

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 76**

[MB Docket No. 12-68; FCC 12-123]

Program Access Rules**AGENCY:** Federal Communications Commission.**ACTION:** Proposed rule.

SUMMARY: In this document, the Commission seeks comment on the following revisions to its program access rules: the establishment of certain rebuttable presumptions in connection with program access complaints challenging exclusive contracts involving cable-affiliated programming; and amendments to its rules to ensure that buying groups utilized by small and medium-sized multichannel video programming distributors (“MVPDs”) can avail themselves of the program access rules.

DATES: Comments are due on or before November 30, 2012; reply comments are due on or before December 17, 2012.

ADDRESSES: You may submit comments, identified by MB Docket No. 12-68, by any of the following methods:

- *Federal Communications Commission’s Web site: <http://www.fcc.gov/cgb/ecfs/>.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

• *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: FCC504@fcc.gov or phone: (202) 418-0530 or TTY: (202) 418-0432.

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

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s *Further Notice of Proposed Rulemaking*, FCC 12-123, adopted and released on October 5, 2012. The full text 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 or call the Commission’s Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Summary of the Further Notice of Proposed Rulemaking**I. Introduction**

In the *Further Notice of Proposed Rulemaking (“FNPRM”)* in MB Docket No. 12-68, we seek comment on whether to establish (i) a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an “unfair act” under section 628(b); (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint; (iii) rebuttable presumptions with respect to the “unfair act” element and/or the “significant hindrance” element of a section 628(b) claim challenging an exclusive contract involving a cable-affiliated “national sports network” (regardless of whether it is terrestrially delivered or satellite-delivered); and (iv) a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates section 628(b) (or, potentially, section 628(c)(2)(B)), any other exclusive contract involving the same network violates section 628(b) (or section 628(c)(2)(B)). We also seek comment in the *FNPRM* on revisions to the program access rules to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of these rules.

A. Rebuttable Presumptions for Cable-Affiliated RSNs

1. We seek comment on whether to establish (i) a rebuttable presumption

that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an “unfair act” under section 628(b); and (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract for that RSN during the pendency of a complaint.

1. Rebuttable Presumption That an Exclusive Contract for a Cable-Affiliated RSN Is an “Unfair Act”

2. As discussed above, under the case-by-case process for complaints alleging that an exclusive contract violates section 628(b), the complainant will have the burden of proving that the exclusive contract at issue (i) is an “unfair act” and (ii) has the “purpose or effect” of “significantly hindering or preventing” the complainant from providing satellite cable programming or satellite broadcast programming. With respect to the second element, the Commission has established 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 Commission established an identical presumption for terrestrially delivered, cable-affiliated RSNs in the *2010 Program Access Order*.

3. With respect to the first element (the “unfair act” element), however, the Commission has not established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN is an “unfair act.” In the *2010 Program Access Order*, the Commission established a categorical rule that all exclusive contracts involving terrestrially delivered, cable-affiliated programming (regardless of whether the programming qualifies as an RSN) are “unfair” under section 628(b). The DC Circuit vacated this aspect of the *2010 Program Access Order*, holding that (i) just because Congress treated certain acts involving satellite programming as “unfair” does not mean the same acts are necessarily “unfair” in the context of terrestrial programming; (ii) even with respect to satellite-delivered programming, Congress established a sunset provision for the exclusivity ban and allowed cable operators or cable-affiliated programmers to seek prior approval to enter into an exclusive contract (neither

of which would apply to terrestrially delivered programming under the *2010 Program Access Order*; and (iii) by labeling conduct “unfair” simply because it might in some circumstances negatively affect competition in the video distribution market, the Commission failed to consider whether it should treat conduct as “unfair” despite it being procompetitive in a given instance. The court concluded that “if the Commission believes that conduct involving the withholding of terrestrial programming should be treated as categorically unfair, as opposed to assessing fairness on a case-by-case basis or perhaps adopting a public interest exception mirroring the one for satellite programming, then it must grapple with whether its definition of unfairness would apply to conduct that appears procompetitive and, if so, whether that result would comport with section 628.” Consistent with the court’s decision, as demonstrated by the *Verizon v. MSG/Cablevision* and *AT&T v. MSG/Cablevision* cases, the Commission to date has elected to address whether challenged conduct, including an exclusive contract, is “unfair” on a case-by-case basis.

4. We seek comment on whether to establish a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an “unfair act” under section 628(b). The D.C. Circuit has explained that an evidentiary presumption is only permissible (i) “if there is a sound and rational connection between the proved and inferred facts” and (ii) “when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact * * * until the adversary disproves it.” Would a rebuttable presumption that an exclusive contract for a cable-affiliated RSN is an “unfair act” under section 628(b) satisfy this requirement? The Commission has held that determining whether challenged conduct is “unfair” requires “balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits.” What are the potentially procompetitive benefits of an exclusive contract for a cable-affiliated RSN? How do these potential benefits compare to the potentially anticompetitive harms of an exclusive contract for a cable-affiliated RSN? We ask commenters to provide evidence supporting their positions.

2. Rebuttable Presumption That a Complainant Challenging an Exclusive Contract Involving a Cable-Affiliated RSN Is Entitled to a Standstill

5. As discussed above, the Commission in the *2010 Program Access Order* established a process whereby a complainant may seek a standstill of an existing programming contract during the pendency of a complaint. The complainant has the burden of proof to demonstrate how grant of the standstill will meet the following four criteria: (i) The complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay.

