

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 76****[MB Docket Nos. 12–68; 07–18; 05–192; 07–29; FCC 12–123]****Program Access Rules****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission declines to extend the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming beyond its October 5, 2012 expiration date. Instead of this prohibition, the Commission will address exclusive contracts involving satellite-delivered, cable-affiliated programming on a case-by-case basis in response to program access complaints. The Commission also affirms its expanded discovery procedures for program access complaints.

**DATES:** Effective November 30, 2012.**ADDRESSES:** Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact David Konczal, [David.Konczal@fcc.gov](mailto:David.Konczal@fcc.gov), or Kathy Berthot, [Kathy.Berthot@fcc.gov](mailto:Kathy.Berthot@fcc.gov), of the Media Bureau, Policy Division, (202) 418–2120.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order and Order on Reconsideration*, FCC 12–123, adopted and released on October 5, 2012. 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 email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

**Summary of the Report and Order and Order on Reconsideration****I. Introduction**

1. In this *Report and Order*, we decline to extend the exclusive contract prohibition section of the program access rules beyond its October 5, 2012 sunset date. This prohibition generally bans exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor in areas served by a cable operator.<sup>1</sup> The prohibition applies only to programming that is delivered via satellite; it does not apply to programming delivered via terrestrial facilities.<sup>2</sup> Congress directed the Commission to adopt this prohibition in 1992 when cable operators served more than 95 percent of all multichannel video subscribers and were affiliated with over half of all national cable networks. In expectation that competition in the video programming and distribution markets would develop, Congress provided that the exclusive contract prohibition would expire on October 5, 2002, unless the Commission found that it “continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming.” On two previous occasions, first in 2002 and again in 2007, the Commission renewed the prohibition for five years, with the latest extension expiring on October 5, 2012, thus extending the prohibition for ten years beyond the original term established by Congress.

2. We find that a preemptive prohibition on exclusive contracts is no longer “necessary to preserve and protect competition and diversity in the distribution of video programming” considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. In upholding the Commission's last extension of the prohibition in 2007, the

United States Court of Appeals for the DC Circuit (“DC Circuit”) noted changes in the marketplace since 1992 and stated its expectation that if the market continued to evolve in this manner, “the Commission will soon be able to conclude that the prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming.” As discussed below, because the current market presents a mixed picture (with the cable industry now less dominant at the national level than it was when the exclusive contract prohibition was enacted, but prevailing concerns about cable dominance and concentration in various individual markets), we find that extending a preemptive ban on exclusive contracts sweeps too broadly. Rather, this mixed picture justifies a case-by-case approach in applying our program access rules (consistent with the case-by-case inquiries we undertake in the terrestrial programming and program carriage contexts), with special account taken of the unique characteristics of Regional Sports Network (“RSN”) programming. In addition to allowing us to assess any harm to competition resulting from an exclusive contract, this case-by-case approach will also allow us to consider the potentially procompetitive benefits of exclusive contracts in individual cases, such as promoting investment in new programming, particularly local programming, and permitting MVPDs to differentiate their service offerings. Accordingly, consistent with Congress's intention that the exclusive contract prohibition would not remain in place indefinitely and its finding that exclusive contracts can have procompetitive benefits in some markets, we decline to extend the preemptive prohibition beyond its October 5, 2012 sunset date.

3. We recognize that the potential for anticompetitive conduct resulting from vertical integration between cable operators and programmers remains a concern. For example, in some markets, vertical integration may result in exclusive contracts between cable operators and their affiliated programmers that preclude competitors in the video distribution market from accessing critical programming needed to attract and retain subscribers and thus harm competition. While the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks has declined since 2007, some of that programming may still be critical for MVPDs to compete in the video distribution market. Congress has provided the

<sup>1</sup> An exclusive contract results in one cable operator having access to a particular cable-affiliated programming network or networks in a given geographic area, to the exclusion of every other multichannel video programming distributor (“MVPD”) competing in that geographic area.

<sup>2</sup> The exclusive contract prohibition in section 628(c)(2)(D) pertains only to “satellite cable programming” and “satellite broadcast programming.” See 47 U.S.C. 548(c)(2)(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). In this *Order*, we refer to “satellite cable programming” and “satellite broadcast programming” collectively as “satellite-delivered programming.”

Commission with the authority to address exclusive contracts on a case-by-case basis. We thus conclude that, in the context of present market conditions, such an individualized assessment of exclusive contracts in response to complaints is a more appropriate regulatory approach than the blunt tool of a prohibition that preemptively bans all exclusive contracts between satellite-delivered, cable-affiliated programmers and cable operators. This case-by-case consideration of exclusive contracts involving satellite-delivered, cable-affiliated programming will mirror our treatment of terrestrially delivered, cable-affiliated programming, including the establishment of a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect prohibited in section 628(b) of the Act. As demonstrated by our recent actions on complaints involving withholding of terrestrially delivered, cable-affiliated programming, the Commission is committed to exercising its authority under section 628 of the Act to require cable-affiliated programmers to license their programming to competitors in appropriate cases.<sup>3</sup>

4. In addition to case-by-case adjudication, we expect that additional factors will mitigate the risk of any potentially adverse impact of the expiration of the exclusive contract prohibition on consumers and competition. First, approximately 30 satellite-delivered, cable-affiliated, national networks (accounting for 30 percent of all such networks) and 14 satellite-delivered, cable-affiliated, RSNs (accounting for over 40 percent of all such RSNs) are subject to program access merger conditions adopted in the *Comcast/NBCU Order* until January 2018. These conditions require Comcast/NBCU to make these networks available to competitors, even after the expiration of the exclusive contract prohibition.<sup>4</sup> Second, the record

<sup>3</sup> See *Verizon v. MSG/Cablevision (Bureau Order)*, Order, 26 FCC Rcd 13145 (MB 2011), *affirmed*, *Verizon v. MSG/Cablevision (Commission Order)*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011); *AT&T v. MSG/Cablevision (Bureau Order)*, Order, 26 FCC Rcd 13206 (MB 2011), *affirmed*, *AT&T v. MSG/Cablevision (Commission Order)*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11–4780 (2nd Cir.). In addition, where vertical integration occurs as a result of a transaction involving the transfer of Commission licenses, we have authority under section 310(d) to impose conditions that address potential competitive harms that might result from such integration. See, e.g., *Comcast/NBCU Order*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011).

<sup>4</sup> These conditions provide that, if “negotiations fail to produce a mutually acceptable set of price,

indicates that existing affiliation agreements between programmers and MVPDs require programming covered by the agreement to be made available for the term of the existing agreement despite the expiration of the exclusive contract prohibition. This effectively defers the period that exclusive contracts will begin to be enforced and thus minimizes any potential disruption to consumers that could result from the expiration of the prohibition. Third, in addition to claims under section 628(b) of the Act, additional causes of action under section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under section 628(c)(2)(A) and claims alleging discrimination under section 628(c)(2)(B). In particular, nothing in our decision today will alter our treatment of selective refusals to license, whereby a satellite-delivered, cable-affiliated programmer refuses to license its content to a particular MVPD (such as a new entrant or satellite provider) while simultaneously licensing its content to other MVPDs competing in the same geographic area. Even after the expiration of the exclusive contract

terms, and conditions” for a carriage agreement with one or more Comcast-controlled networks, an MVPD or bargaining agent may “submit [the] dispute to commercial arbitration.” *Comcast/NBCU Order*, 26 FCC Rcd at 4259–62, paragraphs 49–59 and 4358, Condition II. Each party is required to submit a “final offer \* \* \* in the form of a contract for carriage” for a period of three years. *Id.* at 4365, Condition VII.A.13. The arbitrator must “choose the final offer of the party which most closely approximates the fair market value of the programming carriage rights at issue.” *Id.* at 4366, Condition VII.B.4. Following the decision of the arbitrator, “the parties shall be bound by the final offer chosen by the arbitrator.” *Id.* at 4367, Condition VII.B.11; see also *id.* at 4364, Condition VII.A.1 (stating that the arbitration will “determine the terms and conditions of a new agreement”). By requiring Comcast-controlled networks to enter into arbitration with a requesting MVPD to determine the price, terms, and conditions of a new carriage agreement, these conditions require Comcast-controlled networks to make their programming available to all requesting MVPDs and thus preclude any Comcast-controlled network from enforcing an exclusive contract, including in regions where Comcast does not operate its cable systems. See *id.* at 4261, paragraph 55 (explaining that these conditions apply to the benefit of all MVPDs, “not just those that compete directly with Comcast”). Our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the *Comcast/NBCU Order* concluding that these conditions were necessary to curb Comcast’s anticompetitive exclusionary program access strategies that might result from the transaction. In that proceeding, based on an extensive factual record in the context of an adjudication, the Commission found MVPDs would be “substantially harm[ed]” without Comcast-NBCU’s suite of local, regional, and national programming, and that an “anticompetitive exclusionary program access strategy would often be profitable for Comcast.” *Comcast/NBCU Order*, 26 FCC Rcd at 4254, paragraph 37 (footnotes omitted) and 4257–58, paragraph 44.

prohibition, such conduct will remain a violation of the discrimination provision in section 628(c)(2)(B) of the Act, unless the cable-affiliated programmer can establish a legitimate business reason for the conduct in response to a program access complaint challenging the conduct. Fourth, we will continue to monitor the video marketplace. If the expiration of the exclusive contract prohibition, combined with future changes in the competitive landscape, result in harm to consumers or competition, we have statutory authority pursuant to section 628(b) of the Act to take remedial action by adopting rules to address such concerns.

5. We also take related actions herein to amend our rules pertaining to subdistribution agreements, common carriers, and Open Video Systems (“OVS”) to reflect the expiration of the exclusive contract prohibition. Further, we modify merger conditions pertaining to exclusive contracts adopted in the *Liberty Media Order* to conform to our revised rules. In addition, we revise our procedural rules to (i) provide for a 45-day answer period for all complaints alleging a violation of section 628(b), regardless of whether the complaint involves satellite-delivered or terrestrially delivered programming; and (ii) establish a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming.

6. In the *Order on Reconsideration* in MB Docket No. 07–29, we (i) affirm the expanded discovery procedures for program access complaints adopted in the *2007 Extension Order*; (ii) modify the standard protective order for use in program access complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (iii) clarify that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

## II. Report and Order in MB Docket No. 12–68 et al.

### A. Background

7. In areas served by a cable operator, section 628(c)(2)(D) generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated

programming vendor.<sup>5</sup> The exclusive contract prohibition applies to all satellite-delivered, cable-affiliated programming and preemptively bans all exclusive contracts for such programming with cable operators, regardless of whether the withholding of particular programming would impact competition in the marketplace. As mentioned above, the exclusive contract prohibition applies only to programming that is delivered via satellite; it does not apply to programming that is delivered via terrestrial facilities. Under the statute and our implementing rules, an exclusive contract is permissible if a cable operator or cable-affiliated programmer obtains prior approval by demonstrating to the Commission that the contract serves the public interest. Congress thus recognized that some exclusive contracts may serve the public interest by providing offsetting benefits to the video programming market or assisting in the development of competition among MVPDs.

8. Congress also provided that the exclusive contract prohibition would sunset after ten years (on October 5, 2002), unless the Commission found that it “continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming.” On two previous occasions, first in 2002 and again in 2007, the Commission found that the prohibition remained necessary and thus renewed it for an additional five-year term on each occasion, with the latest extension expiring on October 5, 2012. In issuing the latest extension, the Commission recognized that “Congress intended for the exclusive contract prohibition to sunset at a point when market conditions warrant” and specifically “caution[ed] competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition, including further investments in their own programming.” The DC Circuit upheld the Commission’s decision, characterizing the developments in the marketplace as a “mixed picture” and deferring to the Commission’s analysis. The court expressed an expectation, however, that at the next review “the Commission will weigh heavily Congress’s intention that the exclusive

contract prohibition will eventually sunset.”

9. On March 20, 2012, the Commission adopted and released an *NPRM* initiating a third review of the necessity of the exclusive contract prohibition. The *NPRM* presented data on the current state of competition in the video distribution market and the video programming market and invited commenters to submit more recent data or empirical analyses.<sup>6</sup> The *NPRM* sought comment on whether current conditions in the video marketplace support retaining, sunseting, or relaxing the exclusive contract prohibition. No commenter challenged the accuracy of the data set forth in the *NPRM*.

#### B. Discussion

10. For the reasons discussed below, we decline to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date. First, we review marketplace developments since 2007 and conclude that, because the current market presents a mixed picture (with the cable industry now less dominant at the national level than it was when the exclusive contract prohibition was enacted, but prevailing concerns about cable dominance and concentration in various individual markets), a preemptive ban on exclusive contracts sweeps too broadly and is no longer “necessary to preserve and protect competition and diversity in the distribution of video programming” considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. Second, we describe the case-by-case process that will remain after sunset of the preemptive ban to address competitive harms that may arise in connection with exclusive contracts, including a 45-day period for answering a section 628(b) complaint and the establishment of a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect prohibited in section 628(b). We also explain how addressing exclusive contracts on a case-by-case basis comports with the First Amendment. Third, we describe necessary amendments to our rules pertaining to redistribution agreements, common carriers, and OVS and to merger conditions pertaining to exclusive arrangements adopted in the *Liberty Media Order* to reflect the expiration of the exclusive contract prohibition.

#### 1. Expiration of the Exclusive Contract Prohibition

##### a. Standard of Review

11. Congress provided that the exclusive contract prohibition would expire on October 5, 2002, unless the Commission found that it continued to be “necessary” to preserve and protect competition and diversity in the distribution of video programming. The Commission has previously determined that the exclusive contract prohibition continues to be “necessary” if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected. The DC Circuit has upheld the Commission’s interpretation of the term “necessary” and has also ruled that the Commission’s analysis of the prohibition is appropriately focused on harm to competition and consumers, not harm to competitors.

