FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07–29; FCC 07–169]

Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act—Sunset of Exclusive Contract Prohibition

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission retains for five years the prohibition on exclusive contracts for satellite cable programming and satellite broadcast programming between vertically integrated programming vendors and cable operators and modifies the procedures for resolving program access disputes.

DATES: Effective October 4, 2007, except for the amendments to § 76.1003(e)(1) and (j) which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for those sections.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Steven Broeckaert, *Steven.Broeckaert@fcc.gov;* David Konczal, *David.Konczal@fcc.gov;* or Katie Costello, *Katie.Costello@fcc.gov;* of the Media Bureau, Policy Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* (''*Order*''), FCC 07–169, adopted on September 11, 2007, and released on October 1, 2007. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

In addition to filing comments with the Office of the Secretary, a copy of any comments on the proposed information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 12th St., SW., Room 1–C823, Washington, DC 20554, or via the Internet at *PRA@fcc.gov.*

Paperwork Reduction Act of 1995 Analysis

This document contains modified information collection requirements. The Commission will send the requirements for OMB review at a later date. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public to comment on the information collection requirements as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we sought specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' We have assessed the effects of the information collection requirements resulting from the modifications to the Commission's procedures for resolving program access disputes adopted herein, and find that those requirements will benefit companies with fewer than 25 employees by facilitating the resolution of program access complaints and that these requirements will not burden those companies.

Summary of the Report and Order

I. Introduction and Executive Summary

1. In areas served by a cable operator, Section 628(c)(2)(D) of the Communications Act of 1934, as amended (''Communications Act'') generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators (the ''exclusive contract prohibition''). *See* 47 U.S.C. 548(c)(2)(D). In this *Order,* we 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, until October 5, 2012. In the *Order,* we decline to narrow the scope of the exclusive contract prohibition based on the popularity of the programming network, based on the competitive circumstances in individual geographic areas served by a cable operator, or by precluding certain competitive multichannel video programming distributors (''MVPDs'') from benefiting from the prohibition. We also decline to expand the exclusive contract prohibition to apply to non-cable-affiliated programming, and we again conclude that terrestrially delivered programming is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D).

2. Further, we modify our procedures for resolving program access disputes by (i) codifying the requirements that a respondent in a program access complaint proceeding that expressly relies upon a document in asserting a defense include the document as part of its answer; (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; (iii) codifying the Commission's authority to issue default orders granting a complaint if the respondent fails to comply with discovery requests; and (iv) allowing parties to a program access complaint proceeding to voluntarily engage in alternative dispute resolution, including commercial arbitration, during which time Commission action on the complaint will be suspended. We also retain our goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases. We decline to (i) mandate electronic filings of pleadings at this time (but we note that parties currently may voluntarily submit electronic copies of their pleadings to staff via e-mail); (ii) adopt a more expedited pleading cycle for program access complaints; (iii) mandate weekly status conferences; (iv) shift resolution of program access complaints to the Enforcement Bureau; or (v) adopt mandatory arbitration.

II. Background

A. Exclusive Contract Prohibition

3. In enacting the program access provisions, adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 (''1992 Cable Act''), Congress intended to encourage

entry into the MVPD market by existing or potential competitors to traditional cable systems by making available to those entities the programming necessary to enable them to become viable competitors. The 1992 Cable Act and its legislative history reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical integration (which means the combined ownership of cable systems and suppliers of cable programming), created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors. Congress concluded at that time that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, such as other cable systems, home satellite dish (''HSD'') distributors, direct broadcast satellite (''DBS'') providers, satellite master antenna television (''SMATV'') systems, and wireless cable operators.

4. When the Commission promulgated regulations implementing the program access provisions of Section 628, it recognized that Congress placed a higher value on new competitive entry into the MVPD marketplace than on the continuation of exclusive distribution practices when such practices impede this entry. Congress absolutely prohibited exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators in areas unserved by cable, and generally prohibited exclusive contracts within areas served by cable:

> With respect to distribution to persons in areas served by a cable operator, [the Commission shall] prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines * * * that such contract is in the public interest. 47 U.S.C. 548(c)(2)(D); *see also* 47 CFR 76.1002(c)(2).

Congress recognized that, in areas served by cable, some exclusive contracts may serve the public interest by providing offsetting benefits to the video programming market or assisting in the development of competition among MVPDs. *See* 47 U.S.C. 548(c)(2)(4). Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a ''petition for exclusivity'' to the Commission for approval. *See* 47 CFR 76.1002(c)(5).

5. Congress directed that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found in a proceeding conducted between October 2001 and October 2002 that the prohibition ''continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.'' *See* 47 U.S.C. 548(c)(5). In October 2001, the Commission sought comment on this issue (*2001 Sunset NPRM,* 66 FR 54972, October 31, 2001) and ultimately concluded that the exclusive contract prohibition did continue to be ''necessary.'' *See 2002 Extension Order,* 67 FR 49247, July 30, 2002. The Commission therefore extended the prohibition for five years (i.e., through October 5, 2007).

6. The Commission further provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. We issued a *Notice of Proposed Rulemaking* (''*NPRM*'') in February 2007 to initiate this review (72 FR 9289, March 1, 2007).

B. Program Access Complaint Procedures

7. Section 628 of the Communications Act prohibits unfair methods of competition or unfair or deceptive practices that hinder or prevent any MVPD from providing satellite-delivered programming to consumers. Section 628(b) provides:

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

As part of the Telecommunications Act of 1996, Congress expanded program access protection to include common carriers and their affiliates that provide video programming by any means directly to subscribers, and to satellite cable programming vendors in which a common carrier has an attributable interest. *See* 47 U.S.C. 548(j). Section 628, among other things, protects access to vertically integrated cable programming services by competing MVPDs in order to increase competition and diversity in the MVPD market and foster the development of competition to traditional cable systems.

8. Parties aggrieved by conduct alleged to violate the program access provisions have the right to commence an adjudicatory proceeding before the Commission. As instructed by Section 628(c), the Commission promulgated regulations implementing a program access complaint process. The Commission determined that a streamlined program access complaint process, with limited discovery procedures and adjudication based on a complaint, answer, and reply, would provide the most flexible and expeditious means of enforcing the anti-discrimination program access provisions. The Commission further addressed program access complaint process issues in response to a petition for rulemaking filed by Ameritech New Media, Inc. The Commission resolved these and other issues in the *1998 Program Access Order* (13 FCC Rcd 15822).

9. In the *1998 Program Access Order,* the Commission affirmed its authority to impose damages on a case-by-case basis for program access violations and adopted guidelines for resolving program access disputes so that denial of programming cases, such as unreasonable refusal to sell, petitions for exclusivity, and exclusivity complaints, are resolved within five months of the submission of the complaint to the Commission and all other program access complaints, including price discrimination cases, are resolved within nine months of the submission of the complaint to the Commission. The Commission subsequently amended the program access rules as part of an overhaul of the Commission's pleading and complaint rules.

10. In the *NPRM,* in addition to seeking comment on extension of the exclusive contract prohibition, we sought comment on whether and how our procedures for resolving program access disputes under Section 628 should be modified. We sought comment on the costs associated with the complaint process and whether the pre-filing notice, pleading requirements, evidentiary standards, timing, and potential remedies are appropriate and effective. We also sought comment on whether specific time limits on the

Commission, the parties, or others would promote a speedy and just resolution of program access complaints. We asked whether the program access complaint rules and procedures, including those governing discovery and protection of confidential information, are adequate. We also asked whether we should adopt alternative procedures or remