

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Review of the Commission's Program Access) MB Docket No. 07-198
Rules and Examination of Programming)
Tying Arrangements)

**COMMENTS OF
THE COALITION FOR COMPETITIVE ACCESS TO CONTENT (CA2C)**

CA2C members represented in these comments include: AT&T Inc., Broadband Service Providers Association (BSPA), DIRECTV, Inc., Embarq, Hiawatha Broadband, Independent Telephone and Telecommunications Alliance (ITTA), Knology/PrairieWave, Media Access Project (MAP), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), RCN, SureWest, USTelecom, WOW! Internet, Cable and Phone.

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SUMMARY

The Coalition for Competitive Access to Content (CA2C) is a diverse group of companies and organizations that includes broadband service providers (BSPs), direct broadcast satellite (DBS) and new telco video competitors, trade associations, and consumer groups that have come to the same conclusion regarding the need to maintain assured access to “must have” content distributed by programmers that are vertically integrated with incumbent cable operators. This access is essential to the development and preservation of competition in the multichannel video programming distribution (“MVPD”) market and the further development of broadband networks. The Commission has correctly concluded that vertically integrated cable operators continue to have both the incentive and ability to use discriminatory access to programming to harm competition. Moreover, it is now easier than ever to evade the program access rules via terrestrial distribution, both because terrestrial distribution is less expensive than before and because regional clustering makes terrestrial distribution more feasible. Accordingly the members of CA2C all agree that the use of any type of terrestrial distribution as compared to the use of satellite distribution of cable affiliated programming should not affect the application of a prohibition on exclusive contracts or the prohibition on discriminatory conduct with respect to the price, terms, and conditions of access. The CA2C also opposes any early sunset of the prohibitions on exclusives as prescribed in Section 628(c)(2)(D) or as it might apply to any new rules adopted in this proceeding.

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The Coalition for Competitive Access to Content ("CA2C"), hereby submits these comments in response to the Notice of Proposed Rulemaking of the Federal Communications Commission ("Commission" or "FCC") in the captioned proceeding.¹

INTRODUCTION AND BACKGROUND

CA2C is a diverse group of companies and organizations that includes broadband service providers (BSPs), direct broadcast satellite (DBS) and new telco video competitors, trade associations, and consumer groups that are committed to sustained and expanded competition for consumers in the video market place. These member organizations disagree on many other public policy issues, but nonetheless have come to the same conclusion regarding the need to

¹ *Matter of Review of the Commissions, Program Access Rules and Examination of Programming Tying Arrangements*, NPRM, 22 FCC Rcd 17791 (2007)("Notice").

have assured access to “must have” content distributed by programmers that are vertically integrated with incumbent cable operators. This access is essential to the development and preservation of competition in the multichannel video programming distribution (MVPD) market regardless of whether this content is delivered by satellite or any alternate method of terrestrial distribution technology.

The exclusivity prohibition and the anti-discrimination provisions in Section 628(c)(2) of the Communications Act were major factors in the development of today’s MVPD competition. DBS, BSP, and other existing wireline and wireless entrants rely on these rules to ensure access to “must have” programming that would otherwise be withheld by vertically integrated incumbent cable operators or made available on unreasonably discriminatory terms and conditions. Even if every other issue that historically has been identified as a potential barrier to competitive video entry (franchising, MDU access, technical standards, etc.) were fully resolved, competition would be seriously impaired if vertically integrated cable operators were allowed to pursue foreclosure strategies related to content.

At bottom, there is still marquee or must have programming that has no equivalent. Existing and new competitive MVPDs are still dependent on access to “must have” vertically integrated programming. So long as incumbent cable operators with ownership interests in essential content can use their leverage over that programming to sustain market share and contain or block competition, assured access to such content will be required.

CA2C fully supports the Commission’s decision to extend the sunset of the current prohibition on exclusive contracts for satellite delivered, cable affiliated programming. We were also encouraged by the unanimous decision and strong statements of support for these effective pro-competition rules that continue to be needed. As stated in the Report and Order:

[W]e find that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming, and accordingly, retain it again for five years.²

* * * * *

[W]e conclude that there are no close substitutes for some satellite-delivered vertically integrated programming and that such programming is necessary for viable competition in the video distribution market. Having made this determination, we further conclude that vertically integrated programmers continue to have the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected.³

In addition to extending the current prohibitions on exclusives for five years we also concur with the following conclusions by the Commission:

1. Access to vertically integrated “must have” programming is essential for healthy competition.⁴
2. Vertically integrated cable programmers still have the incentive and ability to withhold must have programming.⁵
3. The current rules have caused no harm to program development.⁶
4. Expanding regional clusters and further horizontal cable consolidation increase the ability and incentive to withhold programming.⁷
5. Examples of denied access to key programming where the current rules do not apply are clear evidence of what vertically integrated cable operators will do if allowed.⁸

All of these conclusions are equally true for terrestrially delivered content as they have been and continue to be for satellite delivered content. From a competitive policy perspective

² *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Sunset of Exclusive Contract Prohibition*, Report and Order and NPRM, MB Docket 07-29, FCC 07-169, ¶ 1 (rel. Oct. 1, 2007). (“*Sunset Report and Order*”).