6. We seek comment on whether to establish a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract for that RSN during the pendency of a complaint. Would such a rebuttable presumption meet the requirements for establishing such a presumption as set forth by the D.C. Circuit described above? Would this rebuttable presumption meet the requirements set forth by the D.C. Circuit only if we also establish a rebuttable presumption that an exclusive contract for a cable-affiliated RSN is an “unfair act” under section 628(b)? Are the rebuttable presumptions applicable to the “unfair act” (if adopted) and “significant hindrance” elements of a section 628(b) claim rationally related only to the “likelihood to prevail on the merits” prong of the four-part test for a standstill? What basis would there be for rationally presuming the other three elements of the test for a standstill (irreparable harm, no significant harm to other parties, and public interest) for purposes of establishing a standstill presumption for claims involving cable-affiliated RSNs? We ask commenters to provide evidence supporting their positions.

B. Other Rebuttable Presumptions

1. Rebuttable Presumptions for Exclusive Contracts Involving Cable-Affiliated National Sports Networks

7. We seek comment on whether to establish rebuttable presumptions with respect to the “unfair act” element and/or the “significant hindrance” element of a section 628(b) claim challenging an exclusive contract involving a cable-affiliated “national sports network”

(regardless of whether it is terrestrially delivered or satellite-delivered). How should the Commission define a “national sports network”? What cable-affiliated national sports networks exist today? Would these rebuttable presumptions meet the requirements for establishing such presumptions as set forth by the D.C. Circuit described above? On what basis can the Commission conclude that these networks have no good substitutes, are important for competition, and are non-replicable, as the Commission has found with respect to RSNs? We ask that commenters provide reliable, empirical data supporting their positions and address Commission precedent.¹ We also request comment on whether and how these rebuttable presumptions would be consistent with the First Amendment. To the extent we adopt these rebuttable presumptions, should we also adopt a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated national sports network (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract for that network during the pendency of a complaint?

2. Rebuttable Presumption for Previously Challenged Exclusive Contracts

8. We seek comment on whether the Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates section 628(b) (or, potentially, 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 sought comment on this issue in the *NPRM* in MB Docket No. 12-68, we concluded that the record on this issue was not sufficiently developed. Would this rebuttable presumption meet the requirements for establishing such a presumption as set forth by the D.C. Circuit described above? Is there a reasonable basis for

¹ See *2010 Program Access Order*, 25 FCC Rcd at 777 n.182 (discussing exclusive arrangements for “out-of-market, non-regional sports programming” and concluding that commenters “failed to provide evidence in the record of this proceeding of any harm to competition resulting from these arrangements”); *2007 Extension Order*, 22 FCC Rcd at 17843 n.380 (discussing national sports programming and concluding that “[u]nlike in the case of cable-affiliated regional sports programming, we have no evidence that the inability to access this sports programming has impacted MVPD subscribership”).

presuming liability based on a prior determination of a section 628(b) violation involving the same network? How would differences among complainants (e.g., differences in the complainants' market power) or changing circumstances over time (e.g., whether the network continues to carry the same highly coveted content) impact such a presumption? If we establish such a rebuttable presumption, should it be time limited? If we establish such a rebuttable presumption, should it apply if the complaints concern the same network but different geographic markets?

C. Buying Groups

9. We also solicit comment on possible modifications to the program access rules relating to buying groups. ACA filed comments in this proceeding asserting that revisions to the program access rules are needed to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of the program access rules. ACA seeks three modifications to the program access rules: (i) revision of the definition of "buying group" to accurately reflect the level of liability assumed by buying groups under current industry practices; (ii) establishment of standards for the right of buying group members to participate in their group's master licensing agreements; and (iii) establishment of a standard of comparability for a buying group regarding volume discounts. In addition to seeking comment on ACA's proposed modifications, we propose to revise our definition of "buying group" to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership.

1. Definition of "Buying Group"

10. As ACA explains, buying groups play an important role in the market for video programming distribution, both for small and medium-sized MVPDs and for programmers. A buying group negotiates master agreements with video programmers that its MVPD members can opt into and then acts as an interface between its members and the programmers so that the programmers are able to deal with a single entity. Thus, a buying group is generally able to obtain lower license fees for its members than they could obtain through direct deals with the programmers and lower transaction costs for programmers by enabling them to deal with a single entity, rather than many individual MVPDs, for their negotiations and fee collections. Because small and medium-sized MVPDs rely on buying groups as the

primary means by which they purchase their programming, ACA asserts that small and medium-sized MVPDs are protected under the program access rules only to the extent that buying groups are given the same protection in their dealings with cable-affiliated programmers as individual MVPDs are given. ACA notes that Congress, recognizing small MVPDs' reliance on buying groups, explicitly extended the non-discrimination protections of section 628(c)(2)(B) of the Act to buying groups.² The Commission likewise extended the protections of the non-discrimination provision of the program access rules to buying groups by including "buying groups" within the definition of "multichannel video programming distributor" set forth in § 76.1000(e) of the Commission's program access rules.