12. The Commission has also explained that the sunset provision “creates a presumption that the rule will sunset” unless the Commission finds that it continues to be necessary.<sup>7</sup> Moreover, the Commission has explained that, because the exclusive contract prohibition has been in effect since 1992, “it is difficult to obtain specific factual evidence of the impact on competition in the video distribution market if the prohibition were lifted.” Accordingly, we rely on “economic theory and predictive judgment[s] in addition to specific factual evidence in reaching our decision concerning the continued need for the exclusive contract prohibition.”

##### b. Analysis

13. In evaluating whether the exclusive contract prohibition continues to be necessary, the Commission has previously examined data on the status of competition in the video programming market and the video distribution market. The Commission presented extensive data in the *NPRM* on these issues, which presented a mixed picture, and invited commenters to submit more recent data or empirical analyses. While no commenter disputed the accuracy of the data presented in the *NPRM*, updated information in the record requires some modifications to these data. In the discussion below and in Appendix E, we present the most recent data available on the market shares of cable operators and other MVPDs in the video distribution market,

<sup>7</sup> Commenters’ suggestion that vertically integrated cable operators bear the burden of demonstrating that the prohibition is no longer necessary finds no basis in the statute.

<sup>5</sup> In unserved areas, Congress adopted a *per se* prohibition on exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers. 47 U.S.C. 548(c)(2)(C). Unlike the exclusive contract prohibition in served areas, the exclusive contract prohibition in unserved areas is not subject to a sunset provision and is unaffected by this *Order*.

<sup>6</sup> See *id.* at 3424–30, paragraphs 21–29 and 3473–87, Appendices A–C.

which differ only slightly from the data presented in the *NPRM*, and continue to show a mixed picture. In addition, in the discussion below and in Appendices F and G, we update the data presented in the *NPRM* on cable-affiliated networks to reflect (i) Comcast/NBCU's sale of its interest in A&E Television Networks, LLC ("A&E"); and (ii) information in the record provided by Cablevision, Comcast, and Time Warner Cable ("TWC") regarding their affiliation with RSNs and whether those RSNs are satellite-delivered or terrestrially delivered. Appendices E through G are available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-123A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-123A1.pdf).

14. Based on similar data and other record evidence, the Commission in past extension decisions has analyzed whether, in the absence of the exclusive contract prohibition, cable-affiliated programmers would have the incentive and the ability to harm competition and diversity in the distribution of video programming by entering into exclusive contracts. We undertake the same analysis here. Below, we consider the "incentive" element followed by the "ability" element.

(i) Incentive

15. In evaluating whether cable-affiliated programmers retain the incentive to enter into exclusive contracts, the Commission analyzes whether there continues to be an economic rationale for exclusivity. The Commission has explained that, if a vertically integrated cable operator enters into an exclusive arrangement for affiliated programming, it can recoup profits lost at the upstream level (*i.e.*, lost licensing fees and advertising revenues) by increasing the number of subscribers of its downstream MVPD division. The Commission has also explained that, particularly where rival distributors are limited in their market shares, a cable-affiliated programmer will be able to recoup a substantial amount of the revenues foregone by pursuing exclusivity. In the *2007 Extension Order*, the Commission concluded that vertically integrated cable programmers retained the incentive to enter into exclusive contracts for satellite-delivered programming.

16. As discussed below, the record here shows a mixed picture, indicating that vertically integrated cable programmers may still have an incentive to enter into exclusive contracts for satellite-delivered programming in many markets. As the Commission explained previously, the profitability of exclusivity increases as

the number of subscribers controlled by the vertically integrated cable operator increases. In past extension decisions, the Commission has analyzed the aggregate market share of cable operators on a national and regional basis to assess the profitability of exclusivity. In the *2007 Extension Order*, the Commission found that the cable industry's share of MVPD subscribers nationwide had decreased since 2002 from 78 percent to approximately 67 percent, but that this market share was still sufficient to make exclusivity a profitable strategy. Here, the record evidence indicates that the cable industry's share of MVPD subscribers nationwide has continued to decrease, from 67 percent in 2007 to 57.4 percent today, which indicates that vertically integrated cable operators as a whole—and considered solely on a national basis—have a reduced incentive to enter into exclusive contracts, compared to 2007.

17. On a regional basis, however, there remain markets where cable operators have a substantial share of subscribers. In the *2007 Extension Order*, the Commission noted that the cable industry's share of MVPD subscribers in certain Designated Market Areas ("DMAs") remained above or near the 78 percent level that the Commission previously found in 2002 was sufficient to make exclusivity a profitable strategy. Here, the record indicates that the cable industry's share of MVPD subscribers in certain DMAs remains above or near both the 67 percent level and the 78 percent level that the Commission has previously found to be sufficient to make exclusivity a profitable strategy. Although the number of DMAs in which the cable industry's share of MVPD subscribers exceeds these benchmarks has decreased since 2007, there are still a considerable number of DMAs in which concerns about competition remain.

18. Moreover, we note that data submitted in the record by cable operators indicate that clustering has increased since 2007. The Commission has, in past orders, observed that clustering may increase a cable operator's incentive to enter into exclusive contracts for regional programming. In the *2007 Extension Order*, the Commission noted that Comcast passed more than 70 percent of television households in 30 Designated Market Areas (DMAs) and TWC passed more than 70 percent of television households in 23 DMAs. Based on the 2011 data provided by the cable operators, Comcast now passes more than 70 percent of television households

in [REDACTED] DMAs and TWC passes more than 70 percent of television households in [REDACTED] DMAs.<sup>8</sup> These calculations employ data from Nielsen on television households in each DMA and homes passed data provided by the cable operators. In the *2007 Extension Order*, the Commission also noted that the collective market share of MVPDs that compete with incumbent cable operators in many DMAs where cable multiple system operators ("MSOs") have clusters is far less than their collective nationwide market share. The same holds true today.

19. In addition to this data, we note that real-world evidence indicates that in some markets cable-affiliated programmers may have an incentive to enter into exclusive contracts that can harm competition. As noted in the previous extension decisions as well as in the *2010 Program Access Order*, vertically integrated cable operators have withheld from competitors certain terrestrially delivered networks, which are not subject to the exclusive contract prohibition. Most recently, Cablevision and MSG withheld the terrestrially delivered MSG HD and MSG+ HD RSNs from AT&T and Verizon.

20. Because the record before us indicates that there may be certain region-specific circumstances where vertically integrated cable operators may have an incentive to withhold satellite-delivered programming from competitors,<sup>9</sup> we believe that a case-by-case approach authorized under other provisions of the Act—rather than a preemptive ban on exclusive contracts—will adequately address competitively harmful conduct in a more targeted, less burdensome manner. We disagree with commenters to the extent they imply that Congress intended the prohibition to expire only once vertically integrated cable operators no longer have any incentive to enter into exclusive contracts. Such an interpretation

<sup>8</sup> We also received data from Cablevision showing [REDACTED] DMAs in which Cablevision passes more than 70 percent of television households.

<sup>9</sup> We also note that, in past extension decisions, the Commission has noted that increases in horizontal consolidation among vertically integrated cable operators means they will reap a greater portion of the gains from exclusivity, thereby increasing the incentive to enter into exclusive contracts. Our most recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable operators today is 42.7 percent, an increase from the *2002 Extension Order* (34 percent), but a decrease from the *2007 Extension Order* (54–56.75 percent). While the record evidence demonstrates that the data pertaining to horizontal consolidation have remained consistent with 2002 levels, this factor is outweighed by other marketplace considerations favoring elimination of the preemptive ban.

contradicts Congress's recognition that exclusive contracts do not always harm competition and can have procompetitive benefits in some cases.

(ii) Ability

21. In addition to an incentive to enter into exclusive contracts, we also assess the "ability" of vertically integrated cable operators to use exclusivity to harm competition and diversity in the distribution of video programming. In this regard, the Commission considers whether satellite-delivered, cable-affiliated programming remains programming for which there are no good substitutes and are necessary for competition. In previous extension orders, the Commission found that there were no good substitutes for a significant amount of satellite-delivered, cable-affiliated programming, and that such programming remained necessary for viable competition in the video distribution market. Accordingly, the Commission concluded that cable-affiliated programmers retained "the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent the rule." In reaching this conclusion, the Commission explained that "[w]hat 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 the 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."

22. We recognize that some commenters contend that the data in the *NPRM* indicate little change since 2007 in the amount of satellite-delivered, cable affiliated programming among the most popular cable networks. These claims, however, do not consider four developments that impact significantly our determination as to whether a preemptive prohibition remains necessary under the terms of the statute.

23. First, as explained in the *NPRM*, the Commission in 2011 granted the application of Comcast, General Electric Company ("GE"), and NBCU to assign and transfer control of broadcast, satellite, and other radio licenses from GE to Comcast. Reviewing that vertical integration pursuant to section 310(d), the Commission approved the transaction with conditions, including a program access condition requiring Comcast/NBCU to make networks it

controls (the "Comcast-controlled networks")<sup>10</sup> available to competitors. As set forth in Appendices F and G, we estimate that 30 satellite-delivered national networks and 14 satellite-delivered RSNs are Comcast-controlled networks. Comcast/NBCU is subject to these conditions until January 2018. In other words, even after the exclusive contract prohibition expires, these Comcast-controlled networks could not be subject to an exclusive contract until January 2018. For that reason, we find it appropriate to exclude the Comcast-controlled networks when assessing the continued need for a preemptive ban.<sup>11</sup>

24. Some commenters contend, however, that the Commission must consider the Comcast-controlled networks as if they would be impacted by a sunset of the exclusivity prohibition. They claim that, if the Commission declines to extend the prohibition based on an analysis of the market that ignores the Comcast-controlled networks, the Commission

<sup>10</sup> As discussed in the *NPRM*, the program access merger conditions apply to "C-NBCU Programmers." Whether a network qualifies as a "C-NBCU programmer" is a fact-specific determination. As described in the *NPRM*, with the exception of the iN DEMAND networks, we assume that any network in which Comcast or NBCU holds a 50 percent or greater interest is a "C-NBCU Programmer" subject to these conditions. We refer to these networks as "Comcast-controlled networks." We refer to other networks in which Comcast or NBCU holds a less than 50 percent interest as "Comcast-affiliated networks," which we assume for purposes of the estimates in this *Order* are not "C-NBCU Programmers" subject to the program access merger conditions adopted in the *Comcast/NBCU Order*, but are subject to the program access rules, including the exclusive contract prohibition. No commenter opposed this proposed distinction between Comcast-controlled and Comcast-affiliated networks as set forth in the *NPRM*. In addition, given Comcast's previous statements that it cannot control decisionmaking at iN DEMAND, the *NPRM* proposed to consider iN DEMAND as Comcast-affiliated, but not Comcast-controlled. No commenter opposed this characterization, thus we consider the iN DEMAND networks to be Comcast-affiliated, but not Comcast-controlled, for purposes of the estimates in this *Order*. Nothing in this *Order* should be read to state or imply any position as to whether any particular network qualifies or does not qualify as a "C-NBCU Programmer."

<sup>11</sup> Our decision here is consistent with the *2011 Program Carriage Order*. In that order, the Commission found that the "number of cable-affiliated networks recently increased significantly after the merger of Comcast and NBC Universal, thereby highlighting the continued need for an effective program carriage complaint regime." In the *Comcast/NBCU Order*, the Commission specifically relied on the program carriage complaint process to address concerns relating to program carriage resulting from the merger. Accordingly, the increase in vertical integration resulting from the Comcast/NBCU transaction was a significant factor in the *2011 Program Carriage Order*. With respect to program access concerns, however, the *Comcast/NBCU Order* adopted specific conditions to address these concerns, thus allowing us to exclude the Comcast-controlled networks from consideration here.

will have no vehicle to consider whether the prohibition remains necessary after the Comcast merger conditions expire. We reject these claims. The Commission may exercise its broad rulemaking authority under section 628(b) to adopt rules prohibiting certain exclusive contracts involving cable-affiliated programming if it becomes necessary after these merger conditions expire, based on an assessment of the marketplace at that time.

25. Second, after the Commission released the *NPRM*, Comcast sold its interest in A&E to A&E's other owners (Disney and Hearst). As a result of this transaction, the regulatory status of the 17 networks owned by A&E changed from cable-affiliated to non-cable-affiliated. As set forth in the *NPRM*, A&E-owned networks account for four of the Top 20 national cable networks as ranked by average prime-time ratings and three of the Top 20 national cable networks as ranked by subscribership. Thus, the change in the regulatory status of the A&E networks has reduced since 2007 the number of satellite-delivered, cable-affiliated networks among the Top 20 national cable networks ranked by subscribership and by average prime-time ratings.

26. Third, in both the *2002 Extension Order* and the *2007 Extension Order*, the Commission found significant that the subscription premium networks HBO and Cinemax were cable-affiliated. The Commission relied on comments arguing that "first-run programming produced by HBO and other premium networks [is] essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator." In 2009, however, the Commission approved a transaction resulting in the separation of TWC, a cable operator, from Time Warner Inc., an owner of satellite-delivered, national programming networks, including HBO and Cinemax. As a result, HBO and Cinemax are no longer cable-affiliated. This transaction was also significant because it changed the regulatory status of other cable networks cited by the Commission in the *2007 Extension Order* (CNN, TBS, and TNT) from cable-affiliated to non-cable-affiliated. In declining to adopt a condition applying the program access rules to Time Warner Inc. post-transaction, the Commission explained that the underlying premise of the program access rules would no longer apply because Time Warner Inc. (a non-cable-affiliated programmer) and TWC would no longer have the incentive to discriminate in favor of each other.