³ *Sunset Report and Order*, ¶ 42.

⁴ *Id.*, ¶ 41.

⁵ *Id.*, ¶ 29.

⁶ *Id.*, ¶ 64.

⁷ *Id.*, ¶ 29, 52, 53.

⁸ *Id.*, ¶ 51.

the same analysis that justifies the further extension of the current prohibition on exclusives for satellite delivered content and the continued vitality of the program access rules generally has direct application to cable affiliated programming that is delivered terrestrially. The Commission has endorsed this view in the recent Adelphia merger decision by closing the terrestrial loophole for regional sports networks controlled by the parties to the transaction.⁹ It would be good pro-competitive policy to close the terrestrial loophole for all cable affiliated programming. As discussed below, there is no question as to the need to take action and the Commission's authority to do so.

DISCUSSION

I. DENIAL OF ACCESS TO TERRESTRIALLY DELIVERED CONTENT HAS THE SAME OPPORTUNITY TO HARM COMPETITION AS HAS BEEN DETERMINED FOR SATELLITE DELIVERED CONTENT.

The technology and network capacity of terrestrial networks can now deliver virtually any programming historically delivered by satellite. Denial of access to terrestrially delivered content provides the same opportunities to harm competition as has been determined for satellite delivered content. Historically, while generally refusing to apply the program access rules to terrestrially delivered programming, the Commission has found that a program access complaint might lie as an unfair act under Section 628(b), for satellite delivered programming that had been moved to terrestrial distribution to avoid application of the program access rules. In reality, terrestrial networks have evolved to the point where the use of terrestrial distribution can arguably be justified by factors other than the impact migration to a terrestrial network will have on application of the program access rules. It is therefore either difficult or impossible to

⁹ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

document instances where the sole motivation to move content from satellite to terrestrial distribution is to avoid the program access rules, and indeed the Commission has never found a case where such migration is a violation of the program access rules. Terrestrial networks are already hosting significant “must have” content that has never been satellite delivered and the use of terrestrial distribution is expected to expand as we continue to move toward all digital networks with expanded regional and on-demand content.

A. Denial of Access to Growing Amounts of Terrestrially Delivered “Must-Have” Programming Will Significantly Harm Competition.

The central policy issue at hand is not whether content has been moved to terrestrial delivery. The primary issue is whether programming now delivered or expected to be delivered on terrestrial networks has the same “must have” characteristics as satellite delivered content and whether the current and expected use of terrestrially delivered content will be significant enough to warrant the creation of appropriate competitive access protection at this time.

The Commission and Congress have clearly recognized that there are program access issues that go beyond the current scope of the specific language in Section 628(c)(2). The clearest evidence for this conclusion is in recent decisions in the Adelphia transaction ensuring access to regional sports programming.¹⁰ The net effect of this ruling was to close the terrestrial loophole for this regional programming subject to the Adelphia proceeding.¹¹ Relying on its authority to impose appropriate conditions for the approval of the transaction, the Commission did not hesitate to recognize the critical competitive need for assured access to this regional programming and imposed appropriate merger conditions.

¹⁰ *Adelphia Order*, 21 FCC Rcd at 8274.

¹¹ The Philadelphia market, however, was partially excluded from this resolution. *Id.* at 8276.

In the *Sunset Report and Order*, the Commission also acknowledged the negative competitive impact of denied access to terrestrially delivered content:

However, for vertically integrated programming that is delivered terrestrially there is factual evidence that cable operators have withheld this programming from competitors and, in two instances – in San Diego and Philadelphia – there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market.¹²

B. Assured Access to Terrestrially Delivered Content Was Not Needed in 1992 but Is Needed Today.

High capacity terrestrial networks did not exist as they do today when the program access rules were first enacted in 1992 to support the development of satellite competition. This was still true when the first bundled triple play wireline competitors entered the market from 1997-1999. At that time terrestrial networks still had limited development and virtually all essential or “must have” programming was delivered by satellite. Therefore the rules assuring access to satellite delivered programming were sufficient to support early competition.

The dot-com boom and the continuing development of digital technology have now created terrestrial networks as a significant new resource and alternative to satellite distribution. In addition to the extensive networks that have been built during the past ten years, we continue to increase the capacity of these fiber networks through improved transmission technologies. Fiber first deployed in the late 90s can now transport significantly more data than its original capacity expectations. Digital technology also creates new transport network capacity just as it is creating available spectrum for other uses in the conversion to digital broadcasting in 2009. In terrestrial networks the effective impact of converting each analog channel to a digital channel varies from a minimum of 3 to 1 to a 6 to 1 increase in effective channel capacity depending on

¹² *Sunset Report and Order*, ¶ 37.

whether the new digital channels are high definition or standard definition and the video quality an MVPD needs to deliver. The result is a new transport capability that can efficiently transport any or all of the content that had been historically limited to satellite distribution as the only cost effective alternative, and the use of terrestrial distribution is only expected to grow.