11. Although Congress did not define the term "buying group," the Commission has adopted a definition for this term. Section 76.1000(c) of the Commission's rules sets forth the requirements that an entity must satisfy in order to be considered a "buying group" eligible to avail itself of the non-discrimination protections afforded to MVPDs under the program access rules. One of these requirements pertains to the liability of the buying group or its members to the programmer for payments. The Commission has established three alternative ways for the buying group to satisfy this requirement. First, the entity seeking to qualify as a "buying group" may agree "to be financially liable for any fees due pursuant to a * * * programming contract which it signs as a contracting party as a representative of its members" (the "full liability" option). Second, the members of the buying group, as contracting parties, may agree to joint and several liability (the "joint and several liability" option). Third, the entity seeking to qualify as a "buying group" may maintain liquid cash or credit reserves equal to the cost of one

² The legislative history of section 628(c)(2)(B) also reflects Congress's intent to afford small MVPDs that purchase programming through buying groups the same protection against discrimination as other MVPDs. *See S. Rep. No. 102-92*, at 25 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1160 ("To address the complaints of small cable operators that cable programmers will not deal with them or will unreasonably discriminate against them in the sale of programming, the legislation requires vertically integrated, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms, and conditions."); H.R. Conf. Rep. No. 102-862, at 91 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1273 ("National and regional programmers affiliated with cable operators are required by the Senate bill to offer their programming to buying groups on terms similar to those offered to cable operators.").

month of programming fees for all buying group members and each member of the buying group must remain liable for its pro rata share (the "cash reserve" option).³

12. ACA asserts that none of these alternative liability options reflects current industry practice. First, with respect to the "full liability" option, ACA asserts that buying groups, such as the National Cable Television Cooperative ("NCTC"),⁴ never assume full liability for the contractual commitment that each member company makes when it opts into a master agreement. Rather, NCTC's obligation is limited to forwarding any payments that are received from members to the programmer and notifying the programmer of any default by one of its members. Additionally, NCTC's general practice is to deal with delinquent members by terminating their membership and thus all of the master agreements of the delinquent member. Second, with respect to the "joint and several liability" option, ACA notes that NCTC found this option impracticable because it would interfere with some members' loan covenants as to debt and result in fewer MVPDs being able to participate in NCTC master agreements. Third, with respect to the "cash reserve" option, ACA notes that NCTC's standard practice in its early years was to require its members to deposit 30 days of payments into an escrow account when they opted into a master agreement, but programmers and NCTC eventually decided this protection was unnecessary.

13. According to ACA, programmers have widely accepted NCTC's current business model, including the reduced level of liability that NCTC assumes

³ ACA notes that the changes to § 76.1000(c)(1) to reflect the "cash reserve" option were not included in the 1998 *Program Access Order* and that a subsequent Erratum making the relevant changes to § 76.1000(c)(1) was not published in the *Federal Register*. While ACA notes that, as a result, the changes to § 76.1000(c)(1) to reflect the "cash reserve" option are not reflected in the *Code of Federal Regulations*, a summary of the 1998 *Program Access Order*, including a discussion of the "cash reserve" option, was published in the *Federal Register* and is thus a binding rule. *See Development of Competition and Diversity in Video Programming Distribution and Carriage*, 63 FR 45740-02, 45742 (1998).

⁴ NCTC is a buying group with approximately 910 member companies representing approximately 25 million MVPD subscribers. NCTC's members vary widely in size, from a few dozen subscribers to several million subscribers. More than half of NCTC's 910 members have fewer than 1,000 subscribers, while a little over 100 of its members have more than 10,000 subscribers. In addition to negotiating the rates, terms, and conditions of master agreements with programmers, NCTC acts as an interface for all billing and collection activities between its member companies and the programmer.

under a master agreement. Because the existing definition of “buying group” does not conform to these widely accepted practices, ACA asserts that NCTC is effectively barred from bringing a program access complaint concerning a master agreement on behalf of its member companies. ACA accordingly recommends that the Commission modernize the definition of “buying group” in § 76.1000(c)(1) by adding, as an alternative to the existing liability options, a requirement that the entity seeking to qualify as a “buying group” assumes liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.

14. Based on ACA’s comments, it appears that our existing definition of “buying group” set forth in § 76.1000(c)(1) does not reflect accepted industry practices and thus may have the unintended effect of barring some buying groups from availing themselves of the protections of the non-discrimination provision of the program access rules, in contravention of Congress’s express intent in enacting section 628(c)(2)(B) of the Act. We tentatively conclude that we should revise § 76.1000(c)(1) to require, as an alternative to the current liability options, that the buying group agree to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.⁵ We seek comment on this tentative conclusion. We also seek comment on whether NCTC’s practices in terms of the level of liability it assumes under a master agreement are consistent with that of other buying groups. To the extent that the practices of other buying groups differ, how do they differ?

15. We note that the Commission adopted the liability options in § 76.1000(c)(1) to address concerns about the creditworthiness and financial stability of buying groups and protect programmers from excessive financial risk. We do not believe that revising the definition of buying group as discussed above would subject programmers to greater financial risk when contracting with a buying group than they would be when contracting with an individual MVPD. According to ACA, if an individual MVPD defaults on its payments for programming, a

programmer may attempt to require the MVPD to continue making payments over the life of the agreement, or it may cease delivery of the programming to the MVPD. ACA states that the programmer’s legal rights are the same regardless of whether the defaulting MVPD has purchased service on an individual basis or through a buying group. Moreover, we note that NCTC’s general practice of terminating membership, and thus all of the master agreements, of a delinquent member, may reduce the risk of delinquency, which could provide the programmer greater protection than when dealing with an individual MVPD. We invite commenters to address whether the proposed revision to the buying group definition sufficiently protects programmers from financial risks in dealing with buying groups. If not, what additional measures are needed to protect programmers from financial risk? Should we codify NCTC’s practice of terminating membership and all of the master agreements of a delinquent member? Do other buying groups utilize this same practice?

