, the Commission's rules define the "satellite cable programming" and "satellite broadcast programming" to which the rules apply to include only programming transmitted or retransmitted by satellite for reception by cable operators. *See* 47 CFR 76.1000(f), (h). The Commission has previously concluded that terrestrially delivered programming is outside of the direct coverage of Section 628(c)(2) and the Commission's program access rules under Section 628(c)(2). *See DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802, 22807 (2000), *aff'd sub nom. EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002); *see also 2007 Program Access Order; 2002 Program Access Order.*

C. NPRM

27. In September 2007, the Commission adopted an *NPRM* seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming. The Commission noted examples of withholding of terrestrially delivered, cable-affiliated RSNs in San Diego and Philadelphia. The Commission stated its belief that "withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market." To address this concern, the *NPRM* sought comment on whether it would be appropriate to address the terrestrial loophole in the current program access rules pursuant to provisions other than Section 628(c)(2) of the Act, such as Section 628(b) of the Act. The *NPRM* also sought comment on whether extension of program access requirements to terrestrially delivered, cable-affiliated programming by way of a general statutory provision such as Section 628(b) would be barred by the more specific provision in Section 628(c)(2) that requires the promulgating of rules relating only to conduct involving satellite-delivered programming.

28. In their comments filed in response to the *NPRM,* non-incumbent MVPDs contend that the Commission has statutory authority to address the terrestrial loophole in the current rules. They also argue that applying the program access rules to terrestrially delivered, cable-affiliated programming would promote competition in the video distribution market and broadband deployment. Conversely, vertically integrated cable operators contend that the Commission does not have the statutory authority to address the terrestrial loophole. Moreover, they argue that the market for video distribution is competitive and that additional regulations are not justified.

D. Pending Program Access Complaints

29. Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming. First, in September 2008, AT&T filed a program access complaint alleging that Cox is withholding a terrestrially delivered RSN (Cox-4) from AT&T in San Diego. In March 2009, the Media Bureau issued a decision denying this complaint without prejudice because (i) there was no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b); and (ii) the pending *NPRM,* rather than an adjudicatory proceeding, is the correct forum for addressing this issue. *See AT&T Services Inc. et al* v. *Coxcom, Inc.,* Memorandum Opinion and Order, 24 FCC Rcd 2859, 2864 (MB, 2009), *application for review pending.* AT&T has filed an Application for Review of this decision, which is pending. In July 2009, Verizon filed a program access complaint alleging that Cablevision is

withholding the terrestrially delivered HD feeds of its RSNs (MSG and MSG+) from Verizon in New York. In August 2009, AT&T filed a program access complaint against Cablevision making a similar claim regarding the withholding of the terrestrially delivered HD feeds of MSG and MSG+ from AT&T in Connecticut. The latter two complaints are pending.

30. We note that redacted versions of both of AT&T's complaints, the defendants' answers, AT&T's replies, and Cox's response to a declaration and survey included in AT&T's reply were filed in the record of this proceeding. We do not reach a decision in this *Order* on the merits of these complaints, including whether AT&T has demonstrated that the defendants' conduct violated Section 628(b).

III. Discussion

31. In Section A below, we begin with a discussion of our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. In Section B, we explain the bases for our conclusion that there is a need for Commission action to address such complaints. In Section C, we explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. In Section D, we set forth the requirements for complaints alleging such unfair acts. In Section E, we discuss how these rules will be applied to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions. In Section F, we establish procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

A. The Commission's Statutory Authority To Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

32. In this Section, we discuss our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming in the circumstances described in that provision. Section 628(b) gives the Commission authority to promulgate rules applicable to unfair acts of cable operators (and certain other entities), including acts involving terrestrially delivered programming that have the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. *See* 47 U.S.C. 548(b). Section 628(c)(1) authorizes the Commission to prescribe regulations to specify particular conduct prohibited by Section 628(b). *See* 47 U.S.C. 548(c)(1). Our analysis reflects the Commission's interpretation of Section 628(b) in the *MDU Order,* where the Commission held that it has authority pursuant to Section 628(b) to adopt rules prohibiting exclusive contracts between cable operators and owners of multiple dwelling units ("MDUs") because those contracts prevent or significantly hinder the ability of competing MVPDs to provide all programming, including "satellite cable programming" and "satellite broadcast programming," in those markets. *See MDU Order,* 73 FR 1080, January 7, 2008, *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n* v. *FCC,* 567 F.3d 659 (D.C. Cir. 2009). This interpretation was recently upheld by a federal court of appeals. *See NCTA,* 567 F.3d 659. Several commenters argue that applying the program access rules to terrestrially delivered, cable-affiliated programming pursuant to Section 628(b) is consistent with the Commission's analysis in the *MDU Order.*

33. Vertically integrated cable operators note that Section 628(c)(2) requires the Commission to prohibit unfair acts involving only satellite-delivered programming and assert that this specific mandate precludes the Commission from addressing terrestrially delivered programming pursuant to the general authority provided in Section 628(b). While Section 628(c)(2) lists specific unfair acts that the Commission is required to address as "minimum contents" in its regulations, the United States Court of Appeals for the District of Columbia Circuit has explained that this list does not preclude the Commission from adopting rules to address additional conduct that also is prohibited under Section 628(b). *See NCTA,* 567 F.3d at 664–65. As the court stated, "Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission's power solely to that version of the problem." *Id.* at 665; *see also MDU Order* ("nothing in these provisions indicate that they were intended to establish the outer limits of the Commission's authority under Section 628(b)"). The court also held that (i) the title of Section 628(c)(2), "Minimum Contents of Regulations," demonstrates that the Commission's rules must at least address the unfair acts listed in Section 628(c)(2), but are not limited to addressing those acts (47 U.S.C. 548(c)(2); *see NCTA,* 567 F.3d at 665; *see also MDU Order*) and (ii) this interpretation of Section 628(b) is confirmed by Section 628(c)(1), which grants the Commission wide latitude to "specify particular conduct that is prohibited by [Section 628(b)]" (*see NCTA,* 567 F.3d at 665 (quoting 47 U.S.C. 548(c)(1)); *see also MDU Order*). The Commission too has explained previously that it is not limited to addressing only the specific unfair acts listed in Section 628(c)(2); rather, "Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action * * * should additional types of conduct emerge as barriers to competition." *See 1993 Program Access Order,* 8 FCC Rcd at 3374.

34. Here, the record reflects evidence that unfair acts involving terrestrially delivered, cable-affiliated programming have occurred; such conduct is likely to persist absent Commission action; and this conduct can have the effect in some cases of hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers and consumers. Thus, the plain language of Section 628(b), along with the authority provided by Section 628(c)(1) to adopt rules addressing conduct prohibited by Section 628(b), provide us with authority to adopt rules for the consideration of complaints alleging unfair acts with respect to terrestrially delivered, cable-affiliated programming.

35. Moreover, despite the principle of statutory interpretation that, by mentioning one thing, Congress may have implied the exclusion of another, an explicit congressional directive to ban certain activities does not prevent the agency "from taking similar action with respect to activities that pose a similar danger." *See Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.,* 940 F.2d 685, 694 (D.C. Circ. 1991)); *see also Oncale* v. *Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). The fact that Congress singled out a subset of practices with which it was particularly concerned in Section 628(c)(2) and required the Commission to focus on those practices expeditiously does not limit the broader rulemaking authority

expressly granted to the Commission through Sections 628(b) and 628(c)(1). Here, we find that unfair acts involving cable-affiliated programming, regardless of whether that programming is satellite-delivered or terrestrially delivered, pose the danger of significantly hindering MVPDs from providing satellite cable programming or satellite broadcast programming, thereby harming competition in the video distribution market and limiting broadband deployment. As the Commission recognized in the *Adelphia Order,* competitive harm from withholding of programming can occur regardless of how that programming is delivered to MVPDs. *See* 21 FCC Rcd 8203, 8276 (2006). Thus, we conclude that Congress' decision to require the Commission to adopt within 180 days program access rules to address unfair acts involving satellite-delivered, cable-affiliated programming does not preclude us from exercising our authority under Section 628(b) to take similar action where appropriate to address unfair acts involving terrestrially delivered, cable-affiliated programming.

36. Section 628(c)(2)(B)(iv) does not conflict with this interpretation. This provision provides that a cable-affiliated programmer that provides satellite-delivered programming does not violate the program access discrimination prohibition by entering into "an exclusive contract that is permitted under [Section 628(c)(2)(D)]." *See* 47 U.S.C. 548(c)(2)(B)(iv). The Commission has interpreted the phrase "an exclusive contract that is permitted under [Section 628(c)(2)(D)]" to mean an exclusive contract for which the Commission has granted an exception pursuant to the public interest factors listed in Section 628(c)(4). *See 1996 OVS Order,* 11 FCC Rcd 18223, 18319 (1996); *see also* 47 U.S.C. 548(c)(4); 47 CFR 76.1002(c)(4). The Commission has declined to interpret this phrase more broadly to mean any exclusive contract that is not expressly prohibited by Section 628(c)(2)(D). *See 1996 OVS Order,* 11 FCC Rcd at 18319.

37. We are aware that the former Cable Services Bureau stated that Section 628(b) may not be used categorically to preclude programming practices that are related to practices prohibited under Section 628(c)(2), but not themselves reached by Section 628(c)(2). *See Everest Midwest Licensee* v. *Kansas City Cable Partners,* 18 FCC Rcd 26679, 26683–84 (CSB, 2003); *RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 14 FCC Rcd 17093, 17105–06 (CSB, 1999); *EchoStar Commc'ns Corp.* v. *Comcast Corp.,* 14 FCC Rcd 2089, 2102 (CSB, 1999); *Dakota Telecom, Inc.* v. *CBS Broad., Inc.,* 14 FCC Rcd 10500, 10507–08 (CSB, 1999); *DIRECTV, Inc.* v. *Comcast Corp.,* 13 FCC Rcd 21822, 21837 (CSB, 1998). The Cable Services Bureau qualified these statements, however, by explaining that Section 628(b) may not be used "without more," "standing alone," or "on a per se basis" against conduct that is permitted under Section 628(c). *See Everest Midwest Licensee,* 18 FCC Rcd at 26683–84; *RCN,* 14 FCC Rcd at 17105–06; *EchoStar,* 14 FCC Rcd at 2103; *Dakota Telecom,* 14 FCC Rcd at 10507–08; *DIRECTV,* 13 FCC Rcd at 21838; *see also American Cable Co.* v. *TeleCable of Columbus, Inc.,* 11 FCC Rcd 10090, 10117 (CSB, 1996). In other words, complainants under Section 628(b) are required to show that a covered entity has engaged in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent an MVPD from providing satellite programming to consumers. Our holding today is consistent with that understanding.

38. Moreover, staff-level decisions are not binding on the Commission. *See Comcast Corp.* v. *FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008). The Commission itself has specifically held that unfair acts involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b). *See RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 16 FCC Rcd 12048, 12053 (2001) ("[T]here may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming. However, we agree with the Bureau that the facts alleged are not sufficient to constitute such a violation here."); *DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802, 22807 (2000) (same), *aff'd sub nom. EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002); *1996 OVS Order,* 11 FCC Rcd at 18325 ("[W]e do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."). In any event, to the extent prior decisions could be read as precluding the consideration of program access complaints involving terrestrially delivered, cable-affiliated programming under Section 628(b), we reject that view. Section 628(b), by its plain language, allows the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis where the other elements of Section 628(b) are satisfied.

39. The legislative history of the 1992 Cable Act also is consistent with our decision to adopt rules addressing unfair acts involving terrestrially delivered, cable-affiliated programming. For example, the Conference Report on Section 628 specifically states an expectation that the Commission will "address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies." H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273; *see also MDU Order.* The Conference Report further indicates "that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable." H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273. The action we take today fulfills this Congressional mandate by providing a process by which unfair acts involving terrestrially delivered, cable-affiliated programming may be addressed, thereby fostering competition in the video distribution market.

40. We recognize that the Senate version of what became Section 628(c)(2) would have pertained to all programmers, including those that provide terrestrially delivered programming, but that language was, without explanation, removed in the final version of the bill. The Senate version of the legislation that became Section 628(c)(2) would have applied the program access provisions to all "national and regional cable programmers who are affiliated with cable operators." H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91–93, *reprinted in* 1992 U.S.C.C.A.N. at 1273–75; *see also* S. Rep. No. 102–92 (1991), at 64, 77–78, 121–22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1197, 1210–11. The House amendment, by contrast, expressly limited the provisions to "satellite cable programming vendor[s] affiliated with a cable operator." *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91–93, *reprinted in* 1992 U.S.C.C.A.N. at 1273–75. The Conference agreement adopted the House version with amendments. *See id.*

41. Contrary to the claims of cable operators, however, we do not find this unexplained change in Section 628(c)(2) relevant in determining Congress' intent with respect to Section 628(b)'s broadly worded prohibition. *See, e.g., Drummond Coal Co.* v. *Watt,* 735 F.2d 469, 474 (11th Cir. 1984) ("Unexplained changes made in committee are not reliable indicators of congressional intent."), *quoted in Save Our Cumberland Mountains, Inc.* v. *Lujan,* 963 F.2d 1541, 1548 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 911 (1993); *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." (citation omitted)); *see also Mead Corp.* v. *Tilley,* 490 U.S. 714, 723 (1989).

42. The change related specifically to the minimum contents of the program access rules that were required to be issued under Section 628(c)(2). Congress did not make any similar limiting amendment to Section 628(b) during its deliberations in 1992, and the inclusive language of Section 628(b) therefore is controlling here, just as it was in the *MDU Order.* Removal of the references to all "national and regional cable programmers" in the final version of the bill relate to Section 628(c)(2), which is thus expressly limited to satellite-delivered programming. We do not believe that this change to Section 628(c)(2) indicates a Congressional intent to limit the broad statutory language of Section 628(b), which contains no such limitation. We find no significance in earlier characterizations of the legislative history, such as that presented in the *2002 Program Access Order,* which viewed the removal of terrestrially delivered programming from the final version of the bill as an "express decision by Congress to limit the scope of the program access provisions to satellite delivered programming." Those discussions were considering the scope of Section 628(c)(2), not Section 628(b), and thus did not address the issue we address here.

43. AT&T contends that Congress chose the term "satellite cable programming" because Congress was unaware of, and thus had no reason to consider, unfair acts involving terrestrially delivered programming. While Comcast notes some examples of terrestrially delivered programming that existed at the time the 1992 Cable Act was drafted, we agree with AT&T's broader point that "there is nothing to suggest that the phrase 'satellite cable programming' was anything other than a statement of the nature of the specific problem to be addressed at that time," and that Congress could not be expected to predict future trends in programming delivery.