Today's reality is that there can be many circumstances where terrestrial networks are a preferred distribution resource for some types of 'must have' content distribution. This happens most frequently when content has regional as compared to national distribution or where the content will have any form of on-demand delivery to consumers. Regional and on-demand content are now expected to be some of the highest growth programming segments.

C. It is Clear that Congress Wants to Support the Development of New Technology but not Allow It to Impair Competition.

It is not possible to anticipate the technology changes that have consistently expanded the capabilities of services and changed the way all forms of communication services have been delivered. It is clear that the 1992 Cable Act anticipated and sought to encourage the continuing development of new technology along with its commitment to support the development of competition. These twin policy goals were not promulgated with the intent that development of a new technology should in any way impair the development of competition. Section 628(c)(1) directs the Commission to prescribe regulations specifying the particular conduct that is prohibited by Section 628(b) "in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the *continuing development of communications technologies.*" (*Emphasis added.*)

The CA2C and its members in no manner suggest that migration to terrestrial distribution should be artificially encouraged or discouraged and believe that programmers and providers are

in the best position to determine the most technologically efficient means of delivering content to MVPDs. The same program access protections that are afforded vertically integrated “must have” programming delivered by satellite must be applied when that programming is delivered terrestrially or competition can be impaired. No other conclusion makes sense, and no other conclusion would serve the primary objectives of supporting a fully competitive market structure along with the development of new communication technologies.

II. VERTICALLY INTEGRATED CABLE OPERATORS HAVE AND WILL DENY ACCESS TO “MUST HAVE” PROGRAMMING IF ALLOWED.

Vertically integrated cable operators have demonstrated they will use access to “must have” programming as a competitive weapon and still have the incentive and ability to withhold such programming if allowed. This incentive and ability is strengthened for terrestrially delivered content by the current horizontal size of regional clusters now controlled by major incumbent cable operators.

A. Vertically Integrated Cable Operators Have a Long History of Using the Terrestrial Loophole to Deny Access to Programming.

In the *Sunset Report and Order* the Commission acknowledged the existence of relevant examples of denied access to programming where the program access rules do not prohibit such conduct. The examples already recognized and cited by the Commission include:

Sports Programming

- 1) Comcast SportsNet Philadelphia.¹³
- 2) Channel 4 San Diego.¹⁴
- 3) Overflow sports programming in New York, NY.¹⁵
- 4) RSNs Affiliated with Cablevision in New York and New England.¹⁶
- 5) High Definition (“HD”) Feeds of RSNs Affiliated with Cablevision.¹⁷

Non-Sports Programming

- 6) New England Cable News (“NECN”) in Boston, MA.¹⁸
- 7) PBS Kids Sprout.¹⁹
- 8) iN DEMAND.²⁰
- 9) CN8 – The Comcast Network.²¹
- 10) Two claims of NRTC.²²

The list is significant in that it provides examples of the many types of regional must have programming and many incumbent cable operators denying access to content when the rules do not apply. As stated by the Commission in the *Sunset Report and Order*:

¹³ See Comments of CA2C, MB Docket No. 07-29, at 16 (filed Apr. 2, 2007); Comments of EchoStar, MB Docket No. 07-29, at 9 (filed Apr. 2, 2007); Comments of RCN, MB Docket No. 07-29, at 10 (filed Apr. 2, 2007); Comments of USTelecom, MB Docket No. 07-29, at 16 (filed Apr. 2, 2007).

¹⁴ See Comments of AT&T, MB Docket No. 07-29, at 17 (filed Apr. 2, 2007); Comments of CA2C Comments, at 16; Comments of USTelecom, at 15; Reply Comments of Verizon, MB 07-29, at 5 (filed Apr. 16, 2007).

¹⁵ See Comments of RCN, at 10; *see also* Comments of CA2C Comments, at 17.

¹⁶ See Comments of Verizon, MB Docket No. 07-29, at 13 (filed Apr. 2, 2007).

¹⁷ See Comments of Verizon, at 13-14; Reply Comments of Verizon, at 5.

¹⁸ See Comments of CA2C, at 16-17.

¹⁹ Comments of AT&T, at 15; RCN Reply Comments at 7.

²⁰ See Reply Comments of CA2C, MB Docket No. 07-29, at 7-8 (filed Apr. 16, 2007); Reply Comments of Qwest, MB Docket No. 07-29, at 4 (filed Apr. 16, 2007).

²¹ See Comments of Qwest, MB Docket No. 07-29, at 4 (filed Apr. 2, 2007).

²² See Comments of NRTC, MB Docket 07-29, at 5 (filed Apr. 2, 2007) NRTC, which acts as a “buying group” on behalf of its members, claims that it has been denied access to two vertically integrated programming networks, the identities of which it claims it cannot disclose due to non-disclosure agreements..

While many of these examples pertain to terrestrially delivered programming that is beyond the scope of Section 628(c)(2)(D), we find that these examples are nonetheless significant because they demonstrate that, absent a prohibition, cable-affiliated programmers will engage in withholding of programming from competitive MVPDs. Moreover, because it is outside of the scope of the program access provisions, the withholding of terrestrially delivered programming presents the most direct, factually based evidence of cable MSO behavior if the prohibition is permitted to lapse. If vertically integrated programmers had no economic incentive other than to distribute their programming to as many platforms as possible, then we would not expect to see such examples of withholding.”²³

B. Regional Clusters Further Facilitate Implementation of Strategies Using the Terrestrial Loophole for Exclusive Distribution of Regional Programming.