16. We further propose to revise the definition of “buying group” to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership. As ACA submits, “[b]uying groups play an extremely important role in today’s marketplace, for both small and medium-sized MVPDs,” because they provide “significantly lower license fees for [their] members than these MVPDs could obtain through direct deals with programmers.” Although a buying group would presumably benefit from increasing its membership in order to obtain better deals from programmers, we are aware of allegations in recent years that NCTC has denied membership to certain MVPDs. In light of the significance of buying groups in the marketplace today and Congress’s recognition of the importance of buying groups for small MVPDs, we propose to require that a “buying group” eligible to receive the benefits of the non-discrimination provision of the program access rules may not unreasonably deny membership to any MVPD requesting membership. Under this proposal, a buying group would not be required to accept all members. Rather, it would only be prohibited from “unreasonably” denying membership. For example, if an MVPD seeking membership has a history of defaulting on its payments for programming, or if there are legitimate antitrust reasons for denying membership to a particular MVPD, then the buying group’s denial of

membership would not be “unreasonable.” Upon being denied membership, an MVPD could file a Petition for Declaratory Ruling that the buying group no longer qualifies as a “buying group” as defined in § 76.1000(c) because it has “unreasonably” denied the MVPD membership. The central issue in the Declaratory Ruling proceeding would be whether the buying group’s conduct in denying membership was “unreasonable.” If the Commission finds that the buying group’s conduct was “unreasonable,” the buying group would no longer be eligible to receive the benefits of the non-discrimination provision of the program access rules. We seek comment on this proposal.

17. We invite commenters to discuss the potential costs and benefits of each of the proposed revisions of the buying group definition. To the extent possible, we encourage commenters to quantify any costs and benefits and submit supporting data. Commenters that propose an alternative approach should similarly provide data regarding the costs and benefits of the alternative approach.

2. Participation of Buying Group Members in Master Agreements

18. ACA also urges the Commission to revise the program access rules to prohibit cable-affiliated programmers from unreasonably preventing particular members of a buying group from opting into a master agreement. ACA contends that, while the program access rules prohibit unfair methods of competition and discriminatory practices, including selective refusals to license, these rules do not explicitly restrain the ability of a cable-affiliated programmer to unreasonably prevent particular members of a buying group from participating in a master agreement, even if the member normally purchases a substantial share of its programming from the buying group. ACA asserts that if a cable-affiliated programmer had the right to arbitrarily exclude any buying group member that it wished from a master agreement, the requirement that cable-affiliated programmers negotiate non-discriminatory agreements with buying groups could be rendered meaningless.

19. To remedy its concern, ACA recommends that the Commission adopt clear and easily verifiable standards for determining when a buying group member is presumptively allowed to participate in a master agreement with a cable-affiliated programmer. Specifically, ACA suggests that the Commission establish a “safe harbor” subscriber level for buying group

⁵ As discussed above, the changes to § 76.1000(c)(1) to reflect the “cash reserve” option adopted in the 1998 *Program Access Order* are not reflected in the *Code of Federal Regulations*. We intend to conform § 76.1000(c)(1) as amended in this proceeding to the amendment previously adopted in the 1998 *Program Access Order*.

member MVPDs to participate in a master agreement. Under ACA's proposed approach, a buying group member MVPD with no more than the "safe harbor" number of subscribers would be presumptively entitled to participate in master agreements between the programmer and the buying group. A buying group member MVPD which has more than the safe harbor number of subscribers would also be entitled to participate if it demonstrates that it incurs some specified minimum share of its total expenditures on programming through the buying group. Further, when an expiring master agreement is up for renewal, buying group members participating in the expiring agreement would have the right to participate in the renewed agreement. ACA states that, as a consequence of this safe harbor, it would be a violation of the section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that regularly participates in a master agreement. Although not mentioned by ACA, consistent with section 628(c)(2)(B), a cable-affiliated programmer could refuse to deal with a buying group member for a legitimate business reason, such as the distributor's history of defaulting on other programming contracts.

20. We seek comment generally on the need for a safe harbor for buying group participation in master agreements and, more specifically, on ACA's proposed safe harbor. Although several commenters make generalized allegations that cable-affiliated programmers have excluded particular buying group members from participating in master agreements negotiated with the buying group, we have not received information regarding specific instances in which such exclusions have occurred. We seek detailed information on the extent to which the exclusion of particular buying group members from participation in master agreements has occurred in the past or is occurring now. To the extent that some buying group members are being excluded from participating in master agreements, why are they being excluded?

21. If we determine that it is necessary to establish a safe harbor for buying group participation in master agreements, what subscriber level should we establish as the safe harbor? ACA suggests that we set the safe harbor subscriber number at 3 million subscribers. Is this an appropriate safe harbor subscriber number? Commenters that recommend a specific safe harbor subscriber number should explain the

basis for their recommendation. Further, under ACA's suggested approach, a buying group member with more than the safe harbor number of subscribers would be entitled to participate in a master agreement if it demonstrates that it incurs some specified minimum share of its total expenditures on programming through the buying group. What minimum share of programming expenditures should such a buying group member have to incur through the buying group in order to be entitled to participate in a master agreement and over what period of time? ACA suggests that we require a buying group member with more than the safe harbor number of subscribers to demonstrate that the share of programming that it licenses through the buying group is not significantly smaller than the average share of programming that other buying group members license through the buying group. We seek comment on this proposal. What share of programming should be considered "significantly smaller" than the average share for purposes of this proposal? Over what period of time should we measure the "average share" of programming that other buying group members license through the buying group? In addition, we seek comment on ACA's proposal that, when an expiring master agreement is up for renewal, buying group members participating in the expiring agreement would have the right to participate in the renewed agreement. We also invite commenters to suggest any alternatives to ACA's proposed safe harbors and explain why the alternative is preferable or less burdensome. For example, would it be preferable to simply require that, if a cable-affiliated programmer enters into a master agreement with a buying group, all buying group members have a right to participate in the master agreement? What are the potential costs and benefits of ACA's safe harbor approach and any alternative proposals? Commenters should quantify any potential costs and benefits to the extent possible and provide supporting data.