B. The Need for Commission Action to Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

44. Having established that we possess authority to address unfair acts involving terrestrially delivered, cable-affiliated programming, in this Section we discuss whether there is a need for such action. As discussed below, we find three reasons for taking action in this area: (i) Cable operators continue to have an incentive and ability to engage in unfair acts or practices involving their affiliated programming, regardless of whether this programming is satellite-delivered or terrestrially delivered; (ii) our judgment regarding this incentive and ability is supported by real-world evidence that vertically integrated cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors; and (iii) there is evidence that, in some cases, this withholding may significantly hinder MVPDs from providing satellite cable programming and satellite broadcast programming to subscribers.

1. Incentive and Ability to Engage in Unfair Acts

45. Cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market. *See 2007 Program Access Order* (concluding that vertically integrated cable operators continue to have the ability to withhold affiliated programming from competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent extension of the ban on exclusive contracts); *see also id.* (concluding that vertically integrated cable operators continue to have the incentive to withhold affiliated programming from competitive MVPDs); *Adelphia Order,* 21 FCC Rcd at 8271; *2002 Program Access Order.* This incentive and ability do not vary based on whether the cable-affiliated programming is delivered to cable operators by satellite or by terrestrial means. A vertically integrated cable operator may raise the costs of its MVPD competitors by increasing the price of its affiliated programming or may choose not to sell its affiliated programming to rival MVPDs. This strategy is commonly referred to as the "raising rivals' costs" theory. *See Adelphia Order,* 21 FCC Rcd at 8256 (citing Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach,* 63 Antitrust L.J. 513, 523–27 (1995)); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209, 234–38 (1986). As the Commission noted in the *Adelphia Order,* "the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete." 21 FCC Rcd at 8256.

46. Unfair acts involving cable-affiliated programming may harm the ability of MVPDs to compete with incumbent cable operators, thereby resulting in less competition in the marketplace to the detriment of consumers. For example, the Commission has noted previously that, although competitors have entered the video distribution market, there is evidence that cable prices have risen in excess of inflation. *See 2007 Program Access Order* (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Cable Industry Prices, 21 FCC Rcd 15087, 15087–88 (2006)); *see also Cable Price Report,* 24 FCC Rcd 259, 260 (MB, 2009) (concluding that from 1995 to 2008, the price of expanded basic service has grown from $22.35 to $49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period).

47. In the *2007 Program Access Order,* the Commission analyzed the incentive and ability of cable operators and their affiliates to engage in one type of unfair act—withholding of affiliated programming from rival MVPDs. If the vertically integrated cable operator engages in withholding, it can recoup profits lost at the upstream level (*i.e.,* by licensing programming) by increasing the number of subscribers of its downstream MVPD division. *See Adelphia Order,* 21 FCC Rcd at 8256; *see also 2007 Program Access Order; 2002 Program Access Order.* The Commission explained that, particularly "where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy." *2007 Program Access Order.* Although the cable

industry's share of MVPD subscribers nationwide has decreased since the 1992 Cable Act was passed, the Commission in the *2007 Program Access Order* concluded that the cable industry's 67 percent share of MVPD subscribers nationwide remained sufficient to enable vertically integrated cable firms to make withholding a profitable strategy. There is no evidence in this proceeding that market shares have changed materially since that time. To the contrary, the cable industry has elsewhere stated that its share of MVPD subscribers nationwide has declined only slightly since the *2007 Program Access Order,* to approximately 63.5 percent at the end of 2008. Moreover, the Commission observed that the regional market shares of cable operators sometimes exceed the national average. This makes withholding of local and regional programming, which is often terrestrially delivered and therefore beyond the reach of the program access rules, potentially an even more profitable strategy. *See 2007 Program Access Order* ("the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming").

48. NCTA and Comcast state that cable operators are losing subscribers to competitors. CA2C disagrees, noting that "major cable operators dominate" the MVPD market, with regional market shares of 65 percent to 90 percent. Based on data from Nielsen Media Research, as of July 2009, the share of MVPD subscribers held by wired cable operators exceeds 70 percent in 78 out of 210 DMAs. *See* DMA Household Universe Estimates July 2009: Cable And/Or ADS (Alternate Delivery Systems), *http://www.tvb.org/nav/build_frameset.asp* (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink). These include 27 of the Top 50 most-populated DMAs and the following 13 of the Top 20 most-populated DMAs: New York (No. 1; 88.5 percent cable market share); Chicago (No. 3; 77.1 percent cable market share); Philadelphia (No. 4; 83 percent cable market share); San Francisco-Oakland-San Jose (No. 6; 72.9 percent cable market share); Boston (No. 7; 87.5 percent cable market share); Washington, DC (No. 9; 72.2 percent cable market share); Detroit (No. 11; 76.3 percent cable market share); Tampa-St. Pete (No. 13; 84.2 percent cable market share); Seattle (No. 14; 78.9 percent cable market share); Minneapolis-St. Paul (No. 15; 70.3 percent cable market share); Miami-Ft. Lauderdale (No. 16; 70.4 percent cable market share); Cleveland-Akron (No. 17; 77.1 percent cable market share); Orlando (No. 19; 76.7 percent cable market share). We note that the data refer to the market share held by "wired cable operators," and thus reflect market share data for incumbent cable operators as well as cable overbuilders. Given the minimal market share held by overbuilders, however, we believe the data provide a useful estimate of the market share held by incumbent cable operators. *See 13th Annual Report,* 24 FCC Rcd 542, 591 and 684, Table B–1 (2009) (concluding that broadband service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers). While Cox notes that it has met the "effective competition" test in certain markets, that test is not relevant here. The Media Bureau's review of data from Cox's effective competition petitions indicated that the DBS penetration rates in nine out of 54 San Diego franchise areas served by Cox exceeded 15 percent, and that a local exchange carrier ("LEC") offered service in other franchise areas. *See Cox Communications San Diego: Petition for Determination of Effective Competition in 27 Communities in California,* 23 FCC Rcd 7106, 7110–11, App. A, B (MB, 2008). These numbers do not demonstrate that the entire San Diego DMA is competitive nor that this level of competition deprives cable operators of the incentive to withhold or to take other anticompetitive actions with their affiliated programming.

49. The Commission has also found that the grouping of commonly owned cable systems into regional clusters enhances the ability and incentive of vertically integrated cable firms to engage in unfair acts with their affiliated programming. *See 2007 Program Access Order.* Recent data indicates that over 77 percent of cable subscribers are served by systems that are part of regional clusters. *See 13th Annual Report,* 24 FCC Rcd at 684 (Table B–1) and 686 (Table B–2). In the *2007 Program Access Order,* the Commission relied on data indicating that the percentage of cable subscribers that are served by systems that are part of regional clusters was between 85 and 90 percent. Commenters explain that clustering of a cable operator's systems makes terrestrial delivery of affiliated regional programming more feasible. And the Commission has previously demonstrated through empirical analyses that clustering enhances the potential profitability of withholding regional programming from rival distributors. *See 2007 Program Access Order* ("[I]n many cities where cable [multiple system operators ("MSOs")] have clusters, the market penetration of competitive MVPDs is much lower and cable market penetration is much higher than their nationwide penetration rates. . . . As a result, the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming. Moreover, the affiliated cable operator will obtain a substantial share of the benefits of a withholding strategy because its share of subscribers within the cluster is likely to be inordinately high."); *see id.* (concluding that withholding of an RSN would be profitable in a significant range of cases).

50. The Commission has also concluded that the recent emergence of new wireline entrants in the video distribution market enhances the incentive of incumbent cable operators to engage in unfair acts with their affiliated programming. *See id.* Data indicate that DBS operators do not constrain the price of cable service to the extent that wireline MVPDs do, thereby implying that incumbent cable operators perceive wireline MVPDs as a more significant competitive threat. *See Cable Price Report,* 24 FCC Rcd at 261. In addition, unlike DBS operators, wireline MVPDs can offer combinations of video, voice, and data services similar to those that incumbent cable operators offer to customers (the "triple play"), thus posing a greater competitive threat than DBS to cable operators. (The Commission has noted a "shift from competition between stand-alone services to that between service bundles." *See Promotion of Competitive Networks in Local Telecommunications Markets,* Report and Order, 23 FCC Rcd 5385, 5388–89 (2008). Although DBS operators offer triple play packages to their customers, they partner with outside vendors to do so.) Moreover, because recent wireline entrants have relatively small subscriber bases in most areas at this time, withholding affiliated programming from these new entrants would not cause programmers to lose a significant current source of revenue. *See 2007 Program Access Order* ("Because recent entrants have minimal subscriber bases at this time, the costs that a cable-affiliated programmer would incur from withholding programming from recent entrants are negligible."); *see also 13th Annual Report,* 24 FCC Rcd at 591 and 684, Table B–1 (concluding that broadband

service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers).

51. In the *2007 Program Access Order,* the Commission noted the argument that, because of the non-discrimination provision of the program access rules, a vertically integrated programmer that withholds programming from one competitive MVPD in a market (such as a new entrant with a minimal subscriber base) would generally need to withhold the programming from all other competitive MVPDs in the market (such as an established competitor with a significant number of subscribers), thereby increasing the foregone revenues resulting from a withholding strategy. This condition does not apply in the case of terrestrially delivered, cable-affiliated programming, however, because the program access rules do not currently apply to this programming. Thus, the non-discrimination provision of the program access rules applicable to satellite-delivered, cable-affiliated programming does not preclude a vertically integrated programmer from withholding its terrestrially delivered programming from a new entrant in a market but providing the same programming to established competitors in the market. Moreover, even if the non-discrimination rule applied to terrestrially delivered, cable-affiliated programming, the Commission nonetheless found in the *2007 Program Access Order* that this rule would not deter withholding because the long-term benefits to the vertically integrated cable operator would outweigh any short-term costs.

2. Evidence of Unfair Acts

52. Our judgment that cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming, including terrestrially delivered programming, is supported by real-world evidence. Because the program access rules currently apply only to satellite-delivered programming, terrestrial distribution allows a cable-affiliated programmer to bypass the program access rules. The record here, as well as our discussion in the *2007 Program Access Order,* reflects substantial evidence that cable firms withhold affiliated programming from competitors when not barred from doing so. Moreover, the record reflects that terrestrial distribution is becoming more cost effective, and that its use is likely to continue and possibly increase in the future. Below, we provide several examples of withholding of terrestrially delivered, cable-affiliated programming. Although we provide examples of terrestrially delivered, cable-affiliated programming networks that have been withheld from competitive MVPDs, we do not conclude in this *Order* that the withholding of any of these networks is currently significantly hindering or preventing any MVPD from providing satellite cable programming or satellite broadcast programming in violation of Section 628(b). Rather, that would be a point of fact to be proven or rebutted in each case. As discussed below, we will consider on a case-by-case basis whether an unfair act involving terrestrially delivered, cable-affiliated programming is significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming.

53. *HD Feeds of MSG and MSG+.* Cablevision has withheld the terrestrially delivered HD feeds of its affiliated MSG and MSG+ RSNs from certain competitors in New York City, Buffalo, and Connecticut. *See 2007 Program Access Order.* Consumers Union states that, even though Cablevision does not provide cable service in Buffalo, Cablevision has "chosen to make this content available only to select MVPDs and has denied access to Verizon."

54. *Cox-4 San Diego.* Cox has withheld the terrestrially delivered Cox-4 channel, which has exclusive rights to the San Diego Padres baseball games, from DIRECTV, EchoStar, and AT&T. *See 2007 Program Access Order.* As discussed above, the Media Bureau has denied without prejudice a program access complaint regarding access to this programming because (i) there is no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b); and (ii) the pending rulemaking, rather than an adjudicatory proceeding, is the correct forum for addressing this issue. *See AT&T* v. *Coxcom,* 24 FCC Rcd at 2864.

55. *Comcast SportsNet Philadelphia.* Comcast has withheld this terrestrially delivered RSN, which carries regional professional sports programming in Philadelphia, from DBS firms. *See Adelphia Order,* 21 FCC Rcd at 8276; *see also 2007 Program Access Order.* This RSN was the subject of previous program access complaints, which were denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) there were not sufficient facts alleged to find that Comcast delivered the programming terrestrially to evade the program access rules. *See DIRECTV, Inc.* v. *Comcast Corp.,* 13 FCC Rcd 21822 (CSB, 1998) and *EchoStar Commc'ns Corp.* v. *Comcast Corp.,* 14 FCC Rcd 2089 (CSB, 1999), *aff'd., DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802 (2000), *aff'd EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002). As a result of merger conditions adopted in the *Adelphia Order,* Comcast SportsNet Philadelphia is currently subject to the program access rules applicable to satellite-delivered programming with respect to some but not all of the competing MVPDs in Philadelphia. *See Adelphia Order,* 21 FCC Rcd at 8276 ("[W]e do not require that Comcast SportsNet Philadelphia be subject to [the program access] conditions to the extent it is not currently available to MVPDs. With regard to MVPDs that currently have contracts for SportsNet Philadelphia, both the program access and arbitration conditions will apply as set forth above.").

56. *Sports Programming in New York City.* The Commission previously noted evidence that Cablevision withheld certain sports programming from RCN after Cablevision revised its distribution system from satellite to terrestrial delivery. *See 2007 Program Access Order.* RCN's program access complaint regarding this dispute was denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) Cablevision did not change its distribution system from satellite to terrestrial delivery to evade the Commission's rules. *See RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 14 FCC Rcd 17093 (CSB, 1999), *aff'd RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 16 FCC Rcd 12048 (2001).

57. *New England Cable News.* The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated regional news network had been withheld temporarily from RCN. *See 2007 Program Access Order.*

58. *CN8—The Comcast Network.* The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated local news and information channel is available only to Comcast and Cablevision subscribers and is withheld from competitors to incumbent cable operators. *See id.*

59. *iN DEMAND.* The Commission previously noted claims that this terrestrially delivered, cable-affiliated network has been withheld from certain MVPD competitors. *See id.*

3. Evidence of the Impact of Unfair Acts

60. As discussed below, Commission action to address unfair acts involving

terrestrially delivered, cable-affiliated programming is also needed because (i) there is evidence suggesting that such conduct has significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming in some cases and (ii) by significantly hindering MVPDs from providing video programming to subscribers, such conduct may significantly hinder the ability of competitive MVPDs to provide broadband services, particularly in rural areas.

a. Impact on Competition in the Video Distribution Market

61. Our previous decisions, as well as the record here, demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming may "hinder significantly" MVPDs from providing satellite cable programming and satellite broadcast programming in some cases, thereby harming competition in the video distribution market. *See 2007 Program Access Order; Adelphia Order,* 21 FCC Rcd at 8271. We note that AT&T and Verizon have submitted studies (some of which contain redacted information) and other evidence in the record of this proceeding to support their view that withholding of the MSG HD and Cox-4 networks has had the purpose or effect that triggers Section 628(b). These studies and other evidence were submitted previously in pending complaint proceedings. We will assess the merits of those studies and other evidence in addressing the relevant complaints.