27. Fourth, in the *2007 Extension Order*, the Commission relied on data indicating that 46 percent of all RSNs were cable-affiliated. These data, however, did not distinguish between terrestrially delivered and satellite-delivered RSNs. As discussed above, the exclusive contract prohibition applies only to programming that is delivered via satellite; it does not apply to programming that is delivered via terrestrial facilities. An exclusive contract involving a terrestrially delivered, cable-affiliated RSN is permitted unless the Commission finds in response to a complaint that it violates section 628(b) of the Act. We, therefore, further refine our prior analysis by distinguishing between cable-affiliated RSNs that are subject to the prohibition (*i.e.*, RSNs delivered via satellite) and those that are not (*i.e.*, RSNs delivered via terrestrial means). To that end, the Media Bureau asked the three cable operators that own the greatest number of RSNs (Cablevision, Comcast, and TWC) whether their RSNs are satellite-delivered or terrestrially delivered. The responses reveal that a little fewer than half (43 percent) of all cable-affiliated RSNs are terrestrially delivered and therefore beyond the scope of the exclusive contract prohibition.<sup>12</sup> The remaining 57 percent of cable-affiliated RSNs are satellite-delivered, but over 43 percent of these RSNs are Comcast-controlled and thus subject to program access merger conditions until January 2018. As set forth in Appendix G, the data demonstrate the following regarding the 108 RSNs (both cable-affiliated and non-cable-affiliated) available today: (i) 52 RSNs (48 percent) are not cable-affiliated; (ii) 24 RSNs (22 percent) are cable-affiliated but terrestrially delivered and therefore subject to a case-by-case process under section

<sup>12</sup> The Media Bureau did not request information from Bright House or Cox regarding whether their affiliated RSNs are satellite-delivered or terrestrially delivered. This includes the following four RSNs: Bright House Sports Network, Bright House Sports Network HD, Cox Sports Television, and Cox Sports Television HD. Moreover, Comcast and TWC did not provide information regarding whether the following affiliated RSNs are satellite-delivered or terrestrially delivered: Comcast SportsNet Houston, Comcast SportsNet Houston HD, Midco Sports Network, Midco Sports Network HD, Time Warner Cable SportsNet, Time Warner Cable SportsNet HD, Time Warner Cable Deportes, and Time Warner Cable Deportes HD. For purposes of this analysis, and with the exception of Cox-4 and Cox-4 HD (which the Commission has previously found are terrestrially delivered), we assume that all cable-affiliated RSNs for which we do not have information are satellite-delivered and therefore subject to the exclusive contract prohibition. Thus, our estimate that 43 percent of cable-affiliated RSNs are terrestrially delivered is conservative.

628(b);<sup>13</sup> (iii) 14 RSNs (13 percent) are cable-affiliated and satellite-delivered, but are also Comcast-controlled, and therefore subject to program access merger conditions until January 2018 that require Comcast to make these networks available to competitors;<sup>14</sup> and (iv) only 18 RSNs (17 percent) are cable-affiliated, satellite-delivered, and not Comcast-controlled, and therefore potentially impacted by the expiration of the exclusive contract prohibition.<sup>15</sup>

28. Based on the four developments noted above, the record indicates a decrease since 2007 in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks. In particular, the number of Top 20 national cable networks as ranked by average prime time ratings that are cable-affiliated has fallen from seven in 2007 to one today<sup>16</sup> and the number of Top 20 national cable networks as ranked by subscribership that are cable-affiliated has fallen from six in 2007 to three today.<sup>17</sup> Moreover, while the Commission in 2007 found that “popular subscription premium networks, such as HBO and Cinemax” were cable-affiliated, those networks are no longer cable-affiliated today. In addition, while the Commission in 2007 relied on data indicating that 46 percent of all RSNs were satellite-delivered and cable-affiliated, this figure is only 17 percent today (not including Comcast-controlled networks, which are subject to program access merger conditions).<sup>18</sup>

29. In light of the mixed picture presented by the current MVPD market (including the decline in the amount of

<sup>13</sup> Four of these 24 terrestrially delivered, cable-affiliated RSNs are Comcast-controlled RSNs and therefore also subject to program access merger conditions until January 2018 that require Comcast to make these networks available to competitors.

<sup>14</sup> As discussed above, our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the *Comcast/NBCU Order* concluding that the program access merger conditions adopted therein were necessary to curb Comcast’s anticompetitive exclusionary program access strategies that might result from the transaction.

<sup>15</sup> Even with respect to these 18 RSNs, TWC has stated it will make its four RSNs featuring the games of the Los Angeles Lakers (Time Warner Cable SportsNet, Time Warner Cable SportsNet HD, Time Warner Cable Deportes, and Time Warner Cable Deportes HD) available to competing MVPDs.

<sup>16</sup> This number increases to three if the Comcast-controlled national networks are included. In the early 1990s when the exclusive contract prohibition was adopted, 12 of the Top 15 national cable networks as ranked by average prime time ratings were cable-affiliated.

<sup>17</sup> This number increases to four if the Comcast-controlled national networks are included. In the early 1990s when the exclusive contract prohibition was adopted, 10 of the Top 25 national cable networks as ranked by subscribership were cable-affiliated.

<sup>18</sup> This percentage increases to 30 percent if the Comcast-controlled RSNs are included.

satellite-delivered, cable-affiliated programming among the most popular cable networks), we find that a broad, preemptive ban on exclusive contracts is no longer necessary to prevent cable-affiliated programmers from harming competition, considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. We recognize that some satellite-delivered, cable-affiliated programming, such as certain RSNs, remains necessary for competition and has no good substitutes. However, we do not believe this warrants extension of a preemptive ban on exclusivity when a case-by-case approach can address competitively harmful exclusive contracts on a more targeted basis.

### (iii) Conclusion

30. Based on the foregoing, we can no longer conclude that the exclusive contract prohibition remains necessary to preserve and protect competition and diversity in the distribution of video programming considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. While the record indicates that vertically integrated cable operators may still have the ability and incentive to withhold satellite-delivered, cable-affiliated programming in some markets with the effect of harming competition and diversity, the record also demonstrates a decline since 2007 in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks. To be sure, absent the prohibition, there may be instances where cable operators enter into exclusive contracts for satellite-delivered, cable-affiliated programming that is necessary for competition and has no good substitutes. But Congress has provided the Commission with the authority to address such contracts on a case-by-case basis after the expiration of the prohibition. Specifically, sections 628(b), 628(c)(1), and 628(d) of the Act grant the Commission broad authority to prohibit “unfair acts” of cable operators and their affiliated programmers that have the “purpose or effect” of “hinder[ing] significantly or prevent[ing]” any MVPD from providing “satellite cable programming or satellite broadcast programming to subscribers or consumers.” In addition, the Commission has authority (i) pursuant to section 628(c)(2)(B) of the Act to prohibit discrimination in the prices, terms, and conditions for sale of satellite-delivered, cable-affiliated programming among MVPDs; and (ii) pursuant to section 628(c)(2)(A) of the

Act to prohibit a cable operator from engaging in undue or improper influence over the decision of its affiliated, satellite-delivered programmer to enter into an exclusive contract. The Commission is committed to using this statutory authority to require cable-affiliated programmers to license programming to competitors in appropriate cases, as demonstrated by our recent actions on complaints involving terrestrially delivered, cable-affiliated RSNs. As demonstrated in those proceedings, a case-by-case approach allows for an individualized assessment of exclusive contracts based on the facts presented in each case.

31. As some commenters note, however, the Commission in previous extension decisions characterized a case-by-case process for addressing exclusive contracts as an inadequate substitute for the “particularized protection” afforded by the exclusive contract prohibition. But the Commission reached that conclusion on a much different factual record. Here, based on the decline during the past five years in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks, we can no longer conclude that a case-by-case process is insufficient to protect MVPDs from the potential anticompetitive impact of exclusive contracts or that a preemptive ban continues to be warranted.<sup>19</sup> Moreover, our recent actions addressing complaints involving terrestrially

<sup>19</sup>The Commission’s conclusions in the *Comcast/NBCU Order* do not require a different result. In that proceeding, based on an extensive factual record in the context of an adjudication, the Commission found that the “record evidence supports a finding that without Comcast-NBCU’s suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast, substantially harming those MVPDs that compete with Comcast in video distribution.” *Comcast/NBCU Order*, 26 FCC Rcd at 4254, paragraph 37 (footnotes omitted). Moreover, the Commission found that “this anticompetitive exclusionary program access strategy would often be profitable for Comcast.” *Id.* at 4257–58, paragraph 44. The Commission’s findings with respect to that transaction, which involved the nation’s largest cable operator both in terms of subscribers and number of cable networks owned, do not compel the same conclusion with respect to all other vertically integrated cable operators. Indeed, the Commission specifically noted that “[a]ll adjudicatory findings are fact specific and based on the evidence in the record in a specific matter.” *Id.* at 4258, paragraph 45. Moreover, consistent with the case-by-case approach we describe herein, the Commission explained that “[a]n assessment of the consequences of foreclosure of the programming at issue in a particular transaction must be made on a case-by-case basis, considering whether the foreclosure to rival MVPDs of access to the specific programming networks offered by the parties to the transaction likely would result in the loss of subscribers to MVPDs having access.” *Id.* at 4258, paragraph 45 n. 109.

delivered, cable-affiliated RSNs demonstrates the adequacy of a case-by-case process.

32. Some commenters note that Congress has already established a case-by-case approach for assessing exclusive contracts involving satellite-delivered, cable-affiliated programming. Specifically, pursuant to section 628(c)(4), a cable operator or a satellite-delivered, cable-affiliated programmer may submit a “Petition for Exclusivity” to the Commission for approval to enforce or enter into an exclusive contract by demonstrating that the contract serves the public interest. Some commenters claim that the Commission could streamline this procedure rather than requiring MVPDs to pursue complaints. We reject this contention. Given the decline during the past five years in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks, we find no basis to continue to preemptively ban exclusive contracts and to place the burden on cable operators or their affiliated programmers to demonstrate that an exclusive contract serves the public interest before entering into or enforcing the contract. Indeed, relying on the Petition for Exclusivity process to avoid the expiration of the prohibition would mean that the prohibition would never expire, contrary to Congress’s direction.

33. We recognize the possibility that the expiration of the exclusive contract prohibition may result in cable operators acquiring additional programming, including “must have” programming, and then entering into exclusive contracts for such programming. We also recognize the possibility that some existing satellite-delivered, cable-affiliated programming may increase in popularity in the future. The record, however, provides no basis on which to predict the likelihood of these developments or their impact on competition. Indeed, such developments seem contrary to current market trends, as discussed above. Given this, extending the prohibition based simply on the chance of a reversal in industry trends would be at odds with Congress’ inclusion of a sunset provision. Moreover, even if a marketplace reversal were to occur, the Commission has the tools in place to address these developments, either on a case-by-case basis in response to complaints, which include a rebuttable presumption of “significant hindrance” for RSNs, or by adopting rules pursuant to section 628(b) that prohibit certain

types of exclusive contracts involving cable-affiliated programming.<sup>20</sup>

#### c. Additional Factors Weighing in Favor of Expiration of the Exclusive Contract Prohibition

34. We find additional factors also weigh in favor of our decision to decline to extend the prohibition beyond its sunset date. First, as both Congress and the Commission have specifically recognized, exclusive contracts may result in the procompetitive benefit of increasing investment in programming in some cases, thereby promoting competition and diversity in the video programming market. Vertically integrated cable operators and cable-affiliated programmers note that expiration of the prohibition will provide cable operators with an incentive to increase their investment in programming ventures, particularly local and regional programming. They also claim that exclusivity is critical to programmers for the following reasons: (i) A new service with limited interest may be able to gain carriage only if it can provide a distributor with exclusive carriage; (ii) exclusivity may be critical for a niche network that targets a particular audience; (iii) a programmer may wish to enter into an exclusive arrangement to reduce or share the risks with a cable operator; and (iv) exclusivity enhances the incentive of the cable operator to market and publicize the network. Moreover, expiration of the exclusive contract prohibition may also encourage other MVPDs or non-MVPD-affiliated programmers to create programming to counteract any exclusives involving cable operators, thereby leading to more competition and diversity in the video programming market. The Commission recognized this benefit in the *2010 Program Access Order*, explaining that,

<sup>20</sup>Some commenters also speculate that cable operators will enter into exclusive contracts covering a bundle of cable-affiliated networks, which has a more harmful impact on competitors than an exclusive contract involving a single network. Should this occur, however, the Commission will be able to address these situations post-sunset pursuant to the provisions of section 628 that do not sunset. The Commission’s conclusions in the *Comcast/NBCU Order* do not require a different result. In that proceeding, the Commission found that the “evidence suggests that the overall bundle of NBCU cable networks is critical programming that MVPDs need to offer a competitive service that is attractive to consumers even if no individual network in the bundle were considered ‘marquee’ programming.” *Comcast/NBCU Order*, 26 FCC Rcd at Appendix B, 4395–96, paragraph 46. As discussed above, this conclusion was based on an extensive factual record in the context of an adjudication involving the nation’s largest cable operator, both in terms of subscribers and number of cable networks owned, and does not compel the same conclusion with respect to all other vertically integrated cable operators.

“[i]f 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.”

35. Some MVPDs question the potential for procompetitive benefits resulting from exclusive contracts involving satellite-delivered, cable-affiliated programming, noting that exclusive contracts involving non-cable-affiliated programmers are rare and that the Commission previously noted an increase in programming networks over time despite the exclusive contract prohibition. Nevertheless, Congress specifically recognized the benefits of exclusive contracts in some cases, as demonstrated by its mandate that the Commission allow the exclusive contract prohibition to expire when it is no longer “necessary” to preserve and protect competition and diversity in the video distribution market.

36. Second, the Commission has recognized that exclusive contracts may result in the procompetitive benefit of allowing MVPDs to differentiate their service offerings.<sup>21</sup> To be sure, the issue of whether the procompetitive benefits of product differentiation outweigh the anticompetitive harms is a fact-specific determination best handled on a case-by-case basis. But, at least in some markets, it is possible that consumers will benefit from increased competition in the video distribution market when MVPDs differentiate their service offerings and thereby invite competitive countermeasures from their rivals.<sup>22</sup>

37. Third, declining to extend the exclusive contract prohibition beyond

<sup>21</sup> Some commenters claim that exclusivity will harm consumers because no consumer could access the full range of programming available without having to subscribe to more than one service. This argument, however, is not specific to cable-affiliated programming. Rather, it is an argument against any type of exclusive programming arrangement, including those involving non-cable-affiliated programming that is not covered by the exclusive contract prohibition. Moreover, despite this alleged drawback of exclusivity, Congress has specifically found that exclusive contracts may have countervailing procompetitive benefits in some cases.