3. Standard of Comparability for Buying Groups Regarding Volume Discounts

22. The Commission has explained that a complainant MVPD alleging program access discrimination must make a *prima facie* showing that there is a difference between the rates, terms, or conditions charged or offered by a cable-affiliated programmer to the complainant MVPD and to a "competing distributor." The Commission has explained that buying groups that are "fundamentally national in operation" may make a comparison to the rates,

terms, or conditions charged or offered by a cable-affiliated programmer to a "national competitor." Once the complainant MVPD establishes a *prima facie* case of discrimination, the defendant programmer must demonstrate that the difference in prices, terms, and conditions is justified by the four factors set forth in section 628(c)(2)(B)(i)–(iv) of the Act. One of those factors allows programmers to use volume-related justifications to establish price differentials. If the programmer believes that the complainant MVPD and the "competing distributor" are not sufficiently similar, and thus cannot be realistically compared, it can state its reasons for this conclusion and submit an alternative contract for comparison with another more "similarly situated" alternative MVPD. The Commission's rules provide that the analysis of whether an alternative MVPD is properly comparable to the complainant includes consideration of, but is not limited to, the following factors: (i) Whether the alternative MVPD operates within a geographic region proximate to the complainant; (ii) whether the alternative MVPD has roughly the same number of subscribers as the complainant; and (iii) whether the alternative MVPD purchases a similar service as the complainant. Moreover, the Commission's rules provide that the alternative MVPD "must use the same distribution technology as the 'competing' distributor with whom the complainant seeks to compare itself."

23. ACA proposes that we amend our rules to clarify that the standard to be applied in determining whether buying groups are being discriminated against is the same as that applied to an individual MVPD providing the same number of subscribers to the programmer. In other words, ACA states, for purposes of determining whether prices offered to a buying group are discriminatory, the buying group should be considered "similarly situated" to an individual MVPD offering the programmer the same number of subscribers. According to ACA, "the utility of the program access rules has been dramatically undercut for buying groups because the Commission has never established a clear standard upon which a buying group is to be compared for purposes of determining whether it is being discriminated against by a cable-affiliated programmer."

24. We invite comment on ACA's proposal. In particular, we seek comment on whether and how any perceived lack of clarity regarding the standard of comparability for buying groups has affected negotiations

between buying groups and cable-affiliated programmers on volume discounts or has discouraged buying groups from filing program access complaints. We note, in this regard, that neither section 628 nor the Commission's rules distinguish between individual MVPDs and buying groups in describing the justifications for volume discounts. Therefore, it is arguably already clear that a buying group would be compared to an individual MVPD providing the same number of subscribers to the programmer.

Moreover, in the *1993 Program Access Order*, the Commission established the conditions that a buying group must meet "in order to benefit from treatment as a single entity for purposes of subscriber volume." The Commission therein stated that "[v]endors can extend [to buying groups] the same volume discounts based on number of subscribers that they would ordinarily extend to single entities of comparable size provided that such discounts are offered in a nondiscriminatory fashion." Thus, to the extent that we adopt the revised definition of "buying group" proposed by ACA, we seek comment on whether it is also necessary to revise the rules to establish an explicit standard of comparability. Are there differences between individual MVPDs and buying groups that would argue against the standard of comparability advocated by ACA? As discussed above, the Commission's analysis of whether MVPDs are "similarly situated" for purposes of a program access discrimination complaint extends beyond consideration of whether MVPDs offer roughly the same number of subscribers to include other factors, such as the geographic region where the MVPDs operate, the services purchased, and the date of their contracts with the defendant programmer. What impact, if any, do these and other factors have on the standard of comparability advocated by ACA?

25. Moreover, as discussed above, a complainant MVPD alleging program access discrimination must make a *prima facie* showing of a differential in the price, terms, or conditions offered or charged to the complainant MVPD and to a "competing distributor." In the case of a national buying group, the comparison is made to a "national competitor." We seek comment on how this requirement impacts discrimination complaints brought by national buying groups and how, if at all, this requirement should be modified for discrimination complaints filed by national buying groups. For example, are there any "national competitors,"

other than DBS operators, to which a national buying group can make a comparison? If only a DBS operator qualifies as a "national competitor," but a defendant programmer believes that a DBS operator is not comparable to the national buying group, the defendant programmer may submit an alternative contract for comparison with another more "similarly situated" alternative MVPD. As discussed above, however, the Commission's rules provide that the alternative MVPD "must use the same distribution technology as the 'competing' distributor with whom the complainant seeks to compare itself." If only a DBS operator can qualify as a "competing distributor" for a national buying group, does this limit the alternative MVPDs that can qualify as "similarly situated" to only other DBS operators?

26. ACA further proposes that we make clear that a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the master agreement. Under this proposal, a cable-affiliated programmer would violate section 628(c)(2)(B)'s prohibition on discriminatory practices if it fails or refuses to offer a non-discriminatory schedule of prices based on the number of subscribers that members of the buying group could provide if they chose to opt into the master agreement. ACA explains that under the current NCTC model, NCTC negotiates the deal with the programmer and then its members decide whether to opt into the deal. Thus, at the time of negotiation, neither NCTC nor the programmer knows exactly which NCTC members will take their programming through NCTC—and therefore neither party knows the precise number of subscribers that NCTC will provide. ACA maintains that its proposal "will solve the 'chicken and egg' problem that might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high, even though the license fees would go down if the members decided to opt in." We seek comment on the benefits and burdens of ACA's proposal. To what extent has the "chicken and egg" problem described above hampered negotiations between buying groups and programmers? If, at the time of negotiation, neither the

buying group nor the programmer knows precisely which buying group members will participate in the agreement, how are volume discounts calculated for buying groups? Has past participation been a reliable indicator of which buying group members are likely to opt into a master agreement?