62. In 2006, the Commission performed a regression analysis which concluded that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been. *See Adelphia Order,* 21 FCC Rcd at 8271; *see also 2007 Program Access Order.* The regression analysis also concluded that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than it otherwise would have been. *See Adelphia Order,* 21 FCC Rcd at 8271; *2007 Program Access Order.* This provides evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming.

63. The empirical model was based on the Wise and Duwadi model, which examines DBS penetration and the variables that affect it. *See* Andrew S. Wise and Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks,* 1 J. COMPETITION L. & ECON. 679 (2005). The data used in the analysis came from the Commission's 2005 Cable Price Survey, Nielsen Media Research, and Comcast and Time Warner filings. *See Adelphia Order,* 21 FCC Rcd at 8344–47, App. D. In the *2007 Program Access Order,* the Commission responded to and refuted criticisms of the Commission's regression analysis.

64. We note that more than three years have passed since the Commission performed its regression analysis in the *Adelphia Order* regarding the impact of withholding of Comcast SportsNet Philadelphia and Cox-4 on the market shares of DBS operators in Philadelphia and San Diego, respectively. Commenters claim that there have been important developments in the video distribution markets in Philadelphia and San Diego since this time. Our reliance here on the Commission's analysis in the *Adelphia Order* to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming can significantly hinder MVPDs from providing video service in some cases should not be read to imply that withholding of Comcast SportsNet Philadelphia or Cox-4 is currently significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming in Philadelphia or San Diego, respectively. Rather, as discussed below, we establish a rebuttable presumption that an unfair act involving certain terrestrially delivered, cable-affiliated RSNs has the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. A defendant to a program access complaint alleging an unfair act involving an RSN will have the opportunity to rebut this presumption.

65. While the Commission concluded in the *1998 Program Access Order* (63 FR 45740, August 27, 1998) that the record developed in that proceeding did not demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming were having a "significant anticompetitive effect," that conclusion was based on the limited data that were available more than ten years ago. (In that decision, the Commission also noted that Congress was considering legislation at the time which, if enacted, would "introduce important changes to the program access provisions, including clarification of the Commission's jurisdiction over terrestrially-delivered programming." The Commission, however, never stated or implied that it did not have jurisdiction over such programming absent such clarification.) We now have evidence that unfair acts involving terrestrially delivered, cable-affiliated programming may well have the effect in some cases of significantly hindering MVPDs from providing all programming to subscribers and consumers. Moreover, while the Commission concluded in the *1998 Program Access Order* that the record developed in that proceeding did not demonstrate that programming was being shifted from satellite to terrestrial delivery, the record here demonstrates that the MVPD marketplace has evolved, such that terrestrial distribution is becoming more cost effective and its use is likely to increase for new as well as established programming networks. Indeed, the record reflects that competitively significant networks, such as RSNs, are being delivered terrestrially today.

66. Comcast argues that the percentage of vertically integrated programming networks affiliated with a cable operator has dropped from 57 percent in 1992 to less than 15 percent today and contends that no program owner has market power. Moreover, cable operators contend that the digital transition will likely foster the development of more programming and that Internet programming is starting to develop as a competitive alternative. In addition, NCTA notes that competitors to incumbent cable operators market themselves as offering superior programming, and contends that such marketing undermines any justification for "retention of the existing regulation of cable-affiliated programming, let alone expansion of those regulations."

67. Accordingly, vertically integrated cable operators argue that MVPDs are not dependent on vertically integrated cable programming because multiple programming options exist. But that is not always the case. As the Commission concluded in the *2007 Program Access Order,* cable operators own programming for which there may be no good substitutes, and this "must-have" programming is necessary for viable competition in the video distribution market. The Commission explained that this includes both satellite-delivered and terrestrially delivered programming. *See 2007 Program Access Order* (discussing withholding of terrestrially delivered, cable-affiliated RSNs in Philadelphia and San Diego). As the

Commission stated in the *2002 Program Access Order,* "cable programming—be it news, drama, sports, music, or children's programming—is not akin to so many widgets." The salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators, but rather the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service. *See 2007 Program Access Order.*

68. Cable operators claim that unfair acts involving terrestrially delivered, cable-affiliated programming have not significantly hindered their competitors from providing satellite cable programming or satellite broadcast programming. For example, some commenters note that DBS operators continue to attract subscribers in San Diego and Philadelphia, despite the fact that cable operators in those markets have withheld the local RSN from the DBS operators. Cox and Cablevision also note that competitors to incumbent cable operators have entered the video distribution market despite the terrestrial loophole. Other commenters contend that withholding of certain terrestrially delivered, cable-affiliated programming, such as local news and community programming, does not raise competitive concerns. One new entrant MVPD, Verizon, urged the Commission to extend the program access rules only to (i) terrestrially delivered RSNs; and (ii) terrestrially delivered HD feeds of programming that is otherwise satellite-delivered.

69. We believe that the cable operators' general, sweeping claims are refuted by the Commission's conclusion in the *Adelphia Order* that DBS market penetration was significantly reduced as a result of the denial of access to certain terrestrially delivered, cable-affiliated programming. *See 2007 Program Access Order; Adelphia Order,* 21 FCC Rcd at 8271. We do not believe, however, that significant hindrance will result in every case. The Commission concluded in the *Adelphia Order,* based on the record evidence in that case, that lack of access to certain terrestrially delivered RSNs had a significant competitive impact. *See* 21 FCC Rcd at 8271 (concluding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; concluding that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been); *see also 2007 Program Access Order.* Lack of access to certain other programming, however, did not have a significant hindering effect. *See Adelphia Order,* 21 FCC Rcd at 8271–72 (concluding that withholding of a terrestrially delivered RSN in Charlotte did not show a statistically significant effect on predicted market share, and noting that the RSN showed the games of the Charlotte Bobcats, a relatively new team that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs); *id.* at 8279 (concluding that the record did not indicate that an MVPD's lack of access to terrestrially delivered non-sports regional programming would harm competition or consumers).

70. Thus, we believe that the potential impact on competition in some cases justifies a case-by-case consideration of the competitive impact of unfair acts involving specific terrestrially delivered, cable-affiliated programming. Rather than adopting a general conclusion about the effect of these unfair acts, we believe that case-by-case consideration of the impact on competition in the video distribution market is necessary to address whether unfair practices significantly hinder competition in particular cases.

71. We note that the Commission adopted a different approach in the *MDU Order,* where it concluded that it would be unnecessarily burdensome for the Commission and parties to assess exclusive contracts between cable operators and MDU owners on a case-by-case basis. In that case, however, the Commission explained that "exclusivity clauses protect cable operators from competition in MDUs from new entrants into the MVPD business." By definition, exclusive agreements in the MDU context prevent competitors from providing service. *See also NCTA,* 567 F.3d at 664 ("cable operators execute them precisely so that they can be the sole company serving a building. . ."). Thus, the Commission categorically proscribes such agreements. In contrast, while some unfair acts involving terrestrially delivered, cable-affiliated programming can and historically have significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming, the record here indicates that others may not. Accordingly, a case-by-case approach to implementing Section 628(b) is necessary in the present context based on the current record, whereas it was not necessary in the *MDU Order.* We note, however, that on an appropriate record the Commission would have authority to adopt a per se ban on particular unfair acts prohibited by Section 628(b). *See* 47 U.S.C. 548(b), (c)(1); *NTCA,* 567 F.3d 659. Nothing in this *Order* forecloses the Commission from adopting such a per se ban on unfair acts involving terrestrially delivered, cable-affiliated programming in the future. We will continue to monitor marketplace developments regarding terrestrially delivered, cable-affiliated programming, as well as the impact of the rules adopted in this *Order* on potential complainants. Based on these developments, we may initiate a new proceeding in the future that explores the adoption of a per se ban on unfair acts involving terrestrially delivered, cable-affiliated programming or certain classes of such programming.

b. Impact on Ability To Provide Broadband Services

72. Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming will have additional benefits, not specifically envisioned by Congress in 1992, because such acts have the potential to limit the ability of MVPDs to provide broadband services, particularly in rural areas. The Commission has previously concluded that a wireline firm's decision to deploy broadband is linked to its ability to offer video. *See Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132–33 (2006), *aff'd., Alliance for Community Media* v. *FCC,* 529 F.3d 763 (6th Cir. 2008). Thus, by impeding the ability of MVPDs to provide video service, unfair acts involving terrestrially delivered, cable-affiliated programming can also impede the ability of MVPDs to provide broadband services. Allowing unfair acts involving terrestrially delivered, cable-affiliated programming to continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission. *See* Telecommunications Act of 1996, Public Law 104–104, section 706, 110 Stat. 56, 153 (codified at 47 U.S.C. 157 note). This secondary

effect heightens the urgency for Commission action.

73. We disagree with Cablevision's contention that addressing the terrestrial loophole will not impact broadband deployment because AT&T and Verizon have already invested in broadband infrastructure. The record here contains no evidence that AT&T and Verizon have already deployed broadband networks throughout their service territories or that these providers will not face decisions regarding whether to upgrade existing networks. Moreover, Congress directed the Commission to promote the deployment of broadband throughout the nation, including in markets outside of the service areas of AT&T and Verizon. *See* American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009) (authorizing the Commission to create the National Broadband Plan that "shall seek to ensure that all people of the United States have access to broadband capability"); Telecommunications Act of 1996, Public Law 104–104, section 706, 110 Stat. 56, 153 (codified at 47 U.S.C. 157 nt. (2008)) (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

c. Impact on Investment in Programming and Product Differentiation

74. Vertically integrated cable operators argue that the Commission should refrain from addressing denials of terrestrially delivered, cable-affiliated programming because exclusive distribution contracts for this programming can promote investment in programming and product differentiation. Advance/Newhouse notes that it has developed regional non-sports programming that is terrestrially delivered and therefore not subject to the program access rules applicable to satellite-delivered programming. Advance/Newhouse states that its affiliated cable operators offer this programming exclusively, thereby differentiating their service offerings from MVPD competitors. Advance/Newhouse contends that applying program access requirements to this programming would force its affiliated cable operators to share this programming with their competitors, thereby eliminating any economic incentive to create this programming. Advance/Newhouse states that it is unlikely to continue investing in such programming unless its affiliated cable operators can offer the programming on an exclusive basis.

75. We note that the Commission in the *2007 Program Access Order* found unpersuasive arguments that the program access rules, including the exclusive contract prohibition, have reduced the incentives for cable operators and competitive MVPDs to create and invest in programming. While cable operators claim without empirical support that regional networks are less likely to be created if they are subject to the complaint procedure established in this *Order,* we find no basis for assuming that the impact of the case-by-case approach adopted here on the incentives to create programming will be different than the impact of the per se rule applicable to satellite-delivered programming. The Commission noted that the number of vertically integrated satellite-delivered national programming networks has in fact more than doubled since 1994 when the rule implementing the exclusive contract prohibition took effect. *See 2007 Program Access Order.* While evidence was submitted in that proceeding that the percentage of vertically integrated satellite-delivered national programming networks had decreased over time, competitive MVPDs characterized the decrease as "meaningless because it is attributable to an increase in the number of total programming networks available, most of which they contend have minimal subscriber bases and are targeted towards niche markets." *See id.* Competitive MVPDs argued that the more relevant fact was the control of cable MSOs over "must have" programming, access to which is necessary to compete in the video distribution market. *See id.* The Commission agreed: "What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace." *See id.* A similar analysis applies to the present matter, given our goal of increasing competition and diversity in the video distribution market. In addition, while vertically integrated cable operators claim that exclusive deals and other unfair acts are justified because they allow a cable operator to differentiate its services from other MVPDs, Section 628(b) specifically precludes such acts where they have the purpose or effect set forth in Section 628(b).

76. In sum, Sections 628(b) and 628(c)(1) of the Act give the Commission authority to address unfair acts of cable operators that have the purpose or effect of hindering significantly or preventing any MVPD from providing "satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. 548(b); *see* 47 U.S.C. 548(c)(1). The focus of the statute is not on the ability of an MVPD to provide a particular terrestrially delivered programming network, but on the ability of the MVPD to compete in the video distribution market by selling satellite cable and satellite broadcast programming to subscribers and consumers. To be sure, unfair acts involving terrestrially delivered, cable-affiliated programming generally do not absolutely bar an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. For example, an incumbent cable operator's exclusive contract with a terrestrially delivered, cable-affiliated RSN does not totally preclude a rival MVPD from providing other programming, including satellite cable programming and satellite broadcast programming, to subscribers or consumers.

77. As discussed above, however, in some cases the effect of denying an MVPD the ability to provide certain terrestrially delivered, cable-affiliated programming may be to significantly hinder the MVPD from providing video programming in general, including satellite cable programming and satellite broadcast programming, as well as terrestrially delivered programming. *See 2007 Program Access Order; Adelphia Order,* 21 FCC Rcd at 8271. The result of this conduct may be to discourage MVPDs from entering new markets or to limit the ability of MVPDs to provide a competitive alternative to the incumbent cable operator. The reduction in robust competition in the video distribution market that results may allow cable operators to raise rates and to refrain from innovating, thereby adversely impacting consumers. Consumers Union, for instance, asserts that large cable operators use the terrestrial loophole "to hold consumers hostage * * *." This is consistent with the Commission's analysis in the *MDU Order.* In that decision, the Commission found that exclusivity clauses significantly hinder MVPDs from providing satellite cable programming and satellite broadcast programming throughout a market, including to subscribers who do not reside in MDUs, because exclusivity clauses "deter[ ]

new entry into the MVPD market in many areas because they put a significant number of new customers off limits to new entrants." *MDU Order* ("Even if exclusivity clauses do not completely bar new entrants from the MVPD market everywhere, they foreclose new entrants from many millions of households, a significant part of the national marketplace. Such clauses could therefore deter new entrants from attempting to enter the market in many areas.").

78. In addition to satisfying the plain language of Section 628(b), our action here will also further the goals established by Congress in Sections 628(a) and 628(c)(1) of the Act. *See* 47 U.S.C. 548(a), (c)(1); *1993 Program Access Order,* 8 FCC Rcd at 3360. First, our action will increase competition and diversity in the video distribution market by providing MVPDs with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer. *See* 47 U.S.C. 548(a), (c)(1). Second, our action will increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and unserved areas by eliminating a barrier to entry in the video distribution market. *See* 47 U.S.C. 548(a). Third, our action will spur the development of communications technologies by promoting the provision of broadband services by MVPDs. *See* 47 U.S.C. 548(a), (c)(1).