The significant and expanding scale of the regional clusters of major incumbent cable operators contribute to their ability and incentive to use exclusive or proprietary access to terrestrially delivered regional content as a potential competitive weapon. One result of the recent conclusion of the Adelpia transaction is the significantly expanded scope of regional clusters for major incumbent cable operators. Incumbent clusters now extend over major population regions and entire states.²⁴ These new regional footprints now provide added incentive and regional marketing power to take advantage of regional programming for competitive advantage where allowed. These clusters provide unique incentive and opportunity to use local and regional programming that is delivered terrestrially, as compared to satellite delivered programming, to thwart local competition. The total scale of major incumbent cable operators also contributes to the levels of bargaining power they possess. For example, the then-top six major incumbent cable operators at the time of the Commission’s Twelfth Annual Cable

²³ *Sunset Report and Order*, ¶ 51.

²⁴ *Adelpia Order*, 21 FCC Rcd at 8315.

Competition Report provided no competition to each other and represented 58.84% of total MVPD subscribers as of 2005.²⁵

As the Commission concluded in the *Sunset Report and Order*, regional market shares that are significantly higher than the national average create additional incentives to withhold programming. These regional clusters also create a more significant opportunity to use terrestrially delivered regional programming that has unique value to the specific regional market to thwart competition. As stated by the Commission:

Moreover, because the share of MVPD subscribers held by cable operators is above or near 78 percent in many DMAs, there is no reduction in potential subscribership or viewership in many regional areas from that which we observed in the *2002 Extension Order*. As the Commission did in the *2002 Extension Order*, we find that the costs (*i.e.*, foregone revenues) incurred by a cable-affiliated programmer by refusing to sell to competitive MVPDs would be offset by (i) revenues from increased subscriptions to the services of its affiliated cable operator resulting from subscribers that switch to cable to obtain access to the cable-exclusive programming; (ii) revenues from increased rates charged by the affiliated cable operator in response to increased demand for its services resulting from its ability to offer exclusive programming; and (iii) revenues resulting from the ability of the cable-affiliated programmer to raise the price it charges for programming to other cable operators in return for exclusivity. Thus, particularly where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy. In the long term, a withholding strategy may result in a reduction in competition in the video distribution market, thereby allowing the affiliated cable operator to raise rates.”²⁶

The clustering and related investments in or contracts with terrestrial networks have also increased the ability of cable incumbents to effectively use terrestrial networks for primary distribution. It would be expected that one of the results of operating extensive regional clusters would be the development of terrestrial distribution to support all of the services offered on the

²⁵ Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, Table B-3, 21 FCC Rcd 2503, 2620 (2006).

²⁶ *Sunset Report and Order*, ¶ 52 (internal citations omitted).

primary final mile distribution network. The investment in and management of transport networks can be justified by operating issues aside from creating the opportunity to use the terrestrial loophole to deny access to programming. Nevertheless, one of the competitive opportunities in these available transport networks is the potential to distribute programming both within a regional cluster and between regional clusters, such that the programming distribution falls outside the current program access regime. This type of structure and the potential it creates for denied access to essential or must have programming under the existing rules is unprecedented in the post-1992 Cable Act history of the MVPD industry and it creates a situation where we would encourage the Commission to also use its predictive judgment along with the documented examples of denied access to support the need to close the terrestrial loophole at this time.

We also face an unprecedented expectation for the entry of new video competition that has been supported by recent Commission actions related to franchising and access to MDUs. This anticipated new competitive entry has also been acknowledged by the Commission as a new circumstance that creates added incentive for cable incumbents to deny access to content if allowed.²⁷ Failing to close the terrestrial loophole will, in the context of today's industry structure and technology, allow incumbent cable to continue to use and expand a significant barrier to desired competition.

III. THE COMMISSION HAS AUTHORITY TO APPLY PROGRAM ACCESS RULES TO CABLE-AFFILIATED TERRESTRIALLY DELIVERED PROGRAMMING.

The *Notice* asks whether the Commission has authority to extend the program access rules to all terrestrially delivered cable-affiliated programming, in light of specific language in

²⁷ *Sunset Report and Order*, ¶¶ 53, 60.

Section 628(c)(2) that limits its scope to satellite delivered programming, and about the basis for such authority. In doing so, however, the *Notice* misapprehends the scope of Section 628, and in particular Section 628(b) and its interplay with Section 628(c)(2), which specifies the “minimum contents of regulations” under Section 628(b), not the scope of that section.

Section 628(b) is the operative program access prohibition, making it unlawful for a cable operator or a vertically integrated satellite cable programming vendor to “engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming . . . to subscribers or consumers.” On its face, Section 628(b) does not limit the “unfair methods of competition or unfair or deceptive acts or practices” within its ambit to conduct involving satellite-delivered programming. To the contrary, the provision is silent as to the particular conduct that might constitute unfair methods of competition or unfair or deceptive acts or practices.