<sup>22</sup> The Commission in the *2007 Extension Order* found that the ability of MVPDs to engage in competitive countermeasures did not mitigate the impact of being unable to offer essential programming, as demonstrated by the material adverse impact on competition in the video distribution market resulting from withholding of RSNs in San Diego and Philadelphia. For the reasons discussed herein, given market developments since 2007, we find no basis to assume that the anticompetitive impact of exclusive arrangements always outweighs the procompetitive benefits.

its sunset date and relying instead on a case-by-case process is consistent with our First Amendment obligations and promotes the goals of Executive Order 13579 and the Commission’s plan adopted consistent with the Executive Order, whereby the Commission analyzes rules that may be outmoded, ineffective, insufficient, or excessively burdensome and determines whether any such regulations should be modified, streamlined, or repealed. In today’s marketplace, a nuanced, narrower, case-by-case approach that meets the statutory objectives is more appropriate than the blunt regulatory tool of a prohibition that preemptively bans all exclusive contracts and places the burden on the proponent of exclusivity to demonstrate how the exclusive contract serves the public interest before entering into or enforcing the contract.

38. Fourth, our action here promotes regulatory parity by treating satellite-delivered and terrestrially delivered programming similarly. Specifically, we will now consider all exclusive contracts involving cable-affiliated programming on a case-by-case basis in response to complaints, regardless of whether the programming is satellite-delivered or terrestrially delivered. Nothing in the record here establishes any basis for continuing to apply a preemptive prohibition to exclusive contracts involving satellite-delivered, cable-affiliated programming while assessing exclusive contracts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis. Achieving parity in treatment between these two types of programming will remove any uncertainty and confusion surrounding which regulatory approach (preemptive prohibition or case-by-case) applies. In addition, parity in regulatory treatment will help to ensure that business reasons, rather than regulatory distinctions, drive the decision whether to deliver programming by satellite or terrestrial means.

39. Fifth, we expect that any enforcement of exclusive contracts in the near term will be limited by the terms of existing affiliation agreements. In the *NPRM*, the Commission sought comment on which of two alternative scenarios would occur after the expiration of the exclusive contract prohibition: (i) existing affiliation agreements allow programmers to terminate or modify their existing agreements immediately on the effective date of the sunset and to instead enter into exclusive contracts with cable operators; or (ii) existing affiliation agreements require programmers to continue to provide their programming

to MVPDs for the duration of the term of the affiliation agreements despite the expiration of the exclusive contract prohibition. In response, no commenter claimed that expiration of the exclusive contract prohibition would allow cable-affiliated programmers to immediately terminate existing agreements. Rather, one commenter noted that programmers have contractual commitments to continue to provide their programming to MVPDs despite the expiration of the exclusive contract prohibition. Thus, enforcement of exclusive contracts in the near term will be limited, thereby effectively deferring the period that exclusive contracts will begin to be enforced.

#### d. Impact of the Expiration of the Exclusive Contract Prohibition on Competition and Consumers

40. Some commenters claim that declining to extend the exclusive contract prohibition beyond its sunset date and relying instead on a case-by-case process will harm competition, consumers, and MVPDs. We find these claims unpersuasive. First, they claim that a case-by-case complaint process is burdensome and time-consuming, especially for smaller MVPDs. These claims are based on the length of time needed to resolve complaints involving terrestrially delivered RSNs, such as the recent *Verizon v. MSG/Cablevision* and *AT&T v. MSG/Cablevision* cases. In those decisions, however, the Media Bureau specifically noted certain atypical circumstances that resulted in a delay in resolution of the complaints. We do not expect that complaints challenging exclusive contracts involving satellite-delivered, cable-affiliated programming will present similarly atypical circumstances. In any event, for the reasons discussed below, we establish a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. Some commenters also claim that a complainant will not have access to the programming subject to the exclusive contract during the pendency of the complaint, thereby harming the complainant’s ability to attract and retain subscribers. As the Commission explained in the *2010 Program Access Order*, however, a complainant may seek a standstill of an existing programming contract during the pendency of a complaint. Moreover, to the extent MVPDs are concerned about the costs of pursuing a complaint, they may seek to join with other MVPDs in pursuing a complaint to share those costs. An exclusive contract results in one cable operator having access to a

particular cable-affiliated programming network or networks in a given geographic area, to the exclusion of every other MVPD competing in that geographic area. Accordingly, unlike a selective refusal to license where a cable-affiliated programmer withholds programming from one rival MVPD, an exclusive contract impacts every MVPD competing in the geographic area subject to the exclusive contract. For example, if a satellite-delivered, cable-affiliated RSN enters into an exclusive contract with an incumbent cable operator for each franchise area within a DMA, there are at least two DBS operators as well as potentially several telcos and cable overbuilders that will be impacted by the exclusive contract and that can seek to join as complainants in challenging the contract.

41. Second, some commenters claim that expiration of the exclusive contract prohibition will hinder the deployment of broadband. They note that the Commission in the *2010 Program Access Order* explained that a wireline firm's decision to deploy broadband is linked to its ability to offer video and that unfair acts involving terrestrially delivered, cable-affiliated programming that impede the ability of MVPDs to provide video service can also impede the ability of MVPDs to provide broadband services. The Commission, however, did not address this concern by adopting a preemptive ban on exclusive contracts and other allegedly unfair acts involving terrestrially delivered, cable-affiliated programming. Rather, the Commission adopted a case-by-case approach for addressing these allegedly unfair acts, which is precisely the approach we rely on here. As in the *2010 Program Access Order*, we believe that a case-by-case process will protect MVPDs from the potential anticompetitive impact of exclusive contracts, including the impact on broadband deployment.

42. Third, although some commenters claim that expiration of the exclusive contract prohibition will have a particularly adverse impact on new entrants in the video distribution market, including small and rural MVPDs, we note that the expiration of the exclusive contract prohibition does not impact the ability of MVPDs to challenge selective refusals to license. Specifically, to the extent that these concerns are based on fear that cable-affiliated programmers will single out certain MVPDs (such as a satellite provider or a new entrant with a small subscriber base) and withhold programming from them, as discussed below, such programmers will face the

prospect of a complaint alleging non-price discrimination in violation of section 628(c)(2)(B).<sup>23</sup>

43. Fourth, DISH claims that expiration of the exclusive contract prohibition will result in increased programming costs for MVPDs by providing cable-affiliated programmers with increased leverage in negotiations based on threats to provide a competing cable operator with exclusivity. As with certain other concerns mentioned above, this concern is not specific to cable-affiliated programming and argues against any type of exclusive programming arrangement. In addition, DISH provides no evidence that non-cable-affiliated programmers have used such threats in programming negotiations. Moreover, as mentioned above, Congress specifically recognized the procompetitive benefits of exclusivity in some cases. DISH offers no basis to conclude that this singular concern about increased programming costs outweighs the potential procompetitive benefits of exclusivity envisioned by Congress.

44. As the preceding analysis makes clear, the benefits of our decision to decline to extend the exclusive contract prohibition beyond its sunset date will outweigh any potential costs. We believe that the case-by-case approach for considering exclusive contracts—which will allow the Commission to consider the unique facts and circumstances of each case—will be sufficient to protect MVPDs, including small, rural, and new entrant MVPDs, in their efforts to compete and will minimize the alleged costs of allowing the exclusive contract prohibition to sunset. We also expect that the following additional factors will further reduce these alleged costs: (i) A significant percentage of satellite-delivered, cable-affiliated programming is subject until January 2018 to program access merger conditions adopted in the *Comcast/NBCU Order*, which require Comcast/NBCU to make these networks available to competitors even after the expiration of the exclusive contract prohibition;<sup>24</sup> (ii) we expect that any

<sup>23</sup> Some commenters claim that the emergence since 2007 of distributors of video programming over the Internet justifies extension of the exclusive contract prohibition, claiming that vertically integrated cable operators have an enhanced incentive to withhold programming from potential new sources of competition. Even assuming that these distributors qualify as MVPDs entitled to the benefits of the program access rules, however, this type of selective refusal to license would be addressed pursuant to the discrimination provision in section 628(c)(2)(B).

<sup>24</sup> As discussed above, our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the

enforcement of exclusive contracts in the near term will be limited by the terms of existing affiliation agreements; (iii) even after the expiration of the exclusive contract prohibition, a satellite-delivered, cable-affiliated programmer's refusal to license its content to a particular MVPD (such as a small, rural, or new entrant MVPD), while simultaneously licensing its content to other MVPDs competing in the same geographic area, will continue to be a violation of the discrimination provision in section 628(c)(2)(B), unless the programmer can establish a "legitimate business reason" for the conduct in response to a program access complaint challenging the conduct; and (iv) if the expiration of the exclusive contract prohibition results in harm to consumers or competition on a broad scale, we have statutory authority pursuant to section 628(b) of the Act to take remedial action by adopting rules, including a prohibition on certain types of exclusive contracts involving cable-affiliated programming, to address these concerns.

45. We acknowledge that a case-by-case approach will result in certain costs by requiring affected parties and the Commission to expend time and resources litigating and resolving complaints. We find, however, that certain factors will help to minimize these costs. Below, we establish a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in section 628(b). This presumption will reduce costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and empirical evidence on RSNs. In addition, as noted above, the costs of pursuing a complaint can be shared by joining with other MVPDs. With these additional measures to ease the burdens of litigating complaints, we believe that the costs of the case-by-case approach are outweighed by the significant benefits of our decision to decline to extend the exclusive contract prohibition beyond its sunset date.

#### e. Alternatives to Expiration of the Exclusive Contract Prohibition

46. In the *NPRM*, the Commission sought comment on two ways to relax the exclusive contract prohibition as alternatives to a complete expiration. For the reasons discussed below, we

*Comcast/NBCU Order* concluding that the program access merger conditions adopted therein were necessary to curb Comcast's anticompetitive exclusionary program access strategies that might result from the transaction.

decline to adopt these approaches. First, the Commission sought comment on establishing a process whereby a cable operator or satellite-delivered, cable-affiliated programmer can file a Petition for Sunset seeking to remove the exclusive contract prohibition on a market-by-market basis based on the extent of competition in the market. Both vertically integrated cable operators and their MVPD competitors oppose this approach. Given the lack of any record support for a market-by-market sunset process, we decline to adopt it.

47. Second, the Commission sought comment on whether to retain an exclusive contract prohibition for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated “must have” programming. In the *2010 Program Access Order*, the Commission rejected suggestions that it adopt a preemptive prohibition on exclusive contracts involving terrestrially delivered, cable-affiliated RSNs. The Commission explained that, previously in the *Adelphia Order*, it analyzed the impact of the withholding of three terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators. While the Commission found a significant impact on predicted DBS market share in two cases, it found no statistically significant impact in a third case. While the Commission found this evidence sufficient to support a rebuttable presumption of “significant hindrance,” it rejected the claim 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.”

48. Based on the record here, we find no basis to reach a different conclusion for satellite-delivered, cable-affiliated RSNs. We note that, since the *2010 Program Access Order*, the Commission has found that the withholding of two additional terrestrially delivered, cable-affiliated RSNs (MSG HD and MSG+ HD) “significantly hindered” two MVPDs (Verizon and AT&T). Commenters also put forth surveys and other evidence, including evidence previously submitted in program access complaint proceedings, to support their claims regarding the uniform nature of RSNs as critical for competition. But this additional evidence fails to refute the Commission’s previous findings that withholding of a cable-affiliated RSN does not always have a significant competitive impact. As the *Adelphia Order* demonstrates, unique factors at

play in individual cases can dictate the extent to which withholding of an RSN impacts competition, such as whether the teams carried by the RSN are new and without an established following. Moreover, as discussed above, if we were to adopt a preemptive prohibition for exclusive contracts involving satellite-delivered, cable-affiliated RSNs, the prohibition would impact only 18 out of the 56 cable-affiliated RSNs available today. The remaining cable-affiliated RSNs are either terrestrially delivered (and thus subject to a case-by-case complaint process) or Comcast-controlled (and thus subject to program access merger conditions that require Comcast to make these networks available to competitors).<sup>25</sup> We find no basis in the record to single out these 18 RSNs for a preemptive prohibition on exclusive contracts. To be sure, as discussed below, we find, as the Commission found in the *2010 Program Access Order*, that the weight of the existing precedent and categorical evidence concerning RSNs is sufficient to establish a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect prohibited in section 628(b) of the Act. But, consistent with our previous holding, we continue to believe that, “[r]ather than adopting a general conclusion about the effect of these unfair acts, \* \* \* 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.”

49. We also decline to retain a preemptive prohibition for any other categories of satellite-delivered, cable-affiliated programming. Several commenters offer examples of networks and programming that they consider to be “must have” programming. These commenters, however, fail to provide empirical data supporting their positions, nor do they offer a rational and workable definition of such programming that can be applied objectively. Accordingly, we conclude that there is insufficient evidence in the record to support retention of a preemptive prohibition for any categories of satellite-delivered, cable-affiliated programming.<sup>26</sup>

<sup>25</sup> As discussed above, our decision to decline to extend the exclusive contract prohibition beyond its sunset date does not impact our analysis in the *Comcast/NBCU Order* concluding that the program access merger conditions adopted therein were necessary to curb Comcast’s anticompetitive exclusionary program access strategies that might result from the transaction.

<sup>26</sup> This lack of record evidence supporting retention of a preemptive prohibition should not be

## 2. Case-by-Case Complaint Process

50. For the reasons discussed above, rather than continue the current approach of a preemptive prohibition on exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers, we will consider these exclusive contracts instead on a case-by-case basis in response to complaints alleging a violation of section 628(b). Moreover, additional causes of action under section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under section 628(c)(2)(A)<sup>27</sup> and claims alleging discrimination under section 628(c)(2)(B).