C. Constitutional Issues

79. We conclude that addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. As the D.C. Circuit explained in rejecting a facial challenge to the constitutionality of the program access provisions dictated by Section 628(c)(2) and applicable to satellite-delivered, cable-affiliated programming, these provisions will survive intermediate scrutiny if they "further[ ] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Time Warner Entertainment Co. L.P.* v. *FCC,* 93 F.3d 957, 978 (D.C. Cir. 1996) (quoting *Turner Broadcasting System, Inc.* v. *FCC,* 512 U.S. 622, 662 (1994) (quoting *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968))). We conclude that the rules we adopt today with respect to terrestrially delivered, cable-affiliated programming comport with the First Amendment.

80. First, in *Time Warner,* the court found that the governmental interest Congress intended to serve in enacting the program access provisions was "the promotion of fair competition in the video marketplace," and that this interest was substantial. *Id.* Moreover, one of Congress' express findings in enacting the 1992 Cable Act was that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 1992 Cable Act, § 2(a)(6). Additionally, the court noted Congress' conclusion that "the benefits of these provisions—the increased speech that would result from fairer competition in the video programming marketplace—outweighed the disadvantages [resulting in] the possibility of reduced economic incentives to develop new programming." *Time Warner,* 93 F.3d at 979 (citing S. Rep. No. 102–92 (1991), at 26–28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159–61). We find that this governmental interest remains substantial today. As the Commission concluded in the *2007 Program Access Order,* cable operators still have a dominant share of MVPD subscribers, there is evidence that cable prices have risen in excess of inflation, and cable operators still own significant programming. These factors lead us to believe that regulations intended to promote competition in the video distribution market in accordance with the objectives of Congress are still warranted. Our decision here furthers this substantial governmental interest by providing competitive MVPDs with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer, thereby promoting competition in the video distribution market for the benefit of consumers.

81. We note that a federal court of appeals in recently vacating the Commission's horizontal cable ownership cap stated that competition has increased in the video distribution market since the 1992 Cable Act was passed. *See Comcast Corp.* v. *FCC,* 579 F.3d 1, 8 (D.C. Cir. 2009). While competition has increased since the 1992 Cable Act was passed, cable operators still control close to two-thirds of all pay television subscribers, and their market share exceeds 70 percent in many markets. Accordingly, we believe that promoting competition in the video marketplace remains a substantial governmental interest. *See 2007 Program Access Order.*

82. Second, in *Time Warner,* the court held that the governmental objective served by the statutory program access provisions was unrelated to the suppression of free expression. *See* 93 F.3d at 978 ("[T]he vertically integrated programming provisions apply to only a limited number of companies for a perfectly legitimate reason: The antitrust concerns underlying the statute arise precisely because the number of vertically integrated companies is small. The vertically integrated programmer provisions are thus not 'structured in a manner that raise[s] suspicions that their objective was, in fact, the suppression of certain ideas.' " (*quoting Turner,* 512 U.S. at 660)). Similarly, our decision to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis is not based on programming content but is instead intended to address significant hindrances to competition in the video distribution market. It responds to concerns about competition, not content. Thus, the regulations are content-neutral and unrelated to the suppression of free speech.

83. Third, any alleged restriction on speech resulting from our decision "is no greater than is essential to the furtherance" of Congress' interest in promoting competition in the video distribution market. *Id.* The analysis in *Time Warner* applies here as well. Indeed, *Time Warner* upheld as narrowly tailored the categorical, prophylactic program access rules, whereas here we adopt a tailored case-by-case approach that examines actual competitive harms in each instance. Noting the Commission's decision in the *2007 Program Access Order,* Comcast contends that applying an exclusive contract prohibition to all cable-affiliated programming is overinclusive because it regulates at least some programming that is not competitively significant. But that argument misconceives the action we take today. In the *2007 Program Access Order,* the Commission was implementing Section 628(c)(2)(D), which establishes a broad prophylactic rule that subjects all satellite-delivered, cable-affiliated programming to an exclusive contract prohibition, subject to a procedure whereby individual programmers can seek Commission approval to enter into exclusive arrangements. *See* 47 U.S.C. 548(c)(2)(D), 548(c)(4). Here, we are not implementing the statutory scheme set forth in Section 628(c)(2)(D). Rather, we act pursuant to Sections 628(b) and 628(c)(1), which give the Commission broad authority to adopt rules to address unfair acts of cable operators that have

the purpose or effect of hindering significantly any MVPD from providing satellite cable programming or satellite broadcast programming. *See* 47 U.S.C. 548(b), (c)(1). We decline to adopt a broad prophylactic rule that subjects all terrestrially delivered, cable-affiliated programming to the program access rules because we lack sufficient record evidence to reach general conclusions that unfair acts involving terrestrially delivered, cable-affiliated programming will always prevent or significantly hinder an MVPD from providing video services. Rather, we adopt rules whereby the Commission will consider on a case-by-case basis whether an unfair act involving terrestrially delivered, cable-affiliated programming has the purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers, as required by Section 628(b). The complaint process we establish today requires showings over and above those required by the program access rules applicable to satellite-delivered programming, and these additional showings (including a purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable or satellite broadcast programming) prevent overinclusiveness. In short, our action today addresses any legitimate concerns about tailoring by adopting a case-by-case evaluation rather than a broad prophylactic rule.

84. Again noting the Commission's decision in the *2007 Program Access Order,* Comcast contends that an exclusive contract prohibition that covers only cable-affiliated programming is underinclusive because it exempts programmers affiliated with non-cable MVPDs and unaffiliated programmers that may offer "must have" programming. We are in fact considering in this proceeding whether to expand the exclusive contract prohibition to apply to programmers affiliated with non-cable MVPDs. *See NPRM.* We do not resolve this issue in this *Order.* We also note that program-access-type conditions already apply to DIRECTV by virtue of its merger with Liberty Media. *See Liberty/DIRECTV Order,* 23 FCC Rcd 3265, 3340–41, Appendix B, section III (2008). Finally, with respect to unaffiliated programmers, the Commission in the *2007 Program Access Order* found no record evidence to conclude that exclusive arrangements involving unaffiliated programmers have harmed competition in the video distribution market. Commenters offer no evidence in the record of this proceeding that would cause us to revisit this conclusion. While some commenters express concern with DIRECTV's exclusive arrangements for certain out-of-market, non-regional sports programming, they fail to provide evidence in the record of this proceeding of any harm to competition resulting from these arrangements.

D. Complaint Filing Requirements

85. In this Section, we review the types of complaints that MVPDs may file regarding unfair acts involving terrestrially delivered, cable-affiliated programming pursuant to the rules we establish in this *Order.* The rules we adopt herein do not limit the right of aggrieved parties to file complaints pursuant to Section 628(d) alleging other violations of Section 628(b). *See* 47 U.S.C. 548(d). We also discuss below four related ways in which the rules we adopt to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming: (i) There is no per se prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; rather, the Commission will assess such contracts on a case-by-case basis in response to a program access complaint; (ii) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption, as explained below) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; (iii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides terrestrially delivered programming (rather than an entity specifically listed in Section 628(b)), the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; and (iv) defendants will have 45 days—rather than the usual 20 days—from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.

1. Types of Claims

86. Section 628(c)(1) gives the Commission authority to adopt regulations defining "particular conduct" that is within the scope of the "unfair methods of competition or unfair or deceptive acts or practices" prohibited by Section 628(b). 47 U.S.C. 548(b), (c)(1). In Section 628(c)(2), Congress itself defined certain conduct that must be included in the Commission's implementing regulations. Congress thereby made a conclusive legislative judgment that the categories of conduct involving satellite-delivered programming that are enumerated in Section 628(c)(2) satisfy the requirements of Section 628(b), including the requirement of constituting an "unfair method[] of competition or unfair or deceptive act[] or practice[]." 47 U.S.C. 548(b). The unfair or deceptive conduct that Congress specifically identified in Section 628(c)(2) is: (i) An exclusive contract between a cable operator and a cable-affiliated programmer (*see* 47 U.S.C. 548(c)(2)(C)–(D)); (ii) discrimination by a cable-affiliated programmer in the prices, terms, and conditions for sale of programming among MVPDs (*see* 47 U.S.C. 548(c)(2)(B)); and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to a competitor (*see* 47 U.S.C. 548(c)(2)(A)). In the *1993 Program Access Order,* the Commission explained that the undue or improper influence provision of the program access rules "can play a supporting role where information is available (such as might come from an internal 'whistleblower') that evidences 'undue influence' between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding. Although such conduct may be difficult for the Commission or complainants to establish, its regulation provides a useful support for direct discrimination and contracting regulation." *See* 8 FCC Rcd at 3424.

87. In this *Order,* we adopt rules specifically permitting complainants to pursue case-by-case claims involving conduct with respect to terrestrially delivered, cable-affiliated programming that is similar to the categorically prohibited conduct concerning satellite-delivered, cable-affiliated programming. We determine that this conduct constitutes "unfair methods of

competition or unfair or deceptive acts or practices" under Section 628(b). Congress has already established that these can be unfair acts for purposes of Section 628(b) by including them in Section 628(c)(2). The record here, moreover, indicates that these acts involving terrestrially delivered programming—like comparable acts involving satellite-delivered programming—have the potential to impede entry into the video distribution market and to hinder existing competition in the market. *See MDU Order.* We note that our determination here is consistent with the *MDU Order,* in which the Commission generally defined an "unfair method of competition or unfair act or practice" to include an act that "can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." *Id.* ("[A]lthough we have never specifically defined what constitutes an 'unfair method of competition' or 'unfair * * * act or practice' beyond that conduct specifically proscribed in Section 628(c)(2), we have recognized that there is additional conduct that could be proscribed under Section 628(b). * * * [T]he use of an exclusivity clause by a cable operator to 'lock up' a MDU owner is an unfair method of competition or unfair act or practice because it can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." (citations omitted)).

88. Cablevision asks the Commission to add an additional element to the definition of an "unfair act," specifically that the "conduct complained of was undertaken other than in pursuit of legitimate business or competitive purposes." The Commission did not include this additional element in the *MDU Order* when it previously defined the term "unfair act" for purposes of Section 628(b). In that decision, despite acknowledging that contracts granting cable operators exclusive access to MDUs may have legitimate business purposes, such as helping to obtain financing to wire an entire building, the Commission nonetheless concluded that such contracts are "unfair acts" because they "can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." *See id.*

89. We thus conclude that actions by cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendors involving terrestrially delivered, cable-affiliated programming that would be prohibited by the program access rules under Section 628(c)(2) but for the terrestrial loophole (*i.e.,* exclusive contracts, discrimination, and undue or improper influence) are "unfair methods of competition or unfair or deceptive acts or practices" within the meaning of Section 628(b). We note that there may be other acts or practices that are "unfair methods of competition or unfair acts or practices" under Section 628(b). *See, e.g., MDU Order* (holding that the use of an exclusivity clause by a cable operator to "lock up" an MDU owner is an unfair method of competition). This *Order* pertains only to exclusive contracts, discrimination, and undue or improper influence involving programming that is both terrestrially delivered and, consistent with Section 628(c)(2), cable-affiliated. We do not reach any conclusions in this *Order,* nor do we foreclose potential complaints, regarding other acts that may be "unfair methods of competition or unfair acts or practices" under Section 628(b). For example, the rules established by this *Order* do not address exclusive contracts between a cable operator and a non-cable-affiliated programmer.

90. Accordingly, an MVPD may initiate a complaint proceeding alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor has engaged in one or more of these three unfair acts involving terrestrially delivered, cable-affiliated programming, with the purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. Cable operators argue that a "cable operator" and a "satellite cable programming vendor" cannot violate Section 628(b) by withholding terrestrial programming. They claim that these entities are "captured" by Section 628(b) only to the extent that they are engaged in activities that meet the statutory definition of "cable operator" and "satellite cable programming vendor" (which do not include distribution of terrestrial programming). *See* 47 U.S.C. 522(5) ("the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system"); 548(i)(2) (the "term 'satellite broadcast programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor"); *see also* 47 U.S.C. 522(6) (defining "cable service"); 522(7) (defining "cable system"); 548(i)(1) (defining "satellite broadcast programming"). They claim that to the extent they are engaged in other activities, such as the distribution of terrestrial programming, they are not covered under that section. This argument effectively reads into the statute an additional condition that is not there. Nothing in the statute excludes an otherwise covered entity from the reach of Section 628(b) simply because the conduct at issue is not covered by the statutorily defined activities of a "cable operator" or "satellite cable programming vendor." To the contrary, under Section 628(b), so long as the provider itself meets the statutory definition of a covered entity, it is prohibited from engaging in any unfair or deceptive acts or practices that hinder significantly or prevent any MVPD from providing satellite cable or satellite broadcast programming to consumers. In contrast, when Congress intends to restrict the circumstances under which an entity is covered under a category of providers, it has done so expressly. *See* 47 U.S.C. 153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services"). There is no such restriction contained in Section 628(b). For this reason, we reject this argument.

91. While our program access procedural rules provide a defendant with 20 days after service to file an Answer to a complaint (*see* 47 CFR 76.1003(e)), we will provide the defendant with 45 days from the date of service of the complaint to file an Answer to a complaint involving terrestrially delivered programming to ensure that the defendant has adequate time to develop a response. We believe that additional time is appropriate because program access complaints involving terrestrially delivered programming, unlike complaints involving satellite-delivered programming, entail an additional factual inquiry regarding whether the unfair act has the purpose or effect set forth in Section 628(b). With the exception of the additional burdens described below and the additional time for defendants to file an Answer, these proceedings will be subject to the same

procedures set forth in Sections 76.7 and 76.1003 of the Commission's rules that apply to program access complaints involving satellite-delivered, cable-affiliated programming. 47 CFR 76.7, 76.1003. Among other things, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply. *See id.; see generally 1993 Program Access Order,* 8 FCC Rcd 3359. We remind potential complainants that filing a frivolous program access complaint is unlawful and an abuse of process subject to sanctions. *See* 47 CFR 76.6(c); *see also* 47 U.S.C. 548(f)(3); *1993 Program Access Order,* 8 FCC Rcd at 3426–28; *1998 Biennial Regulatory Review,* Report and Order, 1999 WL 4984 (1999) (adopting 47 CFR 76.6(c)).

2. Additional Burdens in Program Access Complaint Proceedings Alleging Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

92. We are adopting rules to address unfair acts involving terrestrially delivered, cable-affiliated programming pursuant to the authority Congress provided the Commission in Sections 628(b) and 628(c)(1) of the Act. Unlike the program access rules for satellite-delivered programming, which the Commission adopted pursuant to Section 628(c)(2), Section 628(b) requires that the "purpose or effect" of the unfair act is "to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. 548(b); *see 2002 Program Access Order* ("Section 628(b) addresses 'unfair or deceptive acts or practices' generally and carries with it an added burden 'to demonstrate that the purpose or effect of the conduct complained of was to 'hinder significantly or to prevent' an MVPD from providing programming to subscribers or customers.' " (*quoting 1993 Program Access Order,* 8 FCC Rcd at 3377–78)). The unfair acts listed in Section 628(c)(2) pertaining to satellite-delivered programming are presumed to harm competition, and complainants alleging such unfair acts are not required to demonstrate harm. *See 1993 Program Access Order,* 8 FCC Rcd at 3377–78; *see also 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,* Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1930 (1994).