Rather, satellite delivered programming is only relevant to the *effect* of such conduct. Thus, under Section 628(b) *any* unfair method of competition or unfair or deceptive act or practice is unlawful, provided that its “purpose or effect . . . is to hinder significantly or to prevent” an MVPD from providing satellite cable programming . . . to consumers.”

The point is, that conduct that may not be directly related to programming at all can form the basis of a potential violation of the Section 628(b), provided that the purpose or effect of such conduct is to hinder significantly an MVPD from providing satellite programming. Thus, in its NPRM on exclusive MDU contracts, the Commission asked whether exclusives between cable

operators and MDUs can be prohibited under Section 628(b).²⁸ The Commission's answer in its recently released Report and Order in that docket was in the affirmative.²⁹ Essentially, exclusive MDU agreements were viewed by the Commission as an unfair or deceptive act, the purpose or effect of which was, in that case, to prevent MVPDs from providing satellite programming to consumers.³⁰ As discussed above, refusals to deal and exclusives involving terrestrially delivered programming have an analogous effect; in particular, to the extent competitors are denied access to terrestrially delivered regional sports programming that has not historically been covered by the program access rules, their ability to enter the market and provide multichannel video programming, including satellite delivered programming, to consumers is "significantly hindered" or "prevented" outright.³¹

Importantly, Section 628(c)(1) directs the Commission to prescribe regulations specifying the particular conduct that is prohibited by Section 628(b) "in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies." Subsection 628(c)(2), specifies the "*minimum contents*" of such regulations. (emphasis added). The Commission's discrimination and exclusive dealing regulations adopted pursuant to Section 628(c), listing specific prohibited conduct under Section 628(b), essentially repeat almost verbatim the Section 628(c)(2) minimum prohibitions and their focus on discrimination and

²⁸ See *Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, NPRM, 22 FCC Rcd 5935, 5939 (2007) ("MDU Exclusivity Notice").

²⁹ See *Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and FNPRM, MB Docket No. 07-51, FCC 07-189, ¶ 22 (2007) ("MDU Exclusivity Report and Order") (Section 628(b) authorizes rule that will prohibit the continuation and proliferation of an anticompetitive cable practice that has erected a barrier to the provision of competitive video service).

³⁰ *Id.*, ¶ 43.

³¹ See Communications Act, § 628(b).

exclusive dealing arrangements involving the sale of satellite delivered programming to competing providers. *See generally* 47 C.F.R. § 76.1002.

However, until the MDU exclusivity proceeding, the Commission had failed to consider in a rulemaking context the full extent to which other unfair or deceptive acts beyond the bare minimum specified in Section 628(c)(2) involving satellite programming, might constitute unfair or deceptive acts under Section 628(b), or to specify what other particular conduct beyond the “minimum” specified should be prohibited under 628(b) “in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies,” as required by Section 628(c)(1).³² Thus, for the most part, the Commission has only had occasion to address specific refusals to deal involving cable-affiliated, regional programming services delivered via terrestrial fiber and microwave in the context of specific program access complaints – and those cases have principally involved the specific prohibitions promulgated under Section 628(c)(2).³³

³² *MDU Exclusivity Report and Order*, ¶ 42. (prior to *MDU Exclusivity Report and Order*, Commission had “never specifically defined what constitutes and ‘unfair method of competition’ or ‘unfair . . . act or practice’ beyond that conduct specifically proscribed in Section 628(c)(2), [but has] recognized that there is additional conduct that could be proscribed under Section 628(b)”).

³³ Historically, the Commission has taken the view that competitive providers cannot bring discrimination and exclusivity claims under the existing program access rules adopted pursuant to Section 628(c), for refusals to deal and exclusive dealing arrangements involving terrestrially-delivered programming affiliated with incumbent providers. *See, e.g., Matter of RCN Telecom Serv. of N.Y., Inc. v. Cablevision Sys. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 12048, 12049-050 (2001) (“*RCN*”) (refusal to provide terrestrially delivered programming to a competitor is outside the anti-discrimination provision of Section 628(c), which explicitly prohibits discrimination “in the prices, terms, and conditions of sale or delivery of satellite cable programming . . .”). Moreover, in *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc., Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, 15856-857 (1998) (“*Ameritech Petition*”), where the Commission was asked to extend 628(b) to situations where cable operators move programming from satellite to terrestrial distribution, the Commission did not attempt to address the scope of Section 628, but held only that with respect to terrestrially delivered programming there had not been a sufficient factual showing of anticompetitive conduct to necessitate a change in the program access rules. Similarly, in *DIRECTV Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807-808 (2000), *aff’d*, *Echostar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002), the

But it has always been clear that the “minimum contents of regulations” contained in Section 628(c)(2) should *not* be viewed as an expression of the limits of the Commission’s jurisdiction under Section 628. As Congress plainly intended, those provisions are but a starting point, the base case, for those regulations.³⁴ This is clear from the legislative history of the 1992 Cable Act. In particular, the House considered and rejected an amendment that would have limited the prohibition in Section 628(b) expressly to program access, instead of the broader language prohibiting any cable operator from engaging in unfair competition or unfair or deceptive acts was included.³⁵

Moreover, there is no dispute that refusals to deal, exclusive dealing and other discriminatory conduct constitute unfair competition or unfair acts or practices for purposes of Section 628(b) – indeed such conduct is explicitly prohibited with respect to satellite programming under Section 628(c)(2).³⁶ So long as, given the programming involved, the

Commission acknowledged that cable operators could violate Section 628 by denying access to terrestrially delivered programming, but held only that, as a factual matter, the cable operator had legitimate business reasons for switching to terrestrial delivery and consequently there had been no unlawful evasion of the program access rules.