Additionally, we seek comment on whether the Commission has the authority under section 628 or some other provision of the Act to require programmers to provide buying groups generally applicable rate schedules for differing subscribership levels.

27. Finally, we seek comment on ACA's request that we clarify that the standard of comparability applies for purposes of evaluating all terms and conditions of the agreement, not just the price. As discussed above, to the extent that we adopt the revised definition of "buying group" proposed by ACA, is this proposed clarification necessary? We also invite commenters to analyze the potential costs and benefits of each of ACA's proposals relating to the standard of comparability for buying groups, as well as any alternative proposals, quantify any costs and benefits of the proposals to the extent possible, and submit appropriate supporting data.

II. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

28. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"), the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking ("FNPRM")*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *FNPRM* specified *supra*. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA"). In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rule Changes

29. We seek comment in the *FNPRM* on whether to establish a rebuttable presumption that an exclusive contract for a cable-affiliated Regional Sports Network ("RSN") (regardless of whether it is terrestrially delivered or satellite-delivered) is an "unfair act" under

section 628(b) of the Communications Act of 1934, as amended (the “Act”). Under the case-by-case process for complaints alleging that an exclusive contract violates section 628(b), the complainant has the burden of proving that the exclusive contract at issue (i) is an “unfair act” and (ii) has the “purpose or effect” of “significantly hindering or preventing” the complainant from providing satellite cable programming or satellite broadcast programming. With respect to the second element, the Commission has established a rebuttable presumption that an exclusive contract involving a 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). With respect to the first element (the “unfair act” element), however, the Commission has not established a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN is an “unfair act.” The *FNPRM* seeks comment on whether to establish this rebuttable presumption.

30. We also seek comment in the *FNPRM* on whether to establish a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint. The Commission previously established a process whereby a complainant may seek a standstill of an existing programming contract during the pendency of a complaint. The complainant has the burden of proof to demonstrate how grant of the standstill will meet the following four criteria: (i) The complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay. The *FNPRM* seeks comment on whether to establish a rebuttable presumption that a complainant is entitled to a standstill when challenging an exclusive contract involving a cable-affiliated RSN.

31. The *FNPRM* also seeks comment on whether to establish rebuttable presumptions with respect to the “unfair act” element and/or the “significant hindrance” element of a section 628(b) claim challenging an exclusive contract involving a cable-affiliated “national sports network” (regardless of whether it is terrestrially delivered or satellite-delivered). We also

seek comment in the *FNPRM* on whether the Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates section 628(b) (or, potentially, section 628(c)(2)(B)), any other exclusive contract involving the same network violates section 628(b) (or section 628(c)(2)(B)).

32. We also solicit comment on modifications to the program access rules relating to buying groups proposed by the American Cable Association (“ACA”) in its comments on the *Notice of Proposed Rulemaking* in MB Docket Nos. 12-68, 07-18, and 05-182. ACA asserts that revisions to the program access rules are needed to ensure that buying groups utilized by small and medium-sized multi-channel video programming distributors (“MVPDs”) can avail themselves of the non-discrimination protections of the program access rules. ACA seeks three modifications to the program access rules: (i) The revision of the definition of “buying group” to accurately reflect the level of liability assumed by buying groups under current industry practices; (ii) the establishment of standards for the right of buying group members to participate in their group’s master licensing agreements; and (iii) the establishment of a standard of comparability for a buying group regarding volume discounts. In addition to ACA’s proposed modifications, we propose to revise our definition of “buying group” to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership.

33. Buying groups play an important role in the market for video programming distribution, both for small and medium-sized MVPDs and for programmers. A buying group negotiates master agreements with video programmers that its MVPD members can opt into and then acts as an interface between its members and the programmers so that the programmers are able to deal with a single entity. Thus, a buying group is generally able to obtain lower license fees for its members than they could obtain through direct deals with the programmers, and lower transaction costs for programmers by enabling them to deal with a single entity, rather than many individual MVPDs, for their negotiations and fee collections. Because small and medium-sized MVPDs rely on buying groups as the primary means by which they purchase

their programming, small and medium-sized MVPDs are only protected under the program access rules to the extent that buying groups are given the same protection in their dealings with cable-affiliated programmers as individual MVPDs are given. The non-discrimination protections of section 628(c)(2)(B) of the Communications Act of 1934, as amended (the “Act”) explicitly apply to buying groups. Further, the Commission’s rules extend the non-discrimination protections of the program access rules to buying groups by including “buying groups” within the definition of “multichannel video programming distributor” set forth in § 76.1000(e) of the Commission’s rules.

34. Section 76.1000(c) of the Commission’s rules sets forth the requirements that an entity must satisfy in order to be considered a “buying group” for purposes of the definition of “multichannel video programming distributor” in § 76.1000(e)—that is, to avail itself of the non-discrimination protections afforded to MVPDs under the program access rules. One of these requirements pertains to the liability of the buying group or its members to the programmer for payments. The Commission has established three alternatives ways for the buying group to satisfy this requirement. First, the entity seeking to qualify as a “buying group” may agree “to be financially liable for any fees due pursuant to a * * * programming contract which it signs as a contracting party as a representative of its members” (the “full liability” option). Second, the members of the buying group, as contracting parties, may agree to joint and several liability (the “joint and several liability” option). Third, the entity seeking to qualify as a “buying group” may maintain liquid cash or credit reserves equal to the cost of one month of programming fees for all buying group members and each member of the buying group must remain liable for its pro rata share (the “cash reserve” option).