93. Accordingly, to run afoul of Section 628(b), an unfair act involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order,* includes an exclusive contract, discrimination, or undue or improper influence) must have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. The prohibition in Section 628(b) makes unlawful any unfair or deceptive act or practice that has the "purpose or effect" of hindering significantly or preventing competitors from providing service. 47 U.S.C. 548(b). Under the broad language of the statute, a case involving only a prohibited purpose, even without a likelihood of material effects, may nonetheless support a finding of a violation of Section 628(b). In the antitrust context, however, courts have found that a "desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws." *Ocean State Physicians Health Plan* v. *Blue Cross & Blue Shield,* 883 F.2d 1101, 1113 (1st Cir. 1989), *cert. denied,* 494 U.S. 1027 (1990); *see also Wisconsin Music Network* v. *Muzak Ltd. P'ship,* 5 F.3d 218, 222 (7th Cir. 1993) (under rule of reason standard in antitrust context, "the factfinder must determine from all of the circumstances of a case whether a practice unreasonably restrains competition"); *Alliance Shippers* v. *Southern Pac. Transp. Co.,* 858 F.2d 567, 570 (9th Cir. 1988) (essential element in antitrust context is injury to competition); *United States Football League* v. *NFL,* 842 F.2d 1335, 1359 (2d Cir. 1988) ("hopes and dreams alone cannot support a Section 2 claim of monopolization"). We leave for another day the question whether some additional showing analogous to that required under the antitrust standard should be required when a complainant under Section 628(b) alleges only a prohibited purpose to hinder or prevent competition, and not a prohibited effect.

94. For most terrestrially delivered, cable-affiliated programming, the record contains no evidence that unfair acts involving such programming generally have the purpose or effect of significantly hindering or preventing MVPDs from providing satellite cable programming or satellite broadcast programming. Nonetheless, such an act may have the purpose or effect set forth in Section 628(b) in a particular case, especially given predictions that programming will increasingly shift to terrestrial delivery. Accordingly, in a program access complaint alleging an unfair act involving terrestrially delivered, cable-affiliated programming, the complainant will have the burden of proving that the unfair act has the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming. This burden under Section 628(b) is in addition to any other burdens imposed by the Commission's rules on a complainant pursuing a program access complaint regarding an exclusive contract, discrimination, or undue or improper influence. *See* 47 CFR 76.1003; *see also 1993 Program Access Order,* 8 FCC Rcd at 3390 (discussing complainant's burden in a program access complaint alleging an exclusive contract); *id.* at 3416–17 (discussing complainant's burden in a program access complaint alleging discrimination); *id.* at 3425 (discussing complainant's burden in a program access complaint alleging undue or improper influence).

95. We note that to satisfy its burden, a complainant cannot, consistent with the statute, simply rely on the fact that some impairment to providing service may have occurred because of its lack of access to cable-affiliated, terrestrially delivered programming. *Cf. AT&T Corp.* v. *Iowa Utilities Bd.,* 525 U.S. 366, 389 (1999). Rather, the statute requires a complainant to show that it was "hindered significantly" or "prevented" from providing service. We will thus review individual complaints in light of the higher standard imposed under Section 628(b). It is not our intent, moreover, to remove incentives for MVPDs to improve their program offerings in order to differentiate themselves in the marketplace as long as such efforts do not have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. For example, we believe it highly unlikely that an unfair act involving local news and local community or educational programming will have the prescribed purpose or effect under Section 628(b). Unlike RSN programming, local news and local community or educational programming is readily replicable by competitive MVPDs. Indeed, the record indicates that at least one competitive MVPD, Verizon, has created its own local news channels. Moreover, the Commission previously found that exclusivity plays an important role in the growth and viability of local cable news networks and that permitting such

exclusivity "should not * * * dissuade new MVPDs from developing their own competing regional programming services." *See New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231, 3236 and 3237 (1994).

96. We do identify one class of programming that, as shown by both Commission precedent and record evidence in this proceeding, is very likely to be both non-replicable and highly valued by consumers. In the *Adelphia Order,* the Commission analyzed the impact of the withholding of three terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators. In two cases, the Commission found a significant impact on predicted market share. *See Adelphia Order,* 21 FCC Rcd at 8271 (concluding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; concluding that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been); *see also 2007 Program Access Order* (addressing comments concerning the *Adelphia Order* study). In the third case, the Commission found no statistically significant impact where the RSN showed the games of a relatively new team "that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs." *See Adelphia Order,* 21 FCC Rcd at 8271–72 (concluding that withholding of a terrestrially delivered RSN in Charlotte did not show a statistically significant effect on predicted market share). Other evidence supports the conclusion that RSNs typically offer non-replicable content and are considered "must have" programming by MVPDs. *See 2007 Program Access Order; Liberty/DIRECTV Order,* 23 FCC Rcd at 3305 and 3306–07; *Adelphia Order,* 21 FCC Rcd at 8258–59; *News/Hughes Order,* 19 FCC Rcd 473, 535 (2004). Both the Commission and commenters have noted that RSN programming is unique and cannot be duplicated. *See Adelphia Order,* 21 FCC Rcd at 8287; *News/Hughes Order,* 19 FCC Rcd at 535. The Commission on two prior occasions has extended the sunset date of the per se ban established by Congress on exclusive contracts involving satellite-delivered, cable-affiliated programming. *See generally 2002 Program Access Order* (extending the exclusive contract prohibition until October 5, 2007); *2007 Program Access Order* (extending the exclusive contract prohibition until October 5, 2012). In the most recent decision, the Commission stated that "the record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes." *See 2007 Program Access Order.* In that decision, the Commission was implementing Section 628(c)(5), which requires the Commission to assess the marketplace and extend the per se ban if it finds it "necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. 548(c)(5). The Commission did not consider the question at issue here: Whether there are specific categories of programming that are non-replicable and sufficiently valuable to consumers such that an unfair act involving such programming has the "purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming." 47 U.S.C. 548(b).

97. Although we reject the argument that the empirical evidence concerning RSNs is so uniform that it supports a per se rule that an unfair act involving a terrestrially delivered, cable-affiliated RSN always significantly hinders or prevents the MVPD from providing satellite cable programming or satellite broadcast programming, we will not require litigants and the Commission staff to undertake repetitive examinations of our RSN precedent and the relevant historical evidence. Instead, we recognize the weight of the existing precedent and categorical evidence concerning RSNs by allowing complainants to invoke a rebuttable presumption that an unfair act involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b). Cablevision maintains that adopting special rules for implementing Section 628(b) in the context of RSNs, based on the content of the programming, would violate the First Amendment. Here, however, we place no content-related burden on a defendant in a case brought under Section 628(b) that involves RSN programming. We only recognize the import of existing precedent and record evidence before us in this matter.

98. In a program access complaint alleging an unfair act involving a terrestrially delivered, cable-affiliated RSN, the defendant may overcome the presumption by establishing that the unfair act does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming, as required by the language of Section 628(b). Except in the situation of a temporary standstill order, a terrestrially delivered, cable-affiliated RSN is not required to provide its programming to an MVPD under the rules we establish in this *Order* unless and until the Commission (or Bureau on delegated authority) concludes that the complainant is entitled to relief that includes access to the programming. We reiterate that we are adopting a case-by-case approach that allows us to consider the facts and circumstances of each case. Moreover, as discussed above, while our program access procedural rules provide a defendant with 20 days after service to file an Answer to a complaint (*see* 47 CFR 76.1003(e)), we will provide the defendant with 45 days from the date of service of the complaint to file an Answer in all cases involving terrestrially delivered, cable-affiliated programming, to ensure that the defendant has adequate time to develop a full, case-specific response.

99. For purposes of the foregoing paragraphs, we define "RSN" in the same way the Commission has defined that term in previous merger proceedings for purposes of adopting program access conditions: "Any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball, Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." (In the *Liberty/DIRECTV Order,* the Commission expanded the definition of an RSN originally adopted in the *Adelphia Order* to include sports programming likely to be valued highly by residents of Puerto Rico. *See* 23 FCC

Rcd at 3308–09; *see also Adelphia Order,* 21 FCC Rcd at 8275.) The Commission has recently reaffirmed the appropriateness of the RSN definition for purposes of program access merger conditions. *See TAC Order,* 22 FCC Rcd 17938, 17946–47 (2007); *Liberty/DIRECTV Order,* 23 FCC Rcd at 3308–09. (The Commission suspended the program carriage merger condition for reasons that are not at issue here. *See TAC Order,* 22 FCC Rcd at 17946–47.) A complainant would have the burden of showing that the network at issue satisfies this definition.

100. One commenter has further urged a per se ban on unfair acts and practices involving terrestrially delivered HD "feeds" of programming. According to Verizon, vertically integrated programmers are seeking to compete unfairly by withholding from competitive providers the HD version of programming subject to the program access rules by transporting the "HD feed" terrestrially, thus allowing the affiliated cable operator to offer a more robust line-up of HD programming. There is substantial evidence regarding consumers' preference for HD programming in the context of MVPD services, and the record shows that MVPD subscribers do not consider SD programming to be an acceptable substitute for HD programming. The SD and HD versions of the same network have different technical characteristics and sometimes even different content. HD programming has thus become an important part of a competitive MVPD offering.

101. Based on the record evidence described above, in particular the fact that SD and HD versions of the same network have different technical characteristics and sometimes even different content, we conclude that the HD version of a particular programming channel should be treated as a distinct service from the SD version of the same network. Thus, in considering a complaint regarding an unfair act involving terrestrially delivered HD programming, the mere fact that the complainant offers the SD version of the same network to subscribers will not alone be sufficient to refute a claim under Section 628(b); and, in the case of a covered RSN, it will not establish that the unfair act lacks the purpose or effect set forth in Section 628(b). In that regard, nothing in the statute requires a competitive provider to show complete foreclosure from particular programming to make a claim under Section 628(b). Rather, the competitive provider must show that a covered entity was engaged in an unfair act or practice that has the purpose or effect of hindering significantly or preventing a competitor from providing service. We note that in two pending complaints, the complainant is seeking access to the HD feed of a cable-affiliated RSN; at this time, only the satellite-delivered SD version of the programming is being made available to the competitive provider. *See* Verizon Telephone Companies *et al*, Program Access Complaint, File No. CSR–8185–P (filed July 7, 2009); AT&T Services, Inc. *et al,* Program Access and Section 628(b) Complaint, File No. CSR–8196–P (filed Aug. 13, 2009). As explained below, to the extent the complainants do not supplement their pleadings in the pending adjudicatory matter, their claims fall outside the framework established in this rulemaking, and we do not prejudge whether the records in those cases are sufficient to state a case under Section 628(b) based on the facts alleged.

102. We will also treat other terrestrially delivered formats of programming, such as VOD, 3D, and other new formats, as distinct services subject to the rules established in this *Order.* We do not have precedents or record evidence at this point with respect to such new formats on which to base a conclusion whether any presumption should apply to complaints involving them, thus no presumptions will apply to them at this time.

103. We decline to adopt specific evidentiary requirements with respect to proof, in a complaint brought under Section 628(b), that the defendant's alleged activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming. The evidence required to satisfy this burden will vary based on the facts and circumstances of each case and may depend on, among other things, whether the complainant is a new entrant or an established competitor and whether the programming the complainant seeks to access is new or existing programming. In order to provide some guidance to potential litigants, however, we provide the following illustrative examples of evidence that they might consider providing. A litigant might rely on an appropriately crafted regression analysis that estimates what the complainant's market share in the MVPD market would be if it had access to the programming and how that compares to its actual market share. *See, e.g., Adelphia Order,* 21 FCC Rcd at 8343–50, Appendix D; *2007 Program Access Order.* A regression analysis might be particularly appropriate for an MVPD that is an established competitor operating in a large number of geographic areas that seeks access to an established programming network. Operation in a large number of geographic areas allows for an assessment in the variation in the MVPD's penetration levels between areas where programming is withheld and where it is available to estimate the effect of withholding. Moreover, a regression analysis might be particularly appropriate for an established competitor, where it can be assumed that its market penetration may be approaching an equilibrium level, rather than a recent entrant, where it can be assumed that its market penetration will increase as consumers become more familiar with its service. A litigant might also rely on statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming.

104. We recognize that not all potential complainants will have the resources to perform a regression analysis or market survey, thus, we reiterate that these examples should be considered illustrative only. We will assess the reliability of the regression analysis, survey data, or other empirical data on a case-by-case basis. In that regard, we note that defendants, as well as complainants, are likely to have unique access to certain relevant evidence. For instance, although a competing MVPD seeking access to a cable-affiliated RSN has unique access to information about its own subscribership and the reasons consumers give for declining or terminating the MVPD's service, a defendant cable operator or cable-affiliated programmer is likely to have the best information about the competitive significance of its RSN (*e.g.,* value of subscribers and local demand for the RSN). Moreover, both complainants and defendants are capable of compiling survey data to assess the likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming. The discovery process enables parties to obtain additional evidence needed to satisfy their burdens. *See* 47 CFR 76.1003(j).

105. We note that the language of Section 628(b) requires the Commission to address the unfair acts of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors, but not the unfair acts of other programmers

delivering programming only by terrestrial means. *See* 47 U.S.C. 548(b). We conclude that Section 628(b) allows complaints against the entities listed in Section 628(b) based on the unfair acts of their affiliated programmers delivering programming by terrestrial means, where the facts establish that the programmer is wholly owned by, controlled by, or under common control with one or more of these entities. (If two or more cable operators each have a minority interest in a terrestrial programmer but those interests exceed 50 percent in the aggregate, we will consider the programmer to be cable-controlled. For example, if three cable operators each have a 20 percent ownership interest in a terrestrial programmer, we would consider the programmer to be cable-controlled, despite the fact that no individual cable operator has a controlling interest, because the aggregate interests held by the cable operators exceed 50 percent.) Under these circumstances, the cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor can appropriately be held responsible for the discriminatory acts of its program supplier affiliate because it controls the supplier and the supplier's unfair actions are designed to benefit these entities.

106. This coverage is necessary to give Section 628(b) practical effect. For example, absent a Commission rule to address such discrimination, a cable-controlled terrestrial program supplier could insist that a competitive MVPD pay an exorbitant rate for carriage that far exceeds the rate charged to the incumbent cable system, thereby precluding the MVPD from obtaining the programming on reasonable terms and achieving the same result as an exclusive contract. We believe that we have authority under Section 628(b) to prevent this and similar situations in which a terrestrial programmer that is wholly owned by, controlled by, or under common control with an entity covered by Section 628(b) acts presumptively to further the interests of such an entity. Accordingly, in program access complaints alleging that a cable-affiliated programmer that provides only terrestrially delivered programming has discriminated against an MVPD, the complainant will have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors.