### a. Section 628(b) Complaints

(i) Procedures for Challenging Exclusive Contracts Involving Satellite-Delivered, Cable-Affiliated Programming Pursuant to Section 628(b)

51. The Commission in the *2010 Program Access Order* adopted a case-by-case complaint process to address unfair acts involving terrestrially delivered, cable-affiliated programming that allegedly violate section 628(b). As detailed below, we are extending these rules and policies to section 628(b) complaints challenging exclusive contracts involving satellite-delivered, cable-affiliated programming.

52. Under the case-by-case process for complaints alleging that an exclusive contract involving satellite-delivered, cable-affiliated programming violates section 628(b), the complainant will have the burden to establish that the exclusive contract at issue is “unfair” based on the facts and circumstances presented. The Commission has held previously that determining whether challenged conduct is “unfair” requires “balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits.” In addition, the complainant will have the burden of proving that the exclusive contract has the “purpose or effect” of “significantly hindering or preventing” the

read to state or imply that a complainant could not show that withholding of certain programming results in significant hindrance under section 628(b) based on the facts presented in a complaint proceeding.

<sup>27</sup> The *NPRM* sought comment on whether, in the event of the expiration of the exclusive contract prohibition, a cable operator can “unduly influence” a satellite-delivered, cable-affiliated programmer to enter into an exclusive contract only if the underlying contract violates section 628(b) or section 628(c)(2)(B). Because the record on this issue is not well developed, we decline to address this issue at this time as a rulemaking matter, but leave open the possibility to consider such claims in the context of an appropriate adjudicatory matter.

complainant from providing satellite cable programming or satellite broadcast programming. As noted in the *2010 Program Access Order*, it is not our intent to remove incentives for MVPDs to improve their program offerings in order to differentiate themselves in the marketplace as long as their efforts to do so do not have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. In this regard, as previously noted in the *2010 Program Access Order*, it is 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). As the Commission noted, local news and local community or educational programming is readily replicable by competitive MVPDs and exclusivity has played an important role in the growth and viability of local cable news networks.

53. The Commission has not adopted specific evidentiary requirements with respect to proof that the defendant's alleged activities have the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming. Rather, 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.<sup>28</sup> Illustrative examples of evidence that a complainant may provide include: (i) 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; or (ii) statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or not to switch to an MVPD that did not carry

<sup>28</sup> Comcast maintains that section 628(b) cannot be read to mean that every exclusive contract involving satellite-delivered, cable-affiliated programming would violate the "hinder significantly or prevent" prong of section 628(b) because the contract would "prevent" an MVPD from providing the particular satellite-delivered programming subject to the exclusive contract. We agree. As the Commission and the DC Circuit have explained previously, the "hinder significantly or prevent" prong of section 628(b) focuses on how the withholding at issue impacts the MVPD's ability to provide a competing video service, not particular video programming.

the withheld programming.<sup>29</sup> We will assess the reliability of any evidence presented, such as the regression analysis, survey data, or other empirical data, on a case-by-case basis. The discovery process will enable parties to obtain additional evidence to assist in making these showings.

54. We also establish a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming, as set forth in section 628(b). The record in this proceeding supports the conclusion that RSNs are non-replicable and, in many cases, critically important to consumers. We note that in the *2010 Program Access Order* the Commission adopted a similar rebuttable presumption for terrestrially delivered, cable-affiliated RSNs, relying on Commission precedent and record evidence that demonstrated that RSNs are likely to be both non-replicable and highly valued by consumers. The DC Circuit upheld the Commission's decision to establish this rebuttable presumption under both First Amendment and APA review. The same analysis and findings from the *2010 Program Access Order* supporting a rebuttable presumption for terrestrially delivered, cable-affiliated RSNs apply equally to satellite-delivered, cable-affiliated RSNs. Indeed, commenters in this proceeding have not provided any evidence or suggested any basis for having a rebuttable presumption of "significant hindrance" for terrestrially delivered, cable-affiliated RSNs, but not for satellite-delivered, cable-affiliated RSNs.<sup>30</sup> Moreover, real-world evidence of withholding of RSNs, as well as the data in our record showing the increase of regional clusters, demonstrate that cable-affiliated programmers may still have an incentive to enter into exclusive contracts for satellite-delivered RSNs in

<sup>29</sup> We recognize that not all potential complainants will have the resources to perform a regression analysis or market survey and reiterate that these examples are illustrative only.

<sup>30</sup> To be sure, some vertically integrated cable operators and cable-affiliated programmers claim that there is no basis to presume that exclusive contracts for any RSNs significantly hinder MVPDs from providing a competing video service, noting that certain MVPDs do not carry one or more RSNs in certain markets and that DBS operators' collective market share in Philadelphia (where they do not carry a Comcast-affiliated RSN) is higher than in some other markets where DBS operators carry some or all of the applicable RSNs. We find that this evidence fails to refute the existing precedent and evidence concerning the importance of RSNs, including the rigorous empirical analysis set forth in the *Adelphia Order*.

some markets.<sup>31</sup> Accordingly, we believe that the record justifies the establishment of a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in section 628(b).<sup>32</sup>

55. For purposes of this rebuttable presumption, we will define the term "RSN" in the same way the Commission defined that term in the *2010 Program Access Order* and in previous merger proceedings that have adopted 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.

A complainant will have the burden of showing that the network at issue satisfies this definition.

56. Given consumers' growing preference for HD programming, we will analyze the HD version of a network separately from the standard definition ("SD") version of the network for purposes of determining whether an exclusive contract involving satellite-delivered, cable-affiliated programming has the purpose or effect set forth in section 628(b). The Commission has recognized that consumers are increasingly demanding HD programming and do not view the SD version of a particular network to be an acceptable substitute for the HD version due to the different technical characteristics and sometimes different content of these versions. The DC Circuit upheld under both First Amendment and APA review the Commission's decision in the *2010 Program Access Order* to analyze the HD and SD versions of a network separately when evaluating section

<sup>31</sup> See *supra* paragraphs 18–20.

<sup>32</sup> A defendant may overcome this presumption by establishing that the exclusive contract does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming. As the Commission and the DC Circuit have explained, "a rebuttable presumption does not shift the burden of proof to defendants; rather, it requires defendants to come forward with evidence that rebuts or meets the presumption."

628(b) complaints involving terrestrially delivered programming. The same analysis and findings from the 2010 *Program Access Order* pertaining to the distinction between HD and SD versions of a network apply here. Thus, in considering a complaint regarding an exclusive contract involving a satellite-delivered, cable-affiliated HD network, the mere fact that the complainant offers the SD version of the network to subscribers will not alone be sufficient to refute a claim under section 628(b). In cases involving an RSN, there will be a rebuttable presumption that an exclusive contract involving the HD version of the RSN results in "significant hindrance" even if the complainant offers the SD version of the RSN to subscribers.

57. We decline to establish a rebuttable presumption of "significant hindrance" for any categories of satellite-delivered, cable-affiliated programming other than RSNs.<sup>33</sup> Several commenters offer examples of networks and programming that they consider to be "must have" programming. These commenters, however, fail to provide empirical data supporting their positions, nor do they offer a rational and workable definition of such programming that can be applied objectively. Accordingly, we conclude that there is insufficient evidence in the record to support adoption of a rebuttable presumption for any other categories of satellite-delivered, cable-affiliated programming.<sup>34</sup>

(ii) 45-Day Answer Period

58. We amend our rules to provide for the same 45-day answer period for all complaints alleging a violation of section 628(b), regardless of whether the complaint involves satellite-delivered or terrestrially delivered programming. While our current program access procedural rules require a defendant to a complaint involving satellite-delivered programming to file an answer within

<sup>33</sup> The Commission also sought comment in the *NPRM* on whether to establish a rebuttable presumption that, once a complainant succeeds in demonstrating an exclusive contract involving a satellite-delivered, cable-affiliated programming network violates section 628(b) or section 628(c)(2)(B), any other exclusive contract involving the same network violates section 628(b) or section 628(c)(2)(B). While we have received a few *ex parte* submissions on this issue, we do not believe the record on this issue is sufficiently developed and thus decline to adopt this rebuttable presumption at this time.

<sup>34</sup> This lack of record evidence supporting a rebuttable presumption for this programming should not be read to state or imply that a complainant could not show that withholding of such programming results in significant hindrance under section 628(b) based on the facts presented in a complaint proceeding.

20 days after service, the Commission allows a defendant to a complaint involving terrestrially delivered programming 45 days after service to file an answer. The Commission determined that additional time is appropriate because, unlike complaints alleging a violation of the prohibitions set forth in section 628(c), a complaint alleging a violation of section 628(b) entails additional factual inquiries, including whether the allegedly "unfair act" at issue has the purpose or effect set forth in section 628(b). Although one commenter expresses concern that a 45-day answer period will lead to delays in resolving complaints, we conclude that the same 45-day answer period should apply in all complaint proceedings alleging a violation of section 628(b) because all such complaints will involve the factual issue of whether the challenged conduct has the purpose or effect set forth in section 628(b). To the extent a complaint alleges a violation of both section 628(b) and section 628(c), the longer (45-day) answer period will apply.

b. Section 628(c)(2)(B) Discrimination Complaints

59. Price and non-price discrimination complaints under section 628(c)(2)(B) of the Act will also continue to protect MVPDs in their efforts to compete following expiration of the exclusive contract prohibition. With respect to non-price discrimination, the sunset of the exclusive contract prohibition does not impact the ability of MVPDs to challenge selective refusals to license under section 628(c)(2)(B), which does not contain a sunset provision. In addition, the statute and our precedent provide that an exclusive "arrangement" (as opposed to an exclusive "contract") may violate section 628(c)(2)(B) of the Act.<sup>35</sup>

60. As described in the *NPRM*, a selective refusal to license occurs when a satellite-delivered, cable-affiliated programmer singles out a particular MVPD (such as a satellite provider or a small, rural, or new entrant MVPD) for differential treatment by refusing to license its content to the MVPD while simultaneously licensing its content to other MVPDs competing in the same geographic area. Commission precedent

<sup>35</sup> The Commission also sought comment in the *NPRM* on whether an exclusive contract can be challenged post-sunset as an unreasonable refusal to license in violation of section 628(c)(2)(B). The record on this issue, however, is not well developed. Accordingly, we defer consideration of this issue. We will instead assess this issue based on the facts presented in an individual adjudication.

establishes that a selective refusal to license is a violation of the discrimination provision in section 628(c)(2)(B), unless the programmer can establish a "legitimate business reason" for the conduct. Thus, if a satellite-delivered, cable-affiliated programmer discriminates against an MVPD in this manner, the expiration of the exclusive contract prohibition does not limit the existing right of an MVPD to file a complaint challenging the selective refusal to license as a form of non-price discrimination in violation of section 628(c)(2)(B).<sup>36</sup>

61. As described in the *NPRM*, an exclusive "arrangement" exists when a satellite-delivered, cable-affiliated programmer unilaterally refuses to license its programming to all MVPDs competing in a geographic area except for one (such as its affiliated cable operator), without any exclusive contract with the MVPD. While the expiration of the exclusive contract prohibition in section 628(c)(2)(D) will generally permit "exclusive contracts" between cable operators and satellite-delivered, cable-affiliated programmers,<sup>37</sup> it does not permit the unilateral action of the programmer described here, unless the programmer can establish a "legitimate business reason" for the conduct. Accordingly, the expiration of the exclusive contract prohibition does not limit the existing right of an MVPD to challenge the unilateral action of a satellite-delivered, cable-affiliated programmer to refuse to license its programming to all MVPDs in a market except for one as a form of non-price discrimination in violation of section 628(c)(2)(B).<sup>38</sup>

<sup>36</sup> Complaints alleging a violation of section 628(c)(2)(B) do not require a showing of harm to the complainant.

<sup>37</sup> Section 628(c)(2)(D) of the Act prohibits "exclusive contracts \* \* \* between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest." 47 U.S.C. 548(c)(2)(D). This language presumes that an agreement exists between the cable operator and the satellite-delivered, cable-affiliated programmer that would provide the cable operator with exclusivity.

<sup>38</sup> This scenario assumes that a satellite-delivered, cable-affiliated programmer licenses its programming to one MVPD in a geographic area, to the exclusion of all other MVPDs competing in that geographic area. Conversely, as discussed above, a selective refusal to license assumes that a satellite-delivered, cable-affiliated programmer licenses its programming to more than one MVPD competing in a geographic area, but refuses to license its programming to one or more other MVPDs competing in the same geographic area. In either scenario, an aggrieved MVPD can challenge this conduct as a form of non-price discrimination in violation of section 628(c)(2)(B).

c. Deadline for Media Bureau Action on Complaints Alleging a Denial of Programming

62. We adopt a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. This deadline will apply regardless of whether the programming subject to the exclusive contract is terrestrially delivered or satellite-delivered. As noted above, some commenters claim that a case-by-case complaint process is burdensome and time-consuming. We believe that codifying a specific deadline in our rules for the Media Bureau to act on a complaint alleging a denial of programming will help to resolve disputes quickly and efficiently, provide certainty to all parties to the complaint, and fulfill our statutory mandate to “provide for expedited review” of program access complaints.

63. A complainant alleging a denial of programming may bring a claim pursuant to section 628(b) or section 628(c) or both. For complaints brought pursuant to section 628(b), an initial 60-day pleading cycle applies. For complaints brought pursuant to section 628(c), an initial 35-day pleading cycle applies.<sup>39</sup> After the close of the pleading cycle, the parties may elect to engage in discovery and then file post-discovery pleadings.<sup>40</sup> Although the length of the discovery process will necessarily vary on a case-by-case basis, given our experience in other complaint proceedings, we expect that parties will agree on the scope of discovery and complete discovery and post-discovery briefing within approximately 60 days. When combined with the initial 60-day pleading cycle (in a section 628(b) complaint) or 35-day pleading cycle (in a section 628(c) complaint), this would provide the Media Bureau with the complete record on which to base its decision approximately four months (in a section 628(b) complaint) or three months (in a section 628(c) complaint) after the filing of the complaint. Thus, based on these assumptions, the Media Bureau would have approximately two months (in a section 628(b) denial of programming complaint) or three months (in a section 628(c) denial of programming complaint) to reach a decision once the record closes. We believe this timeframe is sufficient to

<sup>39</sup> As stated above, to the extent a complaint alleges a violation of both section 628(b) and section 628(c), the longer (45-day) answer period will apply.