³⁴ See *MDU Exclusivity Report and Order*, ¶¶ 48-49. *Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, 18320 (1996) (“*Second OVS Report and Order*”) (citations omitted) (Section 628(b) authorizes the Commission “to adopt additional rules to accomplish the program access statutory objectives ‘should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming.’”); *Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20300 (1996) (“*Third Report and Order*”) (Section 628(b) is “clear repository of Commission jurisdiction” to address new obstacles and by entitling section “Minimum Contents of Regulations,” Congress gave Commission authority to adopt additional rules that will advance the purposes of Section 628; “it did not limit the Commission to adopting rules only as set forth in that statutory provision”). The *Second Report and Order* and *Third Report and Order* were consolidated on appeal to the Fifth Circuit and affirmed in part, reversed in part, and remanded, on other grounds. See *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

³⁵ 138 Cong. Rec. H6545-6601 (July 23, 1992).

³⁶ In the *Program Access Report and Order* the Commission recognized that among the types of discrimination covered by Section 628(c)(2)(B) are forms of non-price discrimination such as a vendor’s “‘unreasonable refusal to sell’ ... or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor’s competitor.” *Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3412-13 (1993).

purpose or effect of such refusal to deal or other discriminatory conduct is to “hinder significantly or prevent” a competitive MVPD from providing satellite programming to subscribers, as is the case here, the Commission is well within its authority to adopt rules under Section 628(c)(1) specifying such conduct as being prohibited under Section 628(b).³⁷ It is simply irrelevant whether the particular programming at issue is delivered by satellite or terrestrially. The touchstone of the violation is the effect of that refusal on the ability of MVPDs to provide satellite programming to consumers.

Moreover, under this provision, it is not required that the particular conduct pose an absolute bar to entry. Rather, the standard is far more lenient, and one that is easily met for terrestrially delivered programming. Such conduct, to be unlawful, can have the “purpose or effect” “to hinder significantly or to prevent” satellite programming distribution. In another context, under Section 253 of the Communications Act making unlawful local and state conduct that had the effect of prohibiting a carrier from providing service,³⁸ numerous courts have found that even after a provider has entered the market and is providing service, if conditions imposed by the governmental entity are so onerous and burdensome, so as to impose unreasonable costs and requirements on the provider, they may be struck down as having the effect of prohibiting a carrier from providing a telecommunications service under Section 253.³⁹

³⁷ In its comments on a petition for rulemaking petition of Ameritech New Media urging the imposition of rules governing the movement of programming from satellite to terrestrial delivery, NCTA essentially urged the same construction of Section 628(b). *See* Ameritech Petition, 13 FCC Rcd 15822, 15854-855 (1998) (“NCTA asserts that the test [under Section 628(b)] is not whether the denial of a particular programming service to an MVPD significantly hinders or prevents the MVPD from providing *that programming service*. The test is whether the unavailability of a service has a significant adverse effect on the ability to compete in the provision of video programming to subscribers or consumers.” (Emphasis added).

³⁸ *See* 47 U.S.C. § 253(a).

³⁹ *See, e.g., Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1257-58 (2006) ; *see also City of Auburn v. Qwest*, 260 F.3d 1160, 1175-76 (2001).

Here, Section 628(b) sets an even lower bar than Section 253 for conduct to be unlawful. Not only is conduct that has the effect of preventing programming distribution made unlawful, but so too is conduct that may hinder significantly an MVPD's ability to provide satellite programming to consumers. As has been shown above there is no question that discriminatory and exclusionary conduct involving terrestrially delivered programming meets both standards.⁴⁰

IV. VIDEO PROGRAM ACCESS PROVISIONS ARE ALSO ESSENTIAL TO THE FURTHER DEVELOPMENT OF BROADBAND NETWORKS.

As the Commission has recognized, broadband deployment and video entry are inextricably linked. This linkage between video and broadband was clearly affirmed in the *Local Franchising Report and Order*.⁴¹ The Commission has found repeatedly over the last ten years, that there is no question that the ability to offer programming that is terrestrially delivered, such as regional sports, is needed to offer a viable video service and, accordingly, extending the program access rules to terrestrially delivered cable-affiliated programming would promote the goal of Section 706 to facilitate broadband deployment. Wireline broadband providers cannot justify the massive investments necessary to make advanced telecommunications services available without the protections provided by the program access rules that assure content for a viable video service offering. Video services sold on bundled networks, that will be a significant

⁴⁰ While CA2C has shown herein that Section 628(b) of the Communications Act provides full and sufficient authority for the Commission to close the terrestrial loophole, it should be noted that other sections of the Act may lend additional support to the Commission's authority to close the terrestrial loophole, as the Commission recently found with respect to MDU exclusivity. See MDU Exclusivity Report and Order, ¶¶ 26-30.