35. ACA asserts that none of these alternative liability options reflect current industry practice. First, with respect to the “full liability” option, ACA asserts that buying groups, such as the National Cable Television Cooperative (“NCTC”), never assume full liability for the contractual commitment that each member company makes when it opts into a master agreement. Rather, NCTC’s obligation is limited to forwarding any payments that are received from members to the programmer and notifying the programmer of any default

by one of its members. Second, with respect to the “joint and several liability” option, ACA notes that NCTC found this option impracticable because it would interfere with some members’ loan covenants as to debt and result in fewer MVPDs being able to participate in NCTC master agreements. Third, with respect to the “cash reserve” option, ACA states that NCTC’s standard practice in its early years was to require its members to deposit 30 days of payments into an escrow account when they opted into a master agreement, but programmers and NCTC eventually decided this protection was unnecessary.

36. According to ACA, programmers have widely accepted NCTC’s current business model, including the reduced level of liability that NCTC assumes under a master agreement. Because the existing definition of “buying group” does not conform to these widely accepted practices, ACA asserts that NCTC is effectively barred from bringing a program access complaint concerning a master agreement on behalf of its member companies. ACA accordingly recommends that the Commission modernize the definition of “buying group” in § 76.1000(c)(1) by adding, as an alternative to the existing liability options, a requirement that the entity seeking to qualify as a “buying group” assumes liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.

37. In the *FNPRM*, we tentatively conclude that we should revise § 76.1000(c)(1) to require, as an alternative to the current liability options, that the buying group agree to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer. In light of the significance of buying groups in the marketplace today and Congress’s recognition of the importance of buying groups for small MVPDs, we further propose to revise the definition of “buying group” to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership.

38. In addition, we seek comment on ACA’s proposal that we establish a “safe harbor” subscriber level for buying group members to participate in a master agreement negotiated with a cable-affiliated programmer. Under ACA’s proposed approach, a buying group member MVPD with no more than three million subscribers would be presumptively entitled to participate in master agreements between the

programmer and the buying group. A buying group member MVPD which has more than the safe harbor number of subscribers would also be entitled to participate if it demonstrates that it incurs some specified minimum share of its total expenditures on programming through the buying group. Further, when an expiring master agreement is up for renewal, buying group members participating in the expiring agreement would have the right to participate in the renewed agreement. As a consequence of this safe harbor, it would be a violation of the section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that regularly participates in a master agreement.

39. Finally, we seek comment on ACA’s proposals that we revise the rules to clarify that: (i) The standard to be applied in determining whether buying groups are being discriminated against is the same as that applied to an individual MVPD providing the same number of subscribers to the programmer; (ii) a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscriber levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the master agreement; and (iii) the standard of comparability for a buying group is an MVPD providing the same number of customers for purposes of evaluating all terms and conditions of the agreement, not just the price.

Legal Basis

40. The proposed action is authorized pursuant to 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.

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

41. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted 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.

42. *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 supersedes 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.

43. *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 supersedes 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.

44. 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.

45. 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.

46. 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 supersedes 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.

47. 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 supersedes 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.

48. 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 supersedes 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.

49. 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.

50. 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 supersedes 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.

51. 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 supersedes 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.

52. 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 supersedes 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.

53. *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 supersedes 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.

54. *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.

55. *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.

56. *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.

57. *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, 8,995 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.

58. *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 Projected Reporting, Recordkeeping, and Other Compliance Requirements

59. Certain proposed rule changes discussed in the *FNPRM* would affect reporting, recordkeeping, or other compliance requirements. The *FNPRM* seeks comment on whether to establish (i) a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an “unfair act” under section 628(b); (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint; (iii) rebuttable presumptions with respect to the “unfair act” element and/or the “significant hindrance” element of a section 628(b) claim challenging an exclusive contract involving a cable-affiliated “national sports network” (regardless of whether it is terrestrially delivered or satellite-delivered); and (iv) a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates section 628(b) (or, potentially, section 628(c)(2)(B)), any other exclusive contract involving the same network violates section 628(b) (or section 628(c)(2)(B)). The *FNPRM* tentatively concludes that the Commission should revise definition of “buying group” to require, as an alternative to the current liability options, that the buying group agree to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer. The *FNPRM* also proposes to revise the definition of “buying group” to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership. In addition, the *FNPRM* seeks comment on whether the Commission should establish a “safe harbor” subscriber level for buying group members to participate in master agreements with cable-affiliated programmers. As a consequence of this safe harbor, it would be a violation of the section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that

regularly participates in a master agreement. Finally, the *FNPRM* seeks comment on whether the Commission should revise the rules to clarify that: (i) The standard to be applied in determining whether buying groups are being discriminated against is the same as that applied to an individual MVPD providing the same number of subscribers to the programmer; (ii) a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscription levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the master agreement; and (iii) the standard of comparability for a buying group is an MVPD providing the same number of customers for purposes of evaluating all terms and conditions of the agreement, not just the price.

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

60. The RFA requires an agency to describe any significant alternatives that it has considered in developing its proposed 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.”

61. The *FNPRM* seeks comment on whether to establish (i) a rebuttable presumption that an exclusive contract for a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is an “unfair act” under section 628(b); (ii) a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN (regardless of whether it is terrestrially delivered or satellite-delivered) is entitled to a standstill of an existing programming contract during the pendency of a complaint; (iii) rebuttable presumptions with respect to the “unfair act” element and/or the “significant hindrance” element of a section 628(b) claim challenging an exclusive contract involving a cable-affiliated “national sports network” (regardless of whether it is terrestrially delivered or satellite-delivered); and (iv)

a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates section 628(b) (or, potentially, section 628(c)(2)(B)), any other exclusive contract involving the same network violates section 628(b) (or section 628(c)(2)(B)). These presumptions may benefit small entities by reducing costs by eliminating the need for litigants and the Commission to undertake repetitive examinations of Commission precedent and empirical evidence on RSNs.

62. The *FNPRM* also seeks comment on proposed modifications to the program access rules that are intended to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of the non-discrimination protections of the program access rules. Thus, the proposed modifications would benefit small entities. Specifically, the proposed revision of the definition of “buying group” to include an alternative liability option may benefit small entities by enabling buying groups that do not fall within the scope of the existing definition to file complaints with the Commission alleging violations of the non-discrimination provisions of the program access rules on behalf of their small and medium-sized MVPD members. Additionally, the proposed revision of the “buying group” definition to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership may benefit small entities by making the benefits of buying group membership available to more small entities. Small entities may also benefit from the establishment of a “safe harbor” subscriber level for buying group members to participate in master agreements with cable-affiliated programmers and from clarifications to the rules addressing the standard of comparability for a buying group regarding volume discounts.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

63. None.

B. Paperwork Reduction Act

64. The *FNPRM* in MB Docket No. 12-68 does not contain proposed information collections subject to the PRA. 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. Ex Parte Rules

65. *Permit-But-Disclose.* The proceeding the *FNPRM* in MB Docket No. 12-68 initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule § 1.1206(b). In proceedings governed by rule § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

D. Filing Requirements

66. *Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission’s rules, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (“ECFS”).

- *Electronic Filers:* Comments may be filed electronically using the Internet by

accessing the ECFS: <http://fajallfoss.fcc.gov/ecfs2/>.

- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

67. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

68. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

69. *Additional Information.* For additional information on this proceeding, contact David Konczal, David.Konczal@fcc.gov, or Kathy Berthot, Kathy.Berthot@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

III. Ordering Clauses

70. *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 *Further Notice of Proposed Rulemaking* in MB Docket No. 12-68 *Is Adopted*.

71. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *Shall Send* a copy of the *Further Notice of Proposed Rulemaking* in MB Docket No. 12-68, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television.
Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the preamble, Part 76 of Title 47 of the Code of Federal Regulations is proposed to be 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 76.1000 is amended by revising paragraphs (c)(1) and (c)(3), adding paragraph (c)(4), and revising paragraph (j) to read as follows:

§ 76.1000 Definitions.

* * * * *

(c) * * *

(1)(i) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members, or

(ii) Whose members, as contracting parties, agree to joint and several liability, or

(iii) Maintains liquid cash or credit reserves (*i.e.*, cash, cash equivalents, or letters or lines of credit) equal to cover the cost of one month's programming for all buying group members, or

(iv) Agrees to assume liability to forward to the appropriate programmer all fees due and received from its

members for payment under a programming contract; and

* * * * *

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group; and

(4) Does not unreasonably deny membership to any multichannel video programming distributor that requests membership.

* * * * *

(j) *Similarly situated.* The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor or by a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1)(ii), that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of § 76.1001(a) or § 76.1002(b) has occurred. The analysis of whether an alternative multichannel video programming distributor is properly comparable to the complainant includes consideration of, but is not limited to, such factors as whether the alternative multichannel video programming distributor operates within a geographic region proximate to the complainant, has roughly the same number of subscribers as the complainant, and purchases a similar service as the complainant. Such alternative multichannel video programming distributor, however, must use the same distribution technology as the "competing" distributor with whom the complainant seeks to compare itself. For purposes of determining the size of a volume discount applicable to a buying group, a buying group will be considered similarly situated to an alternative multichannel video programming distributor with approximately the same number of subscribers for the programming as expected to be supplied by the buying group.

* * * * *

3. Section 76.1002 is amended by revising the Note to paragraph (b)(3) and adding paragraph (g) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

* * * * *

(b) * * *

(3) * * *

Note: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on

a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership. Vendors may not use volume-related justifications to establish price differentials between a buying group and an alternative multichannel video programming distributor that has approximately the same number of subscribers for the programming as expected to be supplied by the buying group.

* * * * *

(g) *Buying Groups.* (1) Right to Participate in Buying Group Programming Contracts. No satellite cable programming vendor in which a cable operator has an attributable interest or satellite broadcast programming vendor may unreasonably interfere with or prevent a member of a buying group from participating in a programming contract in which a buying group signs as a contracting party as a representative of its members if:

(i) The member has no more than three million subscribers; or
(ii) The share of programming that the member licenses through the buying group is not significantly smaller than the average share of programming that other members of the buying group license through the buying group. Upon the expiration of a satellite cable programming or satellite broadcast

programming contract which a buying group signs as a contracting party as a representative of its members, all buying group members participating in the expiring programming contract shall be presumptively entitled to participate in the renewed programming contract.

(2) *License Fee Schedule.* A programming vendor must offer a programming contract to a buying group that specifies a schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, provided that it is possible that the buying group could provide this number of subscribers from its current members eligible to participate in the programming contract.

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