107. If it appears that a regulated entity has been organized in a manner to shield its terrestrial programming activities from the reach of Section 628(b) and the Commission's regulations, we may look beyond the corporate structural formalities to ensure that the goals of the statute and rules are not frustrated. Moreover, in cases where one or more of the entities listed in Section 628(b) does not have de jure control of a terrestrial programmer, we do not foreclose complaints alleging that one or more of the entities listed in Section 628(b) has nonetheless influenced the programmer to engage in discrimination. We will assess such claims of alleged influence on a case-by-case basis. In addition, as noted above, there may be acts or practices other than those specified in this *Order* that are "unfair methods of competition or unfair acts or practices" under Section 628(b). For example, nothing in this *Order* forecloses a complaint alleging that the execution or enforcement of a discriminatory contract by one of the entities listed in Section 628(b) violates this section.

3. Exclusive Contracts

108. The rules we adopt here pursuant to Section 628(b) to address exclusive contracts between cable operators and cable-affiliated programmers that provide terrestrially delivered programming differ from the rules applicable to satellite-delivered, cable-affiliated programming pursuant to Section 628(c)(2)(C)–(D). The program access rules applicable to cable-affiliated programmers that provide satellite-delivered programming generally prohibit exclusive contracts with a cable operator subject to certain exceptions. Because we are adopting rules for terrestrially delivered, cable-affiliated programming pursuant to the authority provided in Sections 628(b) and 628(c)(1), we do not apply here the statutory scheme set forth in Section 628(c)(2)(C)–(D) for satellite-delivered, cable-affiliated programming. Our approach to exclusive contracts for terrestrially delivered, cable-affiliated programming will differ from the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming in the following ways.

109. First, the Commission's program access rules applicable to satellite-delivered, cable-affiliated programming generally prohibit exclusive contracts unless the cable operator or cable-affiliated programmer demonstrates that an exclusive contract serves the public interest based on the factors set forth in Section 76.1002(c)(4). 47 CFR 76.1002(c)(4); *see 2002 Program Access Order.* The rules we adopt in this *Order,* however, assign the burden of proof to the complainant to demonstrate (sometimes with the benefit of a presumption) that the exclusive contract has the purpose or effect set forth in Section 628(b).

110. Second, while the Commission's rules applicable to satellite-delivered, cable-affiliated programming draw distinctions between exclusive contracts in served areas and unserved areas (*see* 47 CFR 76.1002(c)(1)–(2); *see also* 47 U.S.C. 548(c)(2)(C)–(D)), the rules we adopt in this *Order* for terrestrially delivered, cable-affiliated programming do not. Section 628(b) does not draw such a distinction, and our case-by-case approach will enable us to take into account relevant factual circumstances of a particular case.

111. Third, while the exclusive contract prohibition generally applicable to satellite-delivered, cable-affiliated programming will sunset on a Commission determination that the categorical prohibition is no longer necessary to preserve and protect competition (*see* 47 CFR 76.1002(c)(6); *see also* 47 U.S.C. 548(c)(5)), the rules we adopt in this *Order* for terrestrially delivered, cable-affiliated programming do not contain a sunset provision because Section 628(b) does not contain such a provision. If the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets, we will still consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis unless and until we repeal the rule with respect to terrestrially delivered programming. Of course, the facts supporting a sunset of the exclusive contract prohibition under Section 628(c)(2) may bear on a particular complaint brought under Section 628(b).

112. By contrast, with the exception of the additional burdens and the additional response time for defendants to file an Answer described above, we will apply the same rules, policies, and procedures to address claims of discrimination and undue or improper influence involving terrestrially delivered, cable-affiliated programming that currently apply to such claims involving satellite-delivered, cable-affiliated programming. *See* 47 CFR 76.1002(b)(1)–(3) (listing actions that a cable-affiliated programmer is not

precluded from taking under the discrimination provision of the program access rules); *id.* § 76.1003(c)(4)–(5) (listing specific requirements for a program access complaint alleging discrimination); *id.* § 76.1003(e)(3)–(4) (listing specific requirements for an answer to a program access complaint alleging discrimination); *see also 1993 Program Access Order,* 8 FCC Rcd at 3400–23 (adopting rules, policies, and procedures for complaints alleging program access discrimination); *see id.* at 3423–26 (adopting rules, policies, and procedures for complaints alleging undue or improper influence).

E. Application of the Rules

113. In this Section, we discuss how the rules adopted here apply to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions.

1. Common Carriers

114. The rules we adopt in this *Order* will apply to common carriers and open video systems as well as cable operators because the Act so requires. Although Section 628(b) requires the Commission to address the unfair acts of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors, Section 628(j) states that "[a]ny provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers." 47 U.S.C. 548(j). Similarly, Section 653(c)(1)(A) provides that "[a]ny provision that applies to a cable operator under [Section 628] of this title shall apply * * * to any operator of an open video system [OVS]." 47 U.S.C. 573(c)(1)(A). Thus, pursuant to Sections 628(j) and 653(c)(1)(A), the rules we adopt to address unfair acts involving terrestrially delivered, cable-affiliated programming must also apply to common carriers and OVS operators, and their affiliated programmers, to the extent that these entities provide video programming to subscribers or consumers. Accordingly, we are amending Section 76.1004(a) of our rules, which contains a limitation on what constitutes an attributable interest held by a common carrier in a satellite cable programming vendor, to also apply to an attributable interest held by a common carrier in a terrestrial cable programming vendor. *See* 47 CFR 76.1004(a); *see also* 47 U.S.C. 628(j); *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996,* Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5956–57 (1996).

2. Existing Contracts

115. Given the potential harms to video competition and broadband deployment that arise from unfair acts involving terrestrially delivered, cable-affiliated programming, we conclude that the public interest requires us to apply the rules adopted in this *Order* to existing contracts or other arrangements for terrestrially delivered, cable-affiliated programming, to the extent a cable operator's reliance on or enforcement of those contracts or arrangements following the effective date of the rules is found to violate Section 628(b). Accordingly, although a cable operator may have entered into an exclusive contract prior to the effective date of the rules adopted in this *Order,* an MVPD may file a program access complaint after the effective date of the rules alleging that the cable operator's continued reliance on or enforcement of this contract violates these rules. We decline, however, to apply the rules adopted in this *Order* to the unfair acts of cable operators involving terrestrially delivered, cable-affiliated programming that preceded the effective date of these rules. Thus, to the extent a terrestrially delivered, cable-affiliated programmer refused to deal with an MVPD prior to (and not after) the effective date of these rules, we would not entertain a program access complaint alleging that such conduct is unlawful under the rules adopted in this *Order.* Rather, an MVPD filing a program access complaint pursuant to the rules adopted in this *Order* regarding the allegedly unlawful conduct would need to demonstrate that the unfair act occurred after the effective date of the rules.

116. Applying the rules to existing contracts in this manner is not impermissibly retroactive. *See, e.g., Celtronix Telemetry, Inc.* v. *FCC,* 272 F.3d 585, 588 (D.C. Cir. 2001) (changing the grace period on auction debt was not impermissibly retroactive where new rule applied to payment delays occurring after the rule's adoption; although it altered the future effect of the initial license issuance, it did not alter past legal consequences); *Bell Atl. Tel. Cos.* v. *FCC,* 79 F.3d 1195, 1207 (D.C. Cir. 1996) (a regulation that governs future rates "is not made retroactive merely because it draws upon antecedent facts for its operation") (quotations and citations omitted); *see also Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 269–70 and n. 24 (1994) (a law does not act retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based in prior law; rather, the issue is whether the new provision attaches new legal consequences to events completed before its enactment); *Chemical Waste Mgmt., Inc.* v. *EPA,* 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking").

117. As discussed above, program access complaints filed pursuant to Section 628(d) are pending before the Commission that allege unfair acts involving terrestrially delivered, cable-affiliated programming that have the purpose or effect set forth in Section 628(b). *See* Verizon Telephone Companies *et al,* Program Access Complaint, File No. CSR–8185–P (filed July 7, 2009); AT&T Services, Inc. *et al.,* Program Access and Section 628(b) Complaint, File No. CSR–8196–P (filed Aug. 13, 2009). Complainants may continue to prosecute these complaints pursuant to Section 628(d). Because these complaints allege unfair acts that occurred before the effective date of the rules adopted in this *Order,* they will not be considered pursuant to these rules, unless supplemented as described below. A complainant that wants a currently pending complaint considered under these rules must submit a supplemental filing alleging that the defendant has engaged in an unfair act (such as a further refusal to provide programming) after the effective date of the rules. In such case, the complaint and supplement will be considered pursuant to the rules adopted in this *Order,* including the rebuttable presumption for RSNs. The defendant will have an opportunity to answer the supplemental filing within 45 days of service, and the complainant will have an opportunity to reply, as set forth in the rules. *See* 47 CFR 76.1003(f).

118. Additionally, application of the rules to existing contracts will not pose economic hardship on cable operators or their affiliated programmers or constitute a "regulatory taking" under the Fifth Amendment. The Supreme Court has outlined the following framework to evaluate regulatory takings claims: "'In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this

determination, however, we have identified three factors which have particular significance: (1) The economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.'" *MDU Order* (quoting *Connolly* v. *Pension Ben. Guaranty Corp.,* 475 U.S. 211, 224–25 (1986) (citations and internal quotation marks omitted)). None of these factors counsels in favor of finding a regulatory taking here. Moreover, because our decision does not involve the permanent condemnation of physical property, it does not constitute a per se taking. *Cf. Loretto* v. *Teleprompter Manhattan City Corp.,* 458 U.S. 419, 427 (1982) ("when faced with a constitutional challenge to a permanent physical occupation of real property, this court has invariably found a taking"); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

119. Under the first prong of the regulatory takings test, applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above would not have a material adverse economic impact on cable operators or their affiliated programmers. Specifically, these rules would not interfere with the ability of cable operators to provide this programming to their subscribers or potential subscribers or the ability of cable-affiliated programmers to sell programming to MVPDs. Our decision may in fact expand the number of customers (*i.e.,* MVPDs) to whom terrestrially delivered, cable-affiliated programmers sell their programming. This will result in increased revenues for the cable-affiliated programmer, which can be used to partially offset the decreased revenues its affiliated cable operator will experience as some subscribers switch to competitive MVPDs that now have access to the formerly withheld programming. Moreover, as the record demonstrates, unfair acts involving terrestrially delivered, cable-affiliated programming have in some cases enabled cable firms to significantly hinder competition in the video distribution market. Thus, under the first prong of the takings analysis, any economic impact on cable operators and terrestrially delivered, cable-affiliated programmers arising from compliance with these rules stems from correcting current market failures, and is outweighed by our public interest objective of promoting competition in the video distribution market.

120. Under the second prong of the Supreme Court's test, applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above would not interfere with distinct investment-backed expectations. Several of the Commission's prior decisions have reflected a concern about unfair acts involving terrestrially delivered, cable-affiliated programming, and our desire to craft appropriate remedies. The Commission has stated in previous program access complaint proceedings that vertically integrated cable operators that migrate their programming to terrestrial delivery could violate Section 628(b) in some instances. *See RCN,* 16 FCC Rcd at 12053; *DIRECTV,* 15 FCC Rcd at 22807; *EchoStar,* 14 FCC Rcd at 2102–03; *RCN,* 14 FCC Rcd at 17104–06; *DIRECTV,* 13 FCC Rcd at 21837; *see also 1996 OVS Order,* 11 FCC Rcd at 18325.

121. Moreover, past Commission Orders in program access rulemaking proceedings have demonstrated continued concern with the harms associated with the terrestrial loophole. *See 2002 Program Access Order* (noting that withholding of terrestrially delivered, cable-affiliated programming "could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market" but finding that the specific language of Section 628(c) applies only to satellite-delivered programming); *1998 Program Access Order* (concluding that the record developed in this proceeding did not demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming were having a significant anticompetitive effect, but stating that "we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace" and that "the Commission will continue to monitor this issue and its impact on competition in the video marketplace"); *see also 2007 Program Access Order.* Moreover, the Commission noted in the *1993 Program Access Order* that the objectives of Section 628(b) were to proscribe conduct "beyond those more specifically referenced in 628(c). The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition * * *. Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming." 8 FCC Rcd at 3373–73.

122. The Commission has also stated in Annual Reports to Congress on the status of competition in the video distribution market that unfair acts involving terrestrially delivered, cable-affiliated programming could have a substantial impact on the ability of competitive MVPDs to compete and that the Commission will "continue to monitor this issue and its impact on the competitive marketplace." *6th Annual Report,* 15 FCC Rcd 978 (2000); *see 3rd Annual Report,* 12 FCC Rcd 4358 (1997); *see also 7th Annual Report,* 16 FCC Rcd 6005 (2001); *8th Annual Report,* 17 FCC Rcd 1244 (2002); *9th Annual Report,* 17 FCC Rcd 26901 (2002); *10th Annual Report,* 19 FCC Rcd 1606 (2004); *11th Annual Report,* 20 FCC Rcd 2755 (2005); *12th Annual Report,* 21 FCC Rcd 2503 (2006).

123. In the *Adelphia Order,* the Commission demonstrated that it would act to mitigate the harm to competition resulting from withholding of terrestrially delivered, cable-affiliated programming. In the *Adelphia Order,* the Commission applied the program access rules, as well as arbitration conditions, to terrestrially delivered RSNs affiliated with the merger applicants based on record evidence demonstrating that withholding of terrestrially delivered, cable-affiliated programming had an adverse impact on competition in the video distribution market. *See* 21 FCC Rcd at 8275. Moreover, in the *News/Hughes Order,* the Commission noted that it has "long recognized that the terrestrial distribution of programming—particularly RSN programming—by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming." 19 FCC Rcd at 535 (citations omitted). In addition, in September 2007, the Commission adopted the *NPRM* in this proceeding, seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming. Thus, for many years now, cable operators and their affiliated programmers have been on notice that withholding of

terrestrially delivered, cable-affiliated programming is a source of concern for the Commission, and that any programming investments had the potential to be impacted by the rules we adopt in this *Order.* Moreover, as the Commission explained in the *MDU Order,* a cable operator does not have a legitimate investment-backed expectation in profits obtained through anticompetitive behavior. *See MDU Order* (citing *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 380 (1973) (antitrust law proscribing monopolies "assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency," and a monopolist may not "substitute for competition anticompetitive uses of its dominant power"); *Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.,* 902 F.2d 174, 178 (2d Cir. 1990) ("A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.")).