⁴¹ See, e.g., *Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and FNPRM, 22 FCC Rcd 5101, 5132 (2007) ("*Local Franchising Report and Order*") (the statute "directs the Commission to encourage broadband deployment by utilizing measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment").

driver to also expand broadband deployment, represent from 35 to 50 percent of total revenues.

A successful video service is therefore essential to network financial viability.

The Commission has repeatedly emphasized that it must take Congress's desire to remove barriers to broadband deployment into account when interpreting other provisions of the Act and designing its regulations.⁴² As the Commission noted in the *Notice*, "We note our previous conclusion that the ability to offer a viable video service is "linked intrinsically" to broadband deployment."⁴³

The rapid deployment of broadband facilities is a paramount federal objective. Congress has embodied this policy in Section 706 of the Telecommunications Act of 1996, which charges the Commission to "encourage the deployment of . . . advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 nt. The President has specifically established an aggressive policy of encouraging widespread deployment of broadband networks by 2007,⁴⁴ and the Commission has repeatedly reiterated its priority to eliminate regulatory impediments to broadband infrastructure deployment.⁴⁵

⁴² See, e.g., *Local Franchising Report and Order*, 22 FCC Rcd at 5132-33 (the statute "directs the Commission to encourage broadband deployment by utilizing measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment").

⁴³ See *Id.* ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.") (footnote omitted).

⁴⁴ See Speech of President Bush, Mar. 26, 2004, available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html ("We ought to have . . . universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier").

⁴⁵ See, e.g., *Matter of IP-Enabled Servs.*, NPRM, 19 FCC Rcd 4863, 4865 (2004) ("*IP-Enabled Services NPRM*") ("we have recognized the paramount importance of encouraging deployment of broadband infrastructure to the American people"); *Matter of Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Sys.*, Report and Order, 19 FCC Rcd 21265, 21271 (2004) ("The

Investment in broadband infrastructure can be especially challenging in sparsely populated, high-cost rural areas. The link between broadband penetration and video services has been demonstrated for both urban and in particular rural markets. When bundled together, customers tend to buy more of both, making broadband deployment economically more feasible in more areas. Denied access to “must have” video content that is controlled by vertically integrated cable operators will thus have a direct and adverse effect on broadband deployment. Policies that support the investment and successful deployment of next generation networks will positively affect the development of both video competition and broadband deployment. Accordingly, effective implementation of federal broadband and video competition policies requires a further extension of these rules to include terrestrially delivered content.

V. **CLOSING THE TERRESTRIAL LOOPHOLE WILL NOT NEGATIVELY IMPACT THE DEVELOPMENT OF LOCAL PROGRAMMING.**

The CA2C members support the objective of developing additional local and regional programming. The expanded capacities of new digital networks along with effective terrestrial transport networks provide a stronger platform and opportunity for local and regional programming than has ever existed in the past.

The record over the past 15 years indicates that primary regional and local programming that has now been determined by the Commission to be essential or must have programming is controlled by vertically integrated cable operators.⁴⁶ Significantly, this programming is all

deployment of broadband delivery capabilities to provide all Americans with access to affordable high speed Internet and data services is one of the most important challenges currently facing the Commission and the communications industry”); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and NPRM, 20 FCC Rcd 14853, 14900-901 (2005) (“[o]ur primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband”).

⁴⁶ *Adelphia Order*, 21 FCC Rcd at 8267-72, and 8341-50 (App. D); *see id* at 8271-72 (“We conclude that there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot

owned by 5 of the largest 6 cable incumbents. These 5 large incumbent cable operators also have significant regional market power through the clusters they have developed. These clusters produce many operating benefits but they also create incentives for vertically integrated operators to exploit exclusivity of regional programming in an anti-competitive manner. Therefore, the largest cable investments in regional or local programming have migrated toward content that has been determined to have the ability to negatively impact competition if exclusivity is allowed. The entire basis for closing the terrestrial loophole is to prevent exclusivity for this type of local and regional programming, other affiliated national programming that could use terrestrial distribution, or new affiliated programming from becoming an unfair barrier to competition. The original focus on satellite delivered content migrated into an opportunity to use the expanded capacity of today's terrestrial networks to block competition when terrestrial networks could enhance the development of additional local content that would otherwise not be developed. Therefore, using a distribution technology distinction to assure competitive access to vertically integrated "must have" programming is no longer appropriate or effective in the context of the broader goal of increased MVPD competition.

It should be noted that while there have been no restrictions on exclusives for non-affiliated local or regional programming, very few if any exclusives have occurred for this programming. This is clear evidence that, absent the influence of vertical integration, the providers of local and regional programming are distributing their product as we would expect they would. Non-affiliated regional programmers have pursued business strategies to reach all of the potential viewers they can in their served markets.

offer an RSN."); *DIRECTV Order*, 19 FCC Rcd at 546-47 (stating that withholding of RSN programming will cause consumers to lose access to highly desired programming and some consumers will leave their preferred MVPD provider to access the foreclosed programming on a less-desired MVPD platform).