<sup>40</sup> In light of the expedited timeframe for the Media Bureau’s decision adopted herein, we emphasize that complainants should not raise new matters in a reply.

allow for the Media Bureau to review the record and draft and release a decision while also providing for the “expedited review” required by Congress and ensuring fairness to all parties.<sup>41</sup>

d. Petitions for Exclusivity

64. We retain our exclusivity petition process, whereby a cable operator or satellite-delivered, cable-affiliated programmer may file a Petition for Exclusivity seeking a Commission ruling that an exclusive contract involving satellite-delivered, cable-affiliated programming serves the public interest. To be sure, post-sunset, there is no requirement for a cable operator or a satellite-delivered, cable-affiliated programmer to seek prior approval for an exclusive contract. However, should a cable operator or satellite-delivered, cable-affiliated programmer elect to pursue a Petition for Exclusivity, grant of such a petition will immunize the contract from potential complaints alleging a violation of section 628(c)(2)(B), as required by the terms of section 628(c)(2)(B)(iv).

e. First Amendment

65. We conclude that addressing complaints challenging exclusive contracts for satellite-delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. As explained below, the case-by-case process we adopt for exclusive contracts involving satellite-delivered, cable-affiliated programming satisfies intermediate scrutiny.

66. Although we conclude herein that changes in the video programming market warrant the expiration of the broad, prophylactic exclusive contract prohibition, regulation of exclusive contracts involving satellite-delivered, cable-affiliated programming on a case-by-case basis is still necessary to preserve and promote competition and diversity in the video distribution market. Cable operators continue to control 57.4 percent of MVPD subscribers nationwide and have an overwhelming share of subscribers in many regional markets, in the 80 percent range in some cases. Moreover, there is evidence that cable prices have risen in excess of inflation. In addition, as discussed above, the record indicates that vertically integrated cable operators may still have an incentive and ability to enter into exclusive contracts for satellite-delivered, cable-affiliated programming in some cases, and there

<sup>41</sup> We will allow the Media Bureau to extend these deadlines under exceptional circumstances, such as where the parties jointly agree to toll the deadline.

may be instances where this programming is necessary for competition and has no good substitutes. In rejecting a First Amendment challenge to the case-by-case approach adopted by the Commission for considering unfair acts involving terrestrially delivered, cable-affiliated programming, the D.C. Circuit in *Cablevision II* stated that “[t]he Commission has no obligation to establish that vertically integrated cable companies retain a stranglehold on competition nationally or that all withholding of terrestrially delivered programming negatively affects competition.” Rather, the Commission “need only show that vertically integrated cable operators remain dominant in *some* video distribution markets, that the withholding of highly desirable terrestrially delivered cable programming, like RSNs, inhibits competition in those markets, and that providing other MVPDs access to such programming will ‘promot[e] \* \* \* fair competition in the video marketplace.’” Given the clear evidence in the record that cable operators remain dominant in some regional markets and in some cases may enter into exclusive contracts for satellite-delivered, cable-affiliated programming that is necessary for competition and has no good substitutes, we find that the case-by-case approach adopted in this *Order* serves an important governmental interest.

67. Our decision to address exclusive contracts involving satellite-delivered, cable-affiliated programming on a case-by-case basis is not based on programming content but rather is intended to address the impact on competition in the video distribution market. Because the regulations we adopt herein respond to concerns about competition, not content, they are content-neutral and unrelated to the suppression of free speech. Similarly, our decision to adopt a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the prohibited purpose or effect set forth in section 628(b) is based not on content but on the existing precedent and record evidence before us regarding the importance of RSNs for competition. As the DC Circuit explained in upholding a similar rebuttable presumption for terrestrially delivered, cable-affiliated RSNs, the “clear and undisputed evidence shows that the Commission established presumptions for RSN programming due to that programming’s economic characteristics, not to its communicative impact.”

68. Finally, we conclude that any incidental restriction on speech which may result from our decision to adopt a case-by-case process to address exclusive contracts involving satellite-delivered, cable-affiliated programming “is no greater than is essential to the furtherance” of Congress’ interest in promoting competition in the video distribution market. The court in *Cablevision II* explained that, “[b]y imposing liability only when complainants demonstrate that a company’s unfair act has the ‘purpose or effect’ of ‘hinder[ing] significantly or \* \* \* prevent[ing] the provision of satellite programming, \* \* \* the Commission’s terrestrial programming rules specifically target activities where the governmental interest is greatest.” Similarly, the tailored case-by-case process for addressing exclusive contracts involving satellite-delivered, cable-affiliated programming targets activities where the governmental interest is greatest by limiting liability to cases where a complainant demonstrates that an exclusive contract is an “unfair act” that has the “purpose or effect” of “significantly hindering or preventing” the provision of satellite programming in violation of section 628(b).<sup>42</sup> Moreover, with respect to the rebuttable presumption for satellite-delivered, cable-affiliated RSNs adopted herein, the DC Circuit has explained regarding a similar rebuttable presumption for terrestrially delivered, cable-affiliated RSNs that “[g]iven record evidence demonstrating the

<sup>42</sup> Some vertically integrated cable operators suggest that the program access rules are underinclusive because they apply to cable-affiliated programmers but not other MVPD-affiliated or unaffiliated programmers. As an initial matter, we note that the issue of whether to extend certain program access rules to programmers affiliated with non-cable MVPDs is pending before the Commission. With respect to unaffiliated programmers, the Commission in the *2007 Extension Order* found no record evidence to conclude that exclusive arrangements involving unaffiliated programmers have harmed competition in the video distribution market, and commenters offer no evidence in the record of this proceeding that would cause us to revisit this conclusion. In any event, the DC Circuit in *Cablevision II* rejected claims that the program access rules were underinclusive, explaining that these rules “focus on vertically integrated cable companies due to their ‘special characteristics’ and their unique ability to impact competition.” *Cablevision II*, 649 F.3d at 713 (citing *Time Warner*, 93 F.3d at 978 (quoting *Turner Broad. Sys.*, 512 U.S. at 660–61, 114 S.Ct. 2445)). Moreover, the court explained that “[w]ere the Commission to persist in regulating only the conduct of cable operators in the face of evidence that exclusive dealing arrangements involving other MVPDs have similar negative impacts on competition, then our analysis would necessarily change. But nothing in the present record suggests such unjustified discrimination.” *Id.* The same conclusion applies based on the record in this proceeding.

significant impact of RSN programming withholding, the Commission’s presumptions represent a narrowly tailored effort to further the important governmental interest of increasing competition in video programming.”

### C. Subdistribution Agreements

69. Consistent with our decision to decline to extend the exclusive contract prohibition beyond its sunset date, we eliminate the restrictions on exclusive subdistribution agreements in served areas between cable operators and satellite-delivered, cable-affiliated programmers. The Commission’s rules define a subdistribution agreement as “an arrangement by which a local cable operator is given the right by a satellite cable programming vendor or a satellite broadcast programming vendor to distribute the vendor’s programming to competing multichannel video programming distributors.” Based on the exclusive contract prohibition, the Commission adopted certain restrictions on exclusive subdistribution agreements in the *1993 Program Access Order* to “address any incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights” and to ensure “appropriate safeguards to limit the potential for anticompetitive behavior.” Because we have concluded that the exclusive contract prohibition in served areas is no longer necessary to preserve and protect competition and diversity in the video distribution market, we conclude that the restrictions on exclusive subdistribution agreements in served areas are likewise no longer necessary and we accordingly eliminate them. In addition, as proposed in the *NPRM*, we conform § 76.1002(c)(3) as it pertains to exclusive subdistribution agreements in unserved areas to the amendments previously adopted in the *1994 Program Access Order*.

### D. Common Carriers and Open Video Systems

70. The Commission’s rules contain provisions pertaining to exclusive contracts involving common carriers or OVS and their affiliated programmers in served areas that mirror the rules applicable to exclusive contracts involving cable operators and their affiliated programmers in served areas. We conclude that the amendments adopted herein to the rules pertaining to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers in served areas will apply equally to common carriers and OVS. Thus, with respect to common carriers, the prohibition on exclusive contracts in served areas between a

satellite-delivered, common carrier-affiliated programmer and a common carrier or its affiliate that provides video programming by any means directly to a subscriber will expire. Similarly, the exclusive contract prohibition in served areas will expire as to exclusive contracts (i) between a satellite-delivered, OVS-affiliated programmer and an OVS or its affiliate that provides video programming on its OVS; and (ii) between a satellite-delivered, cable-affiliated programmer and an OVS video programming provider in which a cable operator has an attributable interest. Instead, we will rely on the protections provided by the case-by-case complaint process described above. We also conform the rules pertaining to exclusive subdistribution agreements involving common carriers and OVS to the rules adopted herein for cable operators by eliminating the restrictions on such agreements in served areas. In addition, as proposed in the *NPRM*, we conform § 76.1507 as it pertains to exclusive subdistribution agreements involving OVS in unserved areas to the amendments previously adopted in the *1994 Program Access Order*.

### E. Liberty Media Order Merger Conditions

71. We modify the exclusivity conditions adopted in the *Liberty Media Order*, which prohibit certain programmers affiliated with Liberty Media and DIRECTV from entering into exclusive contracts. DIRECTV, the only commenter to address this issue, states that if the Commission declines to extend the exclusive contract prohibition beyond its sunset date, conforming modifications to the exclusivity conditions in the *Liberty Media Order* would be appropriate.<sup>43</sup> We agree. The merger conditions adopted in the *Liberty Media Order* provide that “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.”<sup>44</sup> Consistent with our decision not to extend the exclusive contract

<sup>43</sup> The Commission also sought comment on the impact of an expiration of the exclusive contract prohibition on merger conditions applicable to TWC adopted in the *Adelphia Order*. These conditions, however, expired in July 2012, after release of the *NPRM* and before adoption of this *Order*.

<sup>44</sup> In contrast to the *Liberty Media Order*, there is no provision in the *Comcast/NBCU Order* requiring the conditions adopted therein to be modified to conform to changes the Commission makes to the program access rules. See *Comcast/NBCU Order*, 26 FCC Rcd at 4381, Appendix A, Condition XX). Accordingly, the conditions adopted in the *Comcast/NBCU Order* will not be affected by the rule changes adopted in this proceeding.

prohibition beyond its sunset date, we modify the exclusivity conditions in the *Liberty Media Order* to provide that exclusive contracts will not be subject to a preemptive prohibition. No commenter opposed this proposal as set forth in the *NPRM*. Because our rules will allow an exclusive contract involving cable-affiliated programming to be challenged on a case-by-case basis post-sunset, however, we further modify these conditions to provide that an exclusive contract involving programming covered by these conditions may be challenged as violating section 628(b) of the Act and § 76.1001(a) of the Commission's rules.<sup>45</sup> Specifically, we modify Conditions III.1 and III.2 in the *Liberty Media Order* to state as follows:

Condition III.1: Liberty Media shall continue to make its existing or future national and regional programming services available to all MVPDs on nondiscriminatory terms and conditions. Notwithstanding the foregoing, Liberty Media may enter into an exclusive contract for any of these services with any MVPD, provided that the exclusive contract may be challenged as violating section 628(b) of the Act and § 76.1001(a) of the Commission's rules.<sup>46</sup>

Condition III.2: DIRECTV may enter into an exclusive contract with any Affiliated Program Rights Holder,<sup>47</sup> provided that the exclusive contract may be challenged as

<sup>45</sup> As discussed above, we defer consideration of whether an exclusive contract can be challenged post-sunset as an unreasonable refusal to license in violation of section 628(c)(2)(B). We will instead assess this issue based on the facts presented in an individual adjudication. We also note that "Liberty Media RSNs," as defined in the *Liberty Media Order*, will continue to be subject to the arbitration condition set forth in the *Liberty Media Order* until February 27, 2014, unless the arbitration condition is modified earlier in response to a petition.

<sup>46</sup> See *Revision of the Commission's Program Access Rules, et al.*, Report and Order and Order on Reconsideration, FCC 12-123, at paragraphs 72-73 (2012) ("2012 Program Access Order"). The term "Liberty Media" as used in this Appendix includes any entity or program rights holder in which Liberty Media or John Malone holds an attributable interest. Thus, the term "Liberty Media" includes Discovery Communications. Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in any non-broadcast national or regional programming service while these conditions are in effect if the programming service is not obligated to abide by such conditions.

<sup>47</sup> The term "Affiliated Program Rights Holder" includes (i) any program rights holder in which Liberty Media or DIRECTV holds a non-controlling "attributable interest" (as determined by the FCC's program access attribution rules) or in which any officer or director of Liberty Media, DIRECTV, or of any other entity controlled by John Malone holds an attributable interest; and (ii) any program rights holder in which an entity or person that holds an attributable interest also holds a non-controlling attributable interest in Liberty Media or DIRECTV, provided that Liberty Media or DIRECTV has actual knowledge of such entity's or person's attributable interest in such program rights holder.

violating section 628(b) of the Act and § 76.1001(a) of the Commission's rules.<sup>48</sup>

72. To the extent that any programming covered under such an exclusive contract is cable-affiliated, the exclusive contract may also be assessed on a case-by-case basis in response to a program access complaint alleging a violation of section 628(b) or, potentially, section 628(c)(2)(B) of the Act.<sup>49</sup>

### III. Order on Reconsideration in MB Docket No. 07-29

#### A. Background

73. For the reasons discussed below, we grant in part and deny in part a Petition for Reconsideration of the *2007 Extension Order* filed by Fox Entertainment Group, Inc. ("Fox") pertaining to the Commission's program access discovery procedures. In the *2007 Extension Order*, the Commission revised these procedures to "ensure that the Commission has the information necessary to expeditiously resolve program access complaints." The Commission codified its requirement that a respondent must attach to its answer all documents that it expressly references or relies upon in defending a program access claim. In addition, the Commission expanded the discovery procedures to permit party-to-party discovery. Under the expanded discovery procedures, parties to a program access complaint may serve requests for discovery directly on opposing parties and file a copy of the request with the Commission. The respondent has the opportunity to object to any request for documents that are not in its control or relevant to the dispute, and the obligation to produce the documents is suspended until the Commission rules on the objection. Recognizing that the expanded discovery approach requires the submission of confidential and competitively sensitive information, the Commission also revised the standard protective order for use in program access complaint proceedings to ensure that confidential business information is not improperly used for competitive business purposes. Specifically, the Commission modified the language of the protective order to reflect that any counsel or other persons, including in-house counsel, that are involved in "competitive decision-making" are

<sup>48</sup> See *2012 Program Access Order*, FCC 12-123, at paragraphs 72-73.