124. Under the third prong of the regulatory takings test, we find that applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above substantially advances the legitimate governmental interest in protecting consumers from "'unfair methods of competition or unfair acts or practices'—an interest Congress has explicitly recognized and protected by statute * * * and commanded the Commission to vindicate by adopting appropriate regulations." *See MDU Order* (quoting 47 U.S.C. 548(b)). It also comports with Congress' directive to spur the development of communications technologies and to encourage the deployment of advanced telecommunications capabilities. *See* 47 U.S.C. 157 nt. (2008); 47 U.S.C. 548(a). The rules we adopt here will further these governmental interests by promoting competition in the video distribution market and facilitating efforts to deploy broadband.

3. *Adelphia Order* Merger Conditions

125. Pursuant to merger conditions adopted in the *Adelphia Order,* certain terrestrially delivered RSNs ("Covered RSNs") affiliated with Comcast or Time Warner Cable are currently required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming. *See Adelphia Order,* 21 FCC Rcd at 8274 (requiring terrestrially delivered RSNs in which Comcast or Time Warner has or acquires an attributable interest to comply with the program access rules applicable to satellite-delivered cable-affiliated programming, citing 47 CFR 76.1002), 8276 and 8336, Appendix B, § B(1) (citing 47 CFR 76.1002); *see also Applications for Consent to the Assignment and/or Transfer Control, Time Warner Inc., Assignor/Transferor, and Time Warner Cable Inc., Assignee/Transferee,* Memorandum Opinion and Order, 24 FCC Rcd 879, 893 (MB, WCB, WTB, IB, 2009) (approving transaction separating Time Warner from Time Warner Cable and explaining that the *Adelphia Order* program access conditions will continue to apply to Time Warner Cable post-restructuring but will no longer apply to Time Warner). A Covered RSN as defined in the *Adelphia Order* is "any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." *See Adelphia Order,* 21 FCC Rcd at 8336, Appendix B, section A.

126. These Covered RSNs continue to be subject to these conditions until they expire or the program access rules applicable to satellite-delivered, cable-affiliated programming are modified. *See Adelphia Order,* 21 FCC Rcd at 8336, Appendix B, section B(1)(d) ("These exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their Covered RSNs for six years, provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission."); *see also id.* at 8274 (noting that the merger conditions could be modified if the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets). The rules we adopt in this *Order* do not trigger modification of these conditions. The Covered RSNs subject to the *Adelphia Order* merger conditions are required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming. With the exception of the procedure for requesting a standstill discussed below, this *Order* does not modify the program access rules applicable to satellite-delivered, cable-affiliated programming; rather, we adopt new rules that address unfair acts of cable operators involving a class of programmers that are not currently subject to the rules: Cable-affiliated programmers that provide terrestrially delivered programming. Accordingly, the rules adopted in this *Order* do not trigger modification of the merger conditions adopted in the *Adelphia Order.* The program access conditions adopted in the *Liberty/DIRECTV Order* contain a similar modification clause. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3341, Appendix B, section III(6) ("if the program access rules are modified these commitments shall be modified, as the Commission deems appropriate, to conform to any revised rules adopted by the Commission"). For the reasons stated above, because the program access rules are not modified by this *Order,* this modification clause is not triggered.

127. Accordingly, exclusive contracts, discrimination, and undue influence involving these Covered RSNs continue to be prohibited without the need for any showing as to whether the purpose or effect of the unfair act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming. If the conditions expire or the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets, then exclusive contracts for these Covered RSNs will not be precluded. Rather, in accordance with the rules we adopt in this *Order,* we will consider exclusive contracts for these RSNs on a case-by-case basis in response to a program access complaint, where we will assess whether the defendant has rebutted the presumption that an exclusive contract for the RSN has the purpose or effect of significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming.

128. Moreover, any terrestrially delivered network affiliated with Comcast or Time Warner Cable that is not a Covered RSN may be the subject of a complaint pursuant to the rules we adopt in this *Order* upon the effectiveness of these rules.

129. We also note that the Commission in the *Adelphia Order* exempted Comcast SportsNet Philadelphia from these conditions to the extent that it was not available to an MVPD at the time of the *Adelphia Order. See* 21 FCC Rcd at 8276 ("we do not require that Comcast SportsNet Philadelphia be subject to those

conditions to the extent it is not currently available to MVPDs"). With regard to MVPDs that had contracts for Comcast SportsNet Philadelphia at the time of the *Adelphia Order,* the program access conditions adopted in the *Adelphia Order* apply. *See id.* Because Comcast SportsNet Philadelphia was delivered terrestrially before it was acquired by Comcast, the Commission found no anticompetitive "purpose" in Comcast's decision to deliver this network terrestrially. *See id.* Section 628(b), however, requires the Commission to prohibit unfair acts of cable operators that have the "purpose or effect" of significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming. 47 U.S.C. 548(b). Accordingly, although Comcast SportsNet Philadelphia was not available to certain MVPDs at the time of the *Adelphia Order* and the program access conditions adopted in the *Adelphia Order* accordingly do not apply to its dealings with those MVPDs, it may be the subject of a complaint pursuant to the rules we adopt in this *Order* upon the effectiveness of these rules. Thus, an MVPD that did not have access to Comcast SportsNet Philadelphia at time of the *Adelphia Order* may file a program access complaint alleging an unfair act in accordance with the rules adopted in this *Order.* As discussed above, the complainant would need to demonstrate that the defendant engaged in an unfair act after the effective date of the rules. Comcast argues that the doctrine of res judicata precludes DIRECTV and DISH Network from bringing program access complaints alleging an unfair act involving Comcast SportsNet Philadelphia under Section 628(b) because they have previously brought such claims and were denied. Comcast would have an opportunity to present such claim-specific arguments in the context of a specific complaint proceeding involving Comcast SportsNet Philadelphia, should such a complaint be filed.

F. Temporary Standstill of Existing Contract Pending Resolution of a Program Access Complaint

130. We establish specific procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract. *See NPRM.* The specific procedures adopted herein only apply to requests for a standstill involving program access complaints filed pursuant to Sections 76.1001 or 76.1003 of the Commission's rules. Thus, a complainant may use these procedures to seek a temporary standstill in program access complaint proceedings involving terrestrially, cable-affiliated delivered programming as well as satellite-delivered, cable-affiliated programming. We note that of particular concern would be a situation where a cable-affiliated network that is satellite-delivered, and therefore subject to the per se prohibitions in Section 76.1002, moves to terrestrial delivery and threatens to withhold the programming from an MVPD that formerly had access to the network. In such a case, absent a standstill, the MVPD's subscribers would be deprived of the programming unless and until the Commission resolves a program access complaint in favor of the MVPD and grants relief to the MVPD, including carriage of the network.

131. As competitive MVPDs note, such a process will have several benefits, such as minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (i.e., withholding programming to extract concessions from an MVPD during renewal negotiations); encouraging settlement; and increasing the usefulness of the program access complaint process. Regarding temporary foreclosure strategies, the Commission explained in the *Adelphia Order* that "by temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier. In order for a vertically integrated firm successfully to employ temporary foreclosure or the threat of temporary foreclosure as a strategy to increase its bargaining position, there must be a credible risk that subscribers would switch MVPDs to obtain the programming for a long enough period to make the strategy profitable." *See* 21 FCC Rcd at 8262.

132. The Commission has statutory authority to impose a temporary standstill of an existing contract in appropriate cases pending resolution of a program access complaint. The Commission is authorized to "make such rules and regulations * * * as may be necessary in the execution of its functions," and to "[m]ake such rules and regulations * * * not inconsistent with law, as may be necessary to carry out the provisions of this Act." 47 U.S.C. 154(i), 303(r). The Supreme Court has affirmed the Commission's authority to impose interim injunctive relief, in the form of a standstill order, pursuant to Section 4(i). *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 181 (1968); *see also AT&T Corp.* v. *Ameritech Corp.,* Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998) (standstill order issued pursuant to 47 U.S.C. 154(i) temporarily preventing Ameritech from enrolling additional customers in, and marketing and promoting, a "teaming" arrangement with Qwest Corporation pending a decision concerning the lawfulness of the program); *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers,* Report and Order, 12 FCC Rcd 22497, 22566 (1997) (stating that the Commission has authority under section 4(i) of the Act to award injunctive relief); *Time Warner Cable,* Order on Reconsideration, 21 FCC Rcd 9016 (MB, 2006) (standstill order issued pursuant to section 4(i) denying a stay and reconsideration of the Media Bureau's order requiring Time Warner temporarily to reinstate carriage of the NFL Network on systems that it recently acquired from Adelphia Communications and Comcast Corporation until the Commission could resolve on the merits the Emergency Petition for Declaratory Ruling filed by the NFL).

133. Pursuant to the rules we adopt herein, a complainant may submit along with its program access complaint a petition for a temporary standstill of its existing programming contract pending resolution of the complaint. We encourage complainants to file the petition and complaint sufficiently in advance of the expiration of the existing contract to provide the Commission with sufficient time to act prior to expiration. In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria: (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 interested parties; and (iv) the public interest favors grant of a stay. *See, e.g., Virginia Petroleum Jobbers Ass'n* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours,* 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n* v. *FPC*); *Hispanic Information and Telecomm. Network,*

Inc., 20 FCC Rcd 5471, 5480 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted). As part of a showing of irreparable harm, a complainant may discuss, among other things, the impact on subscribers and the likelihood that subscribers will switch MVPDs to obtain the programming in dispute. In order to ensure an expedited decision, the defendant will have ten days after service to file an answer to the petition for a standstill order. In acting on the petition, the Commission may limit the length of the standstill to a defined period or may specify that the standstill will continue until the Commission resolves the program access complaint. In any event, the Commission may lift the temporary standstill to the extent that it finds that the stay is having a negative effect on settlement negotiations or is otherwise no longer in the public interest.

134. If the Commission grants the temporary standstill, its decision acting on the complaint will make the terms of the new agreement between the parties, if any, retroactive to the expiration date of the previous agreement. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3347–48, Appendix B, section IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, section 3(h); *News/Hughes Order,* 19 FCC Rcd at 554. For example, if carriage of the programming has continued uninterrupted during resolution of the complaint, and if the Commission's decision requires a higher amount to be paid than was required under the terms of the expired contract, the MVPD will make an additional payment to the programmer in an amount representing the difference between the amount that is required to be paid pursuant to the decision and the amount actually paid under the terms of the expired contract during resolution of the complaint. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3347–48, Appendix B, § IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, section 3(h); *News/Hughes Order,* 19 FCC Rcd at 554. Conversely, if carriage of the programming has continued uninterrupted during resolution of the complaint, and if the Commission's decision requires a lesser amount to be paid than was required under the terms of the expired contract, the programmer will credit the MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during resolution of the complaint and the amount that is required to be paid pursuant to the Commission's decision. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3347–48, Appendix B, section IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, section 3(h).

135. Vertically integrated cable operators contend that the Commission should not adopt a temporary standstill process, claiming that such an option will tilt the balance of negotiating leverage in favor of MVPDs; encourage MVPDs to file program access complaints to guarantee continued access to programming; and impede parties from settling disputes by removing any incentive for the MVPD to negotiate. On balance, we conclude that the benefits of establishing a temporary stay process outweigh these purported harms. We expect parties to deal and negotiate with one another in good faith to come to settlement while the program access complaint is pending at the Commission. Moreover, there is no reason to assume that carriage negotiations and attempts at a settlement during a temporary stay will necessarily be protracted. In this regard, we note that in three previous merger orders, the Commission adopted a standstill requirement in connection with arbitration of program access disputes. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order,* 19 FCC Rcd at 554. Commenters, however, provide no evidence that any of the purported harms actually resulted from the standstill in those cases. Moreover, the standstill requirement imposed in connection with those merger conditions is automatic upon notice of the MVPD's intent to arbitrate (*see Liberty/DIRECTV Order,* 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order,* 19 FCC Rcd at 554, whereas the process we adopt here requires a complainant to seek Commission approval based on the four-criteria test described above. Thus, the Commission will be able to take into account all relevant facts in each case. Moreover, because the new carriage terms will be applied retroactively to the expiration of the previous contract, we believe that complainants will not have an incentive to seek a temporary standstill solely to continue the status quo or to gain leverage.

136. Time Warner claims that, depending on the terms of the contract, it may be impractical to apply those terms beyond the expiration date of the contract. In addition, Time Warner notes unique concerns regarding a standstill imposed on a contract for a premium network. DISH Network states that Time Warner has overstated the complexity of a standstill, because the existing contract terms—including rate, carriage terms, as well as marketing and promotion provisions—would apply during the pendency of the complaint proceeding. To the extent difficulties arise, we believe we will be able to resolve such issues on a case-by-case basis when acting on a petition for a standstill.

IV. Procedural Matters

A. Final Paperwork Reduction Act Analysis

137. This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA below.

B. Congressional Review Act

138. The Commission will send a copy of this *Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

C. Final Regulatory Flexibility Analysis

139. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"), 5 U.S.C. 604, the Commission

has prepared the following FRFA relating to the *Order.* An Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *NPRM* in MB Docket No. 07–198 (72 FR 61590, October 31, 2007). The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA. *See* 5 U.S.C. 604.

Need for, and Objectives of, the Rules Adopted

140. Section 628(a) of the Communications Act establishes that the goals of Section 628 are to increase competition and diversity in the video distribution market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies. 47 U.S.C. 548(a). Section 628(b) of the Act prohibits unfair acts and practices of cable operators that have the purpose or effect of hindering significantly any multichannel video programming distributor ("MVPD") from providing satellite cable programming or satellite broadcast programming to consumers. 47 U.S.C. 548(b) ("it shall be unlawful for a cable operator * * * to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers"). Section 628(c)(1) provides the Commission with authority to adopt rules to specify the conduct prohibited by Section 628(b). 47 U.S.C. 548(c)(1). As required by Section 628(c)(2) of the Act (47 U.S.C. 548(c)(2)), the Commission adopted rules in 1993 (the "program access rules") which specifically prohibit: (i) A cable operator from unduly or improperly influencing the decision of its affiliated satellite cable programming vendor to sell, or unduly or improperly influencing the vendor's prices, terms, and conditions for the sale of, satellite cable programming to any unaffiliated MVPD (the "undue or improper influence" rule) (*see* 47 CFR 76.1002(a)); (ii) a cable-affiliated satellite cable programming vendor from discriminating in the prices, terms, and conditions of sale or delivery of satellite cable programming among or between competing MVPDs (the "non-discrimination" rule) (*see* 47 CFR 76.1002(b)); and (iii) a cable operator from entering into an exclusive contract for satellite cable programming with a cable-affiliated satellite cable programming vendor, subject to certain exceptions (the "exclusive contract prohibition") (*see* 47 CFR 76.1002(c)–(e)). The Commission has also adopted procedures for resolving complaints alleging a violation of these program access rules. *See* 47 CFR 76.1003.

141. Consistent with the text of Section 628(c)(2), the Commission's program access rules currently apply to "satellite cable programming" and "satellite broadcast programming." 47 U.S.C. 548(c)(2). The Act and the Commission's rules define both terms to apply only to programming transmitted or retransmitted by satellite for reception by cable operators. The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. 548(i)(1); 47 U.S.C. 605(d)(1); *see also* 47 CFR 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. 548(i)(3); *see also* 47 CFR 76.1000(f).

142. The Commission has previously concluded that terrestrially delivered, cable-affiliated programming (such as programming transmitted to cable operators by fiber) is outside of the direct coverage of Section 628(c)(2) and the Commission's program access rules under Section 628(c)(2). *See DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802, 22807 (2000), *aff'd sub nom. EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002); *see also 2007 Program Access Order,* 72 FR 56645, October 4, 2007, *appeal pending sub nom. Cablevision Systems Corp. et al* v. *FCC,* No. 07–1425 (D.C. Cir); *2002 Program Access Order,* 67 FR 49247, July 30, 2002. This is commonly referred to as the "terrestrial loophole," because it allows cable-affiliated programmers to transmit their programming to cable operators via terrestrial means and thereby avoid application of the program access rules. *See 2002 Program Access Order.*

143. In the *Order* adopted herein, the Commission establishes rules for the consideration of complaints on a case-by-case basis alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order,* includes exclusive contracts, discrimination, and undue or improper influence). The *Order* notes that there may be other acts or practices that are "unfair" under Section 628(b). The *Order,* however, pertains only to exclusive contracts, discrimination, and undue or improper influence involving programming that is both terrestrially delivered and, consistent with Section 628(c)(2), cable-affiliated. The *Order* does not reach any conclusions regarding other acts that may be "unfair" under Section 628(b), nor does it foreclose potential complaints. The *Order* discusses the Commission's statutory authority for adopting rules to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. The Commission concludes that Section 628(b) grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming.

144. The *Order* next establishes the following reasons for Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming: (i) Cable operators continue to have an incentive and ability to engage in unfair acts involving their affiliated programming, regardless of whether this programming is satellite-delivered or terrestrially delivered; (ii) the Commission's judgment regarding this incentive and ability is supported by real-world evidence that cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors; and (iii) there is evidence that this withholding may significantly hinder MVPDs from providing video service in some cases. The *Order* concludes that Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming will facilitate broadband deployment and promote the goals of Section 628 to increase competition and diversity in the video distribution market. The *Order* also concludes that addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.

145. The *Order* next explains that complainants may pursue similar claims involving terrestrially delivered, cable-affiliated programming that they may

pursue with respect to satellite-delivered, cable-affiliated programming under the program access rules: exclusive contracts, discrimination, and undue or improper influence. The *Order* also describes four ways in which the rules adopted to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming: (i) A complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming, the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; (iii) there is no per se prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; rather, the Commission will assess such contracts on a case-by-case basis in response to a program access complaint; and (iv)defendants will have 45 days—rather than the usual 20 days—from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint. The *Order* then discusses how these rules will be applied to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions. Finally, the *Order* establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

146. In its Comments on the *NPRM,* the National Telecommunications Cooperative Association ("NTCA") stated that program access rules may have a significant economic impact on a substantial number of small entities, such as small rural MVPDs. NTCA stated further that its proposed amendments to the Commission's program access rules, which would include extending the program access rules to terrestrially delivered, cable-affiliated programming, would reduce the impact on small rural MVPDs. NTCA also stated that its proposed amendments will "promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market and spur development of new communications technologies." We conclude that allowing MVPDs to pursue program access claims involving terrestrially delivered, cable-affiliated programming will reduce the impact on small rural MVPDs by promoting competition and diversity in the MVPD market.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

147. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").

148. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers." Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year. Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

149. *Wired Telecommunications Carriers—Cable and Other Program Distribution.* This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The data we have available as a basis for estimating the number of such entities were gathered under a superseded SBA small business size standard formerly titled Cable and Other Program Distribution. The former Cable and Other Program Distribution category is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, we believe that a substantial number of entities included in the former Cable and Other Program Distribution category may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other

Program Distribution. With respect to OVS, the Commission has approved approximately 120 OVS certifications with some OVS operators now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2006, BSPs served approximately 1.4 million subscribers, representing 1.46 percent of all MVPD households. *See 13th Annual Report,* 24 FCC Rcd 542, 684, Table B–1 (2009). Among BSPs, however, those operating under the OVS framework are in the minority. OPASTCO reports that fewer than 3 percent of its members provide service under OVS certification. *See id.* at 607. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

150. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. As of 2006, 7,916 cable operators qualify as small cable companies under this standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers. Thus, under this standard, most cable systems are small.

151. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." There are approximately 65.3 million cable subscribers in the United States today. Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

152. *Wired Telecommunications Carriers—Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS is now included in the category of Wired Telecommunications Carriers. The size standard for that definition is 1,500 employees. The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, i.e., Cable and Other Program Distribution. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts. Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See 13th Annual Report,* 24 FCC Rcd at 580. All three currently offer subscription services. Two of these three DBS operators, DIRECTV and EchoStar Communications Corporation ("EchoStar"), report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than 500,000 subscribers. *See id.* at 581. Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee.

153. *Wired Telecommunications Carriers—Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. PCOs are now included in the category of Wired Telecommunications Carriers. The size standard for that definition is 1,500 employees. The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, i.e., Cable and Other Program Distribution. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts. The Independent Multi-Family Communications Council ("IMCC"), the trade association that represents PCOs, indicates that PCOs serve about 1 to 2 percent of the MVPD marketplace. *See id.* at 609. Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, PCOs currently serve approximately 900,000 subscribers. *See id.* at 684. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.

154. *Wired Telecommunications Carriers—Home Satellite Dish ("HSD") Service.* HSD is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small. The data we use herein to estimate the number of HSD services is based on a superseded SBA-recognized definition. Because HSD provides subscription services, HSD fell within the SBA-recognized definition of Cable and Other Program Distribution, which has been superseded by the category of Wired Telecommunications Carriers. The definition of Cable and Other Program Distribution provided that a small entity was one with $13.5 million or less in annual receipts. HSD or the large dish segment of the satellite

industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2005 and June 2006, HSD subscribership fell from 206,538 subscribers to 111,478 subscribers. *See id.* at 684, Table B–1. The Commission has no information regarding the annual revenue of the four C–Band distributors.

155. *Wireless Telecommunications Carriers (except Satellite)—Broadband Radio Service and Educational Broadband Service.* Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new category of Wireless Telecommunications Carriers (except Satellite). Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. The Broadband Radio Service (BRS) is composed of Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS). MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)). We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts.

156. *Broadband Radio Service and Educational Broadband Service—Auction Data.* The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934. 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $13.5 million or less).

157. *Broadband Radio Service and Educational Broadband Service—Licenses Not Received Via Auction.* MDS (now BRS) licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall within the new category of Wireless Telecommunications Carriers (except Satellite). Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers under the now superseded SBA small business size standard for Cable and Other Program Distribution.

158. *Educational Broadband Service.* Educational institutions are included in the analysis above as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

159. *Wireless Telecommunications Carriers (except Satellite)—Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new category of Wireless Telecommunications Carriers (except Satellite). Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Previously, LMDS providing wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts.

160. *Wireless Telecommunications Carriers (except Satellite)—Local Multipoint Distribution Service (Auctions).* The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years. These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the Commission's auction rules and the now superseded SBA small business size standard for Cable and Other Program Distribution.

161. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of

programs on a subscription or fee basis. * * * These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers." The SBA has developed a small business size standard for firms within this category, which is all firms with $15 million or less in annual receipts. According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year. Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

162. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials." The SBA has developed a small business size standard for firms within this category, which is all firms with $29.5 million or less in annual receipts. According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year. Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

163. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors." The SBA has developed a small business size standard for firms within this category, which is all firms with $29.5 million or less in annual receipts. According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year. Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

164. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

165. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

166. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

167. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) Operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year. Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

Description of Reporting, Recordkeeping and Other Compliance Requirements

168. The rules adopted in the *Order* will impose additional reporting, recordkeeping, and compliance requirements on MVPDs, cable

operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors. The *Order* allows MVPDs to file complaints with the Commission alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in an unfair act involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order,* includes exclusive contracts, discrimination, and undue or improper influence). The complaint proceeding will be subject to the same procedures set forth in Sections 76.7 and 76.1003 of the Commission's rules that apply to program access complaints involving satellite-delivered, cable-affiliated programming (*see* 47 CFR 76.7, 76.1003), except that (i) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming, the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; and (iii) defendants will have 45 days—rather than the usual 20 days—from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint. In addition, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply. *See* 47 CFR 76.7, 76.1003. The *Order* also establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

Steps Taken To Minimize Significant Impact on Small Entities and Significant Alternatives Considered

169. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The *NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities.

170. As discussed above, the decision to establish rules to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis, and to establish procedures for the Commission's consideration of requests for a temporary standstill, will facilitate competition in the video distribution market and promote broadband deployment. The decision therefore confers benefits upon various MVPDs, including those that are smaller entities. Thus, the decision benefits smaller entities as well as larger entities. In general, because the decision confers these benefits on smaller entities, a discussion of alternatives to the adopted rules is of secondary importance. We note that in the *Order,* the Commission found a lack of record evidence to reach a general conclusion that unfair acts involving this programming will significantly hinder an MVPD from providing video services in every case. A case-by-case approach is less burdensome than declining to consider complaints alleging that a cable operator has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming, because small MVPDs would lack relief in such situations. Moreover, while the *Order* provides illustrative examples of evidence a complainant may provide, such as a regression analysis or market survey, it also recognizes that not all potential complainants will have the resources to provide this type of evidence. In addition, a case-by-case approach is consistent with the First Amendment.

Report to Congress

171. The Commission will send a copy of the *First Report and Order* in MB Docket No. 07–198, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *First Report and Order* in MB Docket No. 07–198, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *First Report and Order* in MB Docket No. 07–198 and FRFA (or summaries thereof) will also be published in the **Federal Register.**

V. Ordering Clauses

172. *It is ordered* that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, this *First Report and Order Is Adopted.*

173. *It is ordered* that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, the Commission's rules *Are Hereby Amended* as set forth in the Rules Changes below.

174. *It is ordered* that the rules adopted herein are effective April 2, 2010, except for Sections 76.1001(b)(2), 76.1003(c)(3), and 76.1003(l) which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA) and will become effective after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

175. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *First Report and Order* in MB Docket No. 07–198, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

176. *It is further ordered* that the Commission shall send a copy of this *First Report and Order* in MB Docket No. 07–198 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, and Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons stated in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Section 76.1000 is amended by revising the first sentence of paragraph (b), (c)(1), the first sentence of paragraph (j), and adding paragraphs (l) and (m) to read as follows:

§ 76.1000 Definitions.

* * * * *

(b) *Cognizable interests.* In applying the provisions of this subpart, ownership and other interests in cable operators, satellite cable programming vendors, satellite broadcast programming vendors, or terrestrial cable programming vendors will be attributed to their holders and may subject the interest holders to the rules of this subpart. * * *

* * * * *

(c) * * *

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

* * * * *

(j) *Similarly situated.* The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor or by a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1)(ii), that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of § 76.1001(a) or § 76.1002(b) has occurred. * * *

* * * * *

(l) *Terrestrial cable programming.* The term "terrestrial cable programming" means video programming which is transmitted terrestrially or by any means other than satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming or satellite cable programming.

(m) *Terrestrial cable programming vendor.* The term "terrestrial cable programming vendor" means a person engaged in the production, creation, or wholesale distribution for sale of terrestrial cable programming, but does not include a satellite broadcast programming vendor or a satellite cable programming vendor.

■ 3. Section 76.1001 is revised to read as follows:

§ 76.1001 Unfair practices generally.

(a) *Unfair practices generally.* No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

(b) *Unfair practices involving terrestrial cable programming and terrestrial cable programming vendors.* (1) The phrase "unfair methods of competition or unfair or deceptive acts or practices" as used in paragraph (a) of this section includes, but is not limited to, the following:

(i) Any effort or action by a cable operator that has an attributable interest in a terrestrial cable programming vendor to unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms, and conditions for the sale of, terrestrial cable programming to any unaffiliated multichannel video programming distributor.

(ii) Discrimination in the prices, terms, or conditions of sale or delivery of terrestrial cable programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors, or their agents or buying groups, by a terrestrial cable programming vendor that is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; except that the phrase does not include the practices set forth in § 76.1002(b)(1) through (3). The cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors that wholly own or control, or are under common control with, such terrestrial cable programming vendor shall be deemed responsible for such discrimination and any complaint based on such discrimination shall be filed against such cable operator, satellite cable programming vendor, or satellite broadcast programming vendor.

(iii) Exclusive contracts, or any practice, activity, or arrangement tantamount to an exclusive contract, for terrestrial cable programming between a cable operator and a terrestrial cable programming vendor in which a cable operator has an attributable interest.

(2) Any multichannel video programming distributor aggrieved by conduct described in paragraph (b)(1) of this section that it believes constitutes a violation of paragraph (a) of this section may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7, as modified by § 76.1003, with the following additions or changes:

(i) The defendant shall answer the complaint within forty-five (45) days of service of the complaint, unless otherwise directed by the Commission.

(ii) The complainant shall have the burden of proof that the defendant's alleged conduct described in paragraph (b)(1) of this section has the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. An answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.

(iii) A complainant alleging that a terrestrial cable programming vendor has engaged in conduct described in paragraph (b)(1)(ii) of this section shall have the burden of proof that the terrestrial cable programming vendor is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors. An answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.

■ 4. Section 76.1002 is amended by revising paragraph (b)(2) introductory text (the note remains unchanged) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

* * * * *

(b) * * *

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming, satellite broadcast programming, or terrestrial cable programming; * * *

* * * * *

■ 5. Section 76.1003 is amended by revising paragraph (c)(3), the first sentence of paragraph (e)(1), paragraphs (g)(1) through (3), and by adding paragraph (l) to read as follows:

§ 76.1003 Program access proceedings.

* * * * *

(c) * * *

(3) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor or a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1);

* * * * *

(e) * * *

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint. * * *

* * * * *

(g) * * *

(1) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor; or

(3) The complainant has notified a cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming, satellite broadcast programming, or terrestrial cable programming, or has made a request to amend an existing contract pertaining to such programming pursuant to § 76.1002(f) of this part that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

* * * * *

(l) *Petitions for temporary standstill.* (1) A program access complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. In addition to the requirements of § 76.7, the complainant shall have the burden of proof to demonstrate the following in its petition:

(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 interested parties; and

(iv) The public interest favors grant of a stay.

(2) The defendant cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the Commission's decision acting on the complaint will provide for remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous programming contract.

■ 6. Section 76.1004 is amended by revising the last sentence of paragraph (a) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

(a) * * * For the purposes of this section, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company).

* * * * *

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