We recommend that the terrestrial loophole should be closed with provisions that will not unduly impair the potential development of local and regional programming that might benefit from exclusive contracts and not harm competition. Congress recognized the potential value for some satellite delivered exclusives and therefore created the ability for any vertically integrated programmer to seek approval for exclusive distribution when the Commission determined that such an exclusive contract is in the public interest.⁴⁷ This same principle should be applied to the terrestrial delivery of any vertically integrated programming and preserve the opportunity for exclusive regional and local programming where appropriate.

VI. THE COMMISSION SHOULD NOT ADOPT RULES ALLOWING FOR THE EARLY SUNSET OF THE PROHIBITION ON EXCLUSIVE CONTRACTS FOR VERTICALLY INTEGRATED CABLE PROGRAMMING.

The CA2C opposes any proposal that would allow for the early sunset of the prohibition on exclusive contracts applicable to vertically integrated programming. Early sunset of the exclusivity prohibition would inure solely to the benefit of major incumbent cable operators and would allow for relaxation of the rule in precisely those markets where the incentive and ability of incumbent cable operators to do competitive harm are greatest, raising serious competitive concerns.

New provisions related to franchising, MDU access and now program access have all been enacted in recent months with the specific goal of supporting increased wireline competition. Such competition for MVPD services now covers less than five percent of the US population. Thus, if rules were adopted at this time permitting early sunset based on the presence of a second competitive wireline provider, they would only apply to a small fraction of

⁴⁷ 47 U.S.C. § 548(c)(2)(D); *see also* 47 C.F.R. § 76.1002(c)(2).

served markets. It is the markets that currently enjoy competition from two wireline providers as well as those that are on the cusp of a second provider entering, where vertically integrated cable operators have the greatest incentive to use their control over programming to inhibit competitive entry. It would be ironic if the Commission adopted rules providing for an early sunset of the exclusivity prohibition in the very markets where vertically integrated cable operators can have the greatest adverse impact on nascent competition through the exercise of vertical foreclosure strategies.

Moreover, an early sunset of the exclusivity prohibition would serve to benefit only the five largest incumbent cable operators because they control nearly all must-have programming. Indeed, the only visible impact of such an early sunset would be to create the conditions for these five incumbent cable operators to again pursue vertical foreclosure strategies that would permit them to reinforce market positions, and push new entrants from markets where consumers have begun to enjoy the benefits of wireline competition. This has already happened in some rural areas where new entrants have left the broadband MVPD market due in large part to the inability to obtain must have content under reasonable terms and conditions.

There is also no record or basis for determining the specific market conditions under which the nature and extent of competitive entry would warrant sunset of the rules, such that an incumbent operator no longer has the incentive and ability to use access to programming to harm competition. Moreover, this is still an emerging market that will experience new competitive dynamics as we move to all digital networks. We clearly need additional competitive market experience as the primary basis for determining when competitive MVPD markets have developed to the point and circumstances are such that the risk of abuse of control over programming is sufficiently remote so as to permit sunset of the exclusivity prohibition.

The Commission concluded in the *Sunset Report and Order* that it made sense to revisit this question in five years, and there is no basis now to consider potential relaxation of the rules in selected markets before that time. As the Commission has noted, Congress made clear that sustaining the development of competition outweighed potential benefits from exclusive contracts that could prevent or harm competition.

While the exclusivity provision creates a presumption against the use of exclusive contracts given the inherent potential for competitive harm, it also provides a path for cable operators and vertically integrated programmers to obtain Commission authorization for a particular exclusive where the Commission determines the exclusivity arrangement is in the public interest, weighing a number of factors set forth Section 628(c)(4). Thus, Section 628 already provides for a process to authorize particular exclusivity arrangements in circumstances where the proponents can make the required showing under Section 628, including the effect of such exclusive on competition in the MVPD market, attraction of capital investment, and diversity of programming in the market.

The CA2C sees no substantive market benefit to creating an opportunity for an early blanket sunset of the rules prohibiting exclusives for any specific market and recommends that this concept be deferred for consideration in five years when the current rules are once again being reviewed for further extension.

CONCLUSION

Access to “must have” cable affiliated programming is essential to the development and preservation of competition in the MVPD market and the further development of broadband networks. The Commission has correctly concluded that incumbent cable continues to have both

the incentive and ability to use discriminatory access to cable affiliated programming to harm competition. Accordingly the members of CA2C all agree that the use of any type of terrestrial distribution as compared to the use of satellite distribution of cable affiliated programming should not affect the application of a prohibition on exclusive contracts or the prohibition on discriminatory conduct with respect to the price, terms, and conditions of access. Action by the Commission is fully justified by Section 628 (b) as also applied by the Commission in the recent Franchising and MDU Orders. It is further justified by Section 706 and the inherent relationship of video and further broadband deployment. The CA2C also opposes any early sunset of the prohibitions on exclusives as prescribed in Section 628(c)(2)(D) or as it might apply to any new rules adopted in this proceeding.

Respectfully submitted for:

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By: /s/ _____

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