<sup>49</sup> In addition, regardless of whether the programming is cable-affiliated, the Commission has not foreclosed a challenge under section 628(b) to an exclusive contract with a cable operator involving non-cable-affiliated programming.

prohibited from access to confidential material.

74. Fox filed a petition for reconsideration of the *2007 Extension Order*, arguing that the Commission's decision to permit party-to-party discovery constituted an unexplained departure from agency policy in contravention of the Administrative Procedure Act. AT&T and DISH filed oppositions to Fox's petition for reconsideration, and Time Warner Inc. filed a reply in support of Fox's petition.

#### B. Discussion

75. We reject Fox's argument that the Commission failed to adequately explain its decision to permit party-to-party discovery. Fox asserts that the Commission departed without explanation from the *1998 Program Access Order*, where the Commission declined to permit party-directed discovery out of concern that it could result in disputes over the production of documents and lengthen resolution times for program access complaints. We disagree. The Commission carefully weighed commenters' arguments in support of and in opposition to expanded discovery and concluded that "expanded discovery will improve the quality and efficiency of the Commission's resolution of program access complaints." In this regard, a number of non-incumbent MVPDs raised concerns that documents necessary for complainants to establish discrimination, including programmers' carriage contracts, are not made available in complaint proceedings. The Commission agreed with these commenters "that the availability of programmers' carriage contracts, subject to confidential treatment, [is] essential for determining whether the programmer is discriminating in price, terms and conditions." The Commission thus found that "it would be unreasonable for a respondent not to produce all the documents requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute." As DISH notes in its opposition, the record in this proceeding reflected ongoing concerns from MVPDs about the availability of relevant documents. Moreover, DISH states that the Commission also had "an additional ten years of experience with the program access complaint process and discovery rules from which to determine that the existing discovery rules were insufficient." Accordingly, the Commission reasonably concluded that party-directed discovery will facilitate the expeditious resolution of program access complaints by ensuring

that all relevant documents are available to Commission staff and the parties, without the need for the Commission to take action to order the production of such documents. The modifications to the discovery rules were thus appropriate and adequately supported.

76. Contrary to Fox's arguments, the Commission also considered concerns raised by commenters that party-controlled discovery could give rise to overly broad discovery requests and "fishing expeditions" for confidential and competitively-sensitive information, which could lead to disputes over discovery and prolong resolution of program access complaints. The Commission adopted several safeguards to address these concerns. For example, the Commission determined that parties should have the opportunity to object to any request for documents that are not in their control or relevant to the dispute and that the obligation to produce the documents would be suspended until the Commission rules on the objection. Moreover, the Commission modified the standard protective order to further limit the individuals who may access competitively sensitive documents, thereby ensuring that confidential business information is not improperly used for competitive business purposes. The Commission emphasized that it has full authority to impose sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings. Further, the Commission cautioned that it intends to vigorously enforce any transgressions of the provisions of its protective orders.

77. We are unpersuaded by Fox's assertion that, notwithstanding these safeguards, expanded discovery "is virtually certain to lengthen significantly the time it takes for the Commission to resolve program access complaints" because the Commission will have to address each disputed discovery demand. Because each party to a program access dispute must respond to discovery requests from the other party, the parties have mutual incentives to avoid overbroad requests and to come to an agreement on the scope of discovery. Indeed, in program access complaint proceedings that have gone to discovery since the expanded discovery rules have been in effect, the parties have generally settled discovery disputes without Commission intervention and, to the extent that they have been unable to resolve discrete

issues on their own, the Commission has quickly resolved these issues.

78. Fox also argues that the expanded discovery process fails to adequately protect highly confidential and competitively sensitive documents and urges the Commission, if it continues to allow party-directed discovery, to revise the standard protective order to provide more stringent protection of highly confidential information. Fox acknowledges that the Commission revised the standard protective order to prohibit access to confidential information to individuals who are involved in competitive decision-making, but asserts that there is currently no mechanism for ensuring compliance with this requirement in advance. According to Fox, any *ex post facto* sanction imposed by the Commission for violating a protective order could likely never mitigate the damage to a programmer's business if confidential information falls into the hands of a competitor. Fox argues that the Commission should therefore revise the protective order to permit parties to object if they have concerns about the individuals who seek access to confidential information. Under Fox's proposal, an individual seeking access to confidential information would be required to provide at least five business days' notice to a programmer prior to accessing any protected documents to give the programmer the opportunity to object. If there is an objection, access would not be provided until the Commission rules on the objection. Fox also asserts that the Commission should revise the standard protective order to permit parties to limit access to certain highly confidential information to outside counsel, and to provide parties the right to prohibit copying of highly sensitive documents.

79. We modify the standard protective order as requested by Fox to include a right to object provision. We note that parties are free to negotiate their own protective orders to include a right to object provision and any other protections they deem necessary, and have done so successfully in program access complaint proceedings that have been initiated since the *2007 Extension Order*. Nevertheless, a right to object provision is commonly included in protective orders, and we agree that adding a right to object provision to the standard protective order will further ensure that confidential information is not improperly used for competitive business purposes. Thus, under the revised standard protective order, an individual seeking access to confidential information will be required to provide at least five business

days' notice to the submitting party prior to accessing any protected documents to provide the submitting party the opportunity to object. If the submitting party objects, the individual will not be provided access to the protected documents until the Commission rules on the objection. We decline, however, to modify the standard protective order at this time to permit parties to limit access to certain "highly confidential" information to outside counsel only. Whether certain categories of confidential information require an enhanced level of protection, and therefore should be restricted to outside counsel, depends on the facts presented in an individual adjudication. Moreover, because protective orders commonly restrict copying of only a subset of "highly confidential" documents that are particularly sensitive, we also decline to modify the standard protective order to provide parties the right to prohibit copying of certain documents. Rather, as with the issue of whether certain categories of confidential information require an enhanced level of protection, the issue of whether to preclude copying of certain documents depends on the facts presented in an individual adjudication.

80. Fox further argues that the Commission should expand the rights of a discovery target to object to the scope of a request for documents. Fox states that the *2007 Extension Order* provides that recipients of a discovery request may object "to any request for documents that are not in its control or relevant to the dispute," and asserts that this narrow basis for an objection would preclude opposing a demand for materials that are subject to the attorney-client or attorney work product privileges or that represent confidential exchanges between programmers and their accountants or experts. We clarify that the language referenced by Fox, which is codified in § 76.1003(j) of the Commission's rules, was not intended to preclude the right to assert the attorney-client privilege or the attorney work product privilege for materials subject to a discovery request in a program access complaint proceeding. We amend this rule to reflect this clarification. The work product privilege may also extend to confidential exchanges between programmers and their accountants or experts if these materials are prepared in anticipation of litigation. We note that the adjudicator in a program access complaint proceeding may order the production of documents for which a privilege is asserted for in camera inspection to determine whether the

attorney-client or work product privileges apply.

81. Finally, Fox asserts that the Commission should consider imposing sanctions against program access complainants that make frivolous discovery requests for information that is clearly not relevant or that is outside the scope of the complaint proceeding. As discussed above, we think it is unlikely that parties will use discovery to engage in “fishing expeditions.” We will, however, take appropriate action if we find that any party to a program access complaint proceeding is abusing the discovery process.

#### IV. Procedural Matters

##### A. Final Regulatory Flexibility Act Analysis

82. As required by the Regulatory Flexibility Act of 1980 (“RFA”), the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Report and Order* in MB Docket No. 12–68 *et al.* and *Order on Reconsideration* in MB Docket No. 07–29.

83. As required by the RFA, an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rulemaking* (“NPRM”) in MB Docket Nos. 12–68, 07–18, and 05–192. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association (collectively, “OPASTCO/NTCA”) filed comments directed toward the IRFA and these comments are discussed below. This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.

Need for, and Objectives of, the Report and Order

84. In areas served by a cable operator, section 628(c)(2)(D) of the Communications Act of 1934, as amended (the “Act”), generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor (the “exclusive contract prohibition”). The exclusive contract prohibition applies to all satellite-delivered, cable-affiliated programming and preemptively bans all exclusive contracts for such programming with cable operators, regardless of the popularity of the programming at issue. The exclusive contract prohibition applies only to programming that is delivered via

satellite; it does not apply to programming delivered via terrestrial facilities. In section 628(c)(5) of the Act, Congress provided that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found that it “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.” On two previous occasions, first in 2002 and again in 2007, the Commission renewed the prohibition for five years, with the latest extension expiring on October 5, 2012. The NPRM initiated the third review of the necessity of the exclusive contract prohibition.

85. The *Report and Order* concludes that the exclusive contract prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming considering that a case-by-case process will remain in place after the prohibition expires to assess the impact of individual exclusive contracts. Accordingly, the Commission declines to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date. Post-sunset, the Commission will rely on existing protections provided by the program access rules to protect multichannel video programming distributors (“MVPDs”) in their efforts to compete in the video distribution market, including the case-by-case consideration of exclusive contracts pursuant to section 628(b) of the Act.

86. The *Report and Order* extends the case-by-case complaint process previously adopted to address section 628(b) complaints involving terrestrially delivered, cable-affiliated programming to section 628(b) complaints challenging exclusive contracts involving satellite delivered, cable-affiliated programming. Under this case-by-case process, the complainant will have the burden of proving that the exclusive contract (i) is “unfair” based on the facts and circumstances presented; and (ii) has the “purpose or effect” of “significantly hindering or preventing” the MVPD from providing satellite cable programming or satellite broadcast programming in violation of section 628(b). There will be a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated Regional Sports Network (“RSN”) has the purpose or effect set forth in section 628(b). A defendant may overcome this presumption by demonstrating that the exclusive contract does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite

broadcast programming. The Commission will analyze the HD version of a network separately from the SD version of the network in evaluating whether an exclusive contract involving satellite-delivered programming has the purpose or effect set forth in section 628(b). In cases involving an RSN, there will be a rebuttable presumption that an exclusive contract involving the HD version of the RSN results in significant hindrance even if the complainant offers the SD version of the RSN to subscribers. In addition to claims under section 628(b) of the Act, additional causes of action under section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under section 628(c)(2)(A) and claims alleging discrimination under section 628(c)(2)(B).

87. The *Report and Order* retains the exclusivity petition process, whereby a cable operator or satellite-delivered, cable-affiliated programmer may file a Petition for Exclusivity seeking Commission approval for an exclusive contract involving satellite-delivered, cable-affiliated programming by demonstrating that the contract serves the public interest. Grant of a Petition for Exclusivity will immunize an exclusive contract from potential complaints alleging a violation of section 628(c)(2)(B) of the Act, as required by the terms of section 628(c)(2)(B)(iv).

88. Finally, the *Report and Order* adopts a 45-day answer period for complaints alleging a violation of section 628(b); establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming; eliminates restrictions on subdistribution agreements involving satellite-delivered, cable-affiliated programming in served areas; determines that the rules applicable post-sunset to exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers will apply equally to common carriers and Open Video Systems; and modifies the exclusivity conditions set forth in the *Liberty Media Order* to conform those conditions to the Commission’s decision to decline to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date.

89. The *Order on Reconsideration* in MB Docket No. 07–29 (i) affirms the expanded discovery procedures for program access complaints adopted in the *2007 Extension Order*; (ii) modifies the standard protective order for use in program access complaint proceedings

to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (iii) clarifies that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

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

90. OPASTCO/NTCA filed comments specifically directed toward the IRFA. In addition, several other commenters addressed the effects of the expiration of the exclusive contract prohibition on small businesses in their comments. OPASTCO/NTCA argues that expiration of the exclusive contract prohibition would have a particularly harmful impact on small and rural MVPDs, which lack the resources to produce alternative programming or engage in effective counter-measures. Therefore, OPASTCO/NTCA argues, "it is particularly imperative to extend the exclusive contract prohibition to avoid the disproportionate consequences that the rule's expiration would impose on the markets served by small MVPDs." Several commenters also argue that small MVPDs do not have the resources to litigate complaints involving exclusive contracts on a case-by-case basis.

91. The *Report and Order* concludes that the case-by-case approach for considering exclusive contracts will be sufficient to protect MVPDs, including small, rural, and new entrant MVPDs, in their efforts to compete. The *Report and Order* also finds that the following additional factors will mitigate the risk of any potentially adverse impact of the expiration of the exclusive contract prohibition: (i) A significant percentage of satellite-delivered, cable-affiliated programming is subject until January 2018 to program access merger conditions adopted in the *Comcast/NBCU Order*, which require Comcast/NBCU to make these networks available to competitors even after the expiration of the exclusive contract prohibition; (ii) the Commission expects that any enforcement of exclusive contracts in the near term will be limited by the terms of existing affiliation agreements; (iii) even after the expiration of the exclusive contract prohibition, a satellite-delivered, cable-affiliated programmer's refusal to license its content to a particular MVPD (such as a small, rural, or new entrant MVPD), while simultaneously licensing its content to other MVPDs competing in

the same geographic area, will continue to be a violation of the discrimination provision in section 628(c)(2)(B), unless the programmer can establish a "legitimate business reason" for the conduct in response to a program access complaint challenging the conduct; and (iv) if the expiration of the exclusive contract prohibition results in harm to consumers or competition, the Commission has statutory authority pursuant to section 628(b) of the Act to take remedial action by adopting rules, including a prohibition on certain types of exclusive contracts involving cable-affiliated programming, to address these concerns.

92. Moreover, the *Report and Order* notes that certain factors will help to minimize the costs of the complaint process. The *Report and Order* establishes a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in section 628(b). This presumption will reduce costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and empirical evidence on RSNs. Moreover, the *Report and Order* establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. In addition, to the extent that MVPDs are concerned with the costs of pursuing a program access complaint, they may seek to join with other MVPDs in pursuing a complaint.

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

93. 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 rules adopted herein. 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). Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

94. *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 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.

95. *Cable Television Distribution Services*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.

96. *Cable Companies and Systems*. 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. Industry data indicate that all but ten cable operators nationwide are small under this size 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, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000–19,999 subscribers. Thus, under this standard, most cable systems are small.

97. *Cable System Operators.* 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." The Commission has determined that an operator serving fewer than 677,000 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. Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard. 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, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

98. *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, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers," which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of

these firms can be considered small. Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network). Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for 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 service provider.

99. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They 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. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers," which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.

100. *Home Satellite Dish ("HSD") Service.* 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. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for

2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.

101. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder

with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

102. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined 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." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.

103. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz

licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 1000 employees, and 15 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

104. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small. In addition, we note that the Commission has certified approximately 42 OVS operators, with some now providing service. Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises. Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City,

Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. The Commission does not have financial or employment information regarding the other entities authorized to provide OVS, some of which may not yet be operational. Thus, up to 41 of the OVS operators may qualify as small entities.

105. *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 this category, which is: all such firms having \$15 million dollars or less in annual revenues. To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year. Of that number, 325 operated with annual revenues of \$9,999,999 dollars or less. Seventy-one (71) operated with annual revenues of between \$10 million and \$100 million or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

106. *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 analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

107. *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. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers. Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.

108. *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. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small. 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.

109. *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." We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not

available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year. Of these, 8995 had annual receipts of \$24,999,999 or less, and 100 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

110. *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." We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having \$29.5 million dollars or less in annual revenues. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year. Of these, 434 had annual receipts of \$24,999,999 or less, and 16 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

#### Description of Reporting, Recordkeeping, and Other Compliance Requirements

111. Following the expiration of the exclusive contract prohibition, the Commission will rely on existing protections in the program access rules to protect MVPDs in their efforts to

compete in the video distribution market. An MVPD will have the option to file a complaint with the Commission alleging that an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer involving satellite-delivered, cable-affiliated programming violates section 628(b) of the Act. The *Report and Order* extends the case-by-case complaint process previously adopted by the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming that allegedly violate section 628(b) to section 628(b) complaints challenging exclusive contracts involving satellite-delivered, cable-affiliated programming. In addition to claims under section 628(b) of the Act, additional causes of action under section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under section 628(c)(2)(A) and claims alleging discrimination under section 628(c)(2)(B). The *Report and Order* also adopts a 45-day answer period in complaint proceedings alleging a violation of section 628(b) and establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. Moreover, the *Order on Reconsideration* (i) modifies the standard protective order for use in program access complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (ii) clarifies that a party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure.

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

112. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, 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 and reporting requirements under the rule for such 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 such small entities." The

NPRM invited comment on issues that had the potential to have significant impact on some small entities.

113. In the *Report and Order*, the Commission declines to extend the exclusive contract prohibition beyond its October 5, 2012 sunset date. The Commission will instead rely on existing protections in the program access rules to protect MVPDs, including small entities, in their efforts to compete in the video distribution market. Small MVPDs will have the option to file a complaint alleging that an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer involving satellite-delivered, cable-affiliated programming violates section 628(b) of the Act. In addition to claims under section 628(b) of the Act, additional causes of action under section 628 will continue to apply after expiration of the exclusive contract prohibition, including claims alleging undue influence under section 628(c)(2)(A) and claims alleging discrimination under section 628(c)(2)(B).

114. The *Report and Order* notes that certain factors will help to minimize the costs of the complaint process. The *Report and Order* establishes a rebuttable presumption that an exclusive contract involving a satellite-delivered, cable-affiliated RSN has the purpose or effect set forth in section 628(b). This presumption will reduce costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and empirical evidence on RSNs. Moreover, the *Report and Order* establishes a six-month deadline (calculated from the date of filing of the complaint) for the Media Bureau to act on a complaint alleging a denial of programming. To the extent that MVPDs are concerned with the costs of pursuing a program access complaint, they may seek to join with other MVPDs in pursuing a complaint.

115. Finally, the *Report and Order* revises the procedural rules for program access complaints to adopt a 45-day answer period for complaints alleging a violation of section 628(b). The standard answer period for other program access complaints is only 20 days. Small entities may benefit from a lengthier 45-day period within which to file an answer.

116. The *Order on Reconsideration* (i) modifies the standard protective order for use in program access complaint proceedings to include a provision allowing a party to object to the disclosure of confidential information based on concerns about the individual seeking access; and (ii) clarifies that a

party may object to any request for documents that are protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure. Small entities may benefit from having the right to object to the disclosure of confidential information.

Report to Congress

117. The Commission will send a copy of the *Report and Order* in MB Docket Nos. 12–68, 07–18, and 05–192, and *Order on Reconsideration* in MB Docket No. 07–29, 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 *Report and Order* in MB Docket Nos. 12–68, 07–18, and 05–192, and *Order on Reconsideration* in MB Docket No. 07–29, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* in MB Docket Nos. 12–68, 07–18, and 05–192, the *Order on Reconsideration* in MB Docket No. 07–29, and FRFA (or summaries thereof) will also be published in the **Federal Register**.

#### *B. Final Paperwork Reduction Act of 1995 Analysis*

118. This *Report and Order* in MB Docket No. 12–68 *et al.* and *Order on Reconsideration* in MB Docket No. 07–29 has been analyzed with respect to the Paperwork Reduction Act of 1995 (“PRA”), and does not contain any new or modified information collection requirements. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002.

#### *C. Congressional Review Act*

119. The Commission will send a copy of this *Report and Order* in MB Docket No. 12–68 *et al.* and *Order on Reconsideration* in MB Docket No. 07–29 in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.

#### **V. Ordering Clauses**

120. *It is ordered* that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), and 548, the *Report and Order* in MB Docket Nos. 12–68, 07–18, and 05–192 and *Order on Reconsideration* in MB Docket No. 07–29 *Is Adopted*.

121. *It is further ordered* that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), and 548, the Commission’s rules *Are Hereby Amended* as set forth in Appendix C.

122. *It is further ordered* that the rules adopted herein *Will Become Effective* November 30, 2012.

123. *It is further ordered* that, pursuant to sections 4(i), 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 309, and 310(d), the conditions previously adopted in the *Liberty Media Order Are Hereby Modified* as set forth in paragraph 72 of the *Report and Order* (FCC 12–123) in MB Docket Nos. 12–68, 07–18, and 05–192 effective 30 days after the date of publication in the **Federal Register**.

124. *It is further ordered* that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, and § 1.429 of the Commission’s rules, 47 CFR 1.429, the Petition for Reconsideration of Fox Entertainment Group, Inc. in MB Docket No. 07–29 *Is Granted in part and Denied in part* as described herein.

125. *It is further ordered* that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, *Shall Send* a copy of this *Report and Order* in MB Docket Nos. 12–68, 07–18, and 05–192 and *Order on Reconsideration* in MB Docket No. 07–29, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

126. *It is further ordered* that the Commission *Shall Send* a copy of this *Report and Order* in MB Docket Nos. 12–68, 07–18, and 05–192 and *Order on Reconsideration* in MB Docket No. 07–29 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. Federal Communications Commission. **Marlene H. Dortch**, Secretary.

#### **Final Rules**

For the reasons discussed in the preamble, Part 76 of Title 47 of the Code of Federal Regulations is amended 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 76.1002 is amended by removing and reserving paragraph (c)(2), revising paragraphs (c)(3)(i) and (c)(3)(ii) introductory text, (c)(4) introductory text, and (c)(5) introductory text, and removing paragraph (c)(6).

The revisions read as follows:

**§ 76.1002 Specific unfair practices prohibited.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(i) Unserved areas. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992 unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(ii) of this section. (ii) Limitations on subdistribution agreements in unserved areas. No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

\* \* \* \* \*

(4) Public interest determination. In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(5) of this section, the Commission will consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

\* \* \* \* \*

(5) Commission approval required. Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest must submit a "Petition for Exclusivity" to the Commission and receive approval from the Commission to preclude the filing of

complaints alleging that an exclusive contract with respect to areas served by a cable operator violates section 628(c)(2)(B) of the Communications Act of 1934, as amended, and paragraph (b) of this section.

\* \* \* \* \*

■ 3. Section 76.1003 is amended by revising paragraphs (e)(1) and (j) and adding paragraph (m) to read as follows:

**§ 76.1003 Program access proceedings.**

\* \* \* \* \*

(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, provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a). To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

\* \* \* \* \*

(j) Discovery. In addition to the general pleading and discovery rules contained in § 76.7, parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute or protected from disclosure by the attorney-client privilege, the work-product doctrine, or other recognized protections from disclosure. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

\* \* \* \* \*

(m) Deadline for Media Bureau Action on Complaints Alleging a Denial of Programming. For complaints alleging a denial of programming, the Chief, Media Bureau shall release a decision resolving the complaint within six (6) months from the date the complaint is filed.

■ 4. Section 76.1004 is amended by revising paragraph (b) to read as follows:

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

\* \* \* \* \*

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers as follows: No common carrier or its affiliate that provides video programming directly to subscribers shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest, or any satellite broadcasting vendor in which a common carrier or its affiliate has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

■ 5. Section 76.1507 is amended by removing and reserving paragraph (a)(2) and revising paragraphs (a)(3), and (b) to read as follows:

**§ 76.1507 Competitive access to satellite cable programming.**

(a) \* \* \*

(3) Section 76.1002(c)(3)(i) and (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October

5, 1992 unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(ii).

(b) No open video system programming provider in which a cable operator has an attributable interest shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

The following Appendix will not appear in the Code of Federal Regulations (CFR):

## Appendix

### Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings Before the Federal Communications Commission Washington, DC 20554

In the Matter of )  
[Name of Proceeding] )  
Docket No.

#### PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents filed in this proceeding or obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act ("FOIA") or other applicable law or regulation, including 47 CFR 0.442.

#### 2. Definitions.

a. *Authorized Representative*. "Authorized Representative" shall have the meaning set forth in Paragraph 7.

b. *Commission*. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. *Confidential Information*. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning

of Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. *Declaration*. "Declaration" means Attachment A to this Protective Order.

e. *Reviewing Party*. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. *Submitting Party*. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

3. *Claim of Confidentiality*. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 CFR 0.459 and 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

4. *Procedures for Claiming Information is Confidential*. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS CONFIDENTIAL INFORMATION—DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information. By designating information as Confidential Information, a Submitting Party signifies that it has determined in good faith that the information should be subject to protection under FOIA, the Commission's implementing rules, and this Protective Order.

5. *Storage of Confidential Information at the Commission*. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. *Commission Access to Confidential Information*. Confidential Information shall be made available to Commission staff and Commission consultants. Consultants under contract to the Commission may obtain

access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. *Disclosure*. Subject to the requirements of Paragraph 9, Confidential Information may be reviewed by counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Subject to the requirements of Paragraph 9, counsel to a Reviewing Party or such other person designated by the Reviewing Party may disclose Confidential Information to other Authorized Representatives only after advising such Authorized Representatives of the terms and obligations of the Order and provided that the Authorized Representatives have signed the Declaration and served it appropriately in accordance with paragraph 9, and the Authorized Representatives are of the type of persons listed in subparagraphs 8.a., b., and c.

8. *Authorized Representatives shall be limited to:*

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. Disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Authorized Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. *Procedures for Obtaining Access to Confidential Information*. In all cases where access to Confidential Information is permitted pursuant to paragraph 7, before reviewing or having access to any Confidential Information, each person seeking such access shall execute the Declaration in Attachment A and file it with the Commission and serve it upon the Submitting Party through their counsel, so that the Declaration is received by the Submitting Party at least five (5) business days prior to such person's reviewing or having access to Confidential Information. Each Submitting Party shall have an

opportunity to object to the disclosure of its Confidential Information to any such person. Any objection must be filed at the Commission and served on counsel for such person within three (3) business days after receipt of that person's Declaration. Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Confidential Information. If there is no objection or once such objection is resolved, the Submitting Party shall make such material available for review as set forth in Paragraph 10.

10. *Inspection of Confidential Information.* Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

11. *Copies of Confidential Information.* The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

12. *Use of Confidential Information.* Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. *Pleadings Using Confidential Information.* Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by

a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. *Violations of Protective Order.* Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. *Termination of Proceeding.* Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may

retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with Paragraphs 11 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

17. *Additional Rights Preserved.* The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. *Effect of Protective Order.* This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

19. *Authority.* This Protective Order is issued pursuant to sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. 154(i), (j); 47 CFR 0.457(d) and 76.1003(k); and section 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4).

**Attachment A to Standard Protective Order DECLARATION**

In the Matter of \_\_\_\_\_ )  
[Name of Proceeding] \_\_\_\_\_ )  
Docket No. \_\_\_\_\_

I, \_\_\_\_\_, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized

Representatives, or other persons does not  
involve rendering advice or participating in  
any or all of the Reviewing Parties',  
Authorized Representatives' or other persons'  
business decisions that are or will be made

in light of similar or corresponding  
information about a competitor.  
(signed) \_\_\_\_\_  
(printed name) \_\_\_\_\_  
(representing) \_\_\_\_\_  
(title) \_\_\_\_\_

(employer) \_\_\_\_\_  
(address) \_\_\_\_\_  
(phone) \_\_\_\_\_  
(date) \_\_\_\_\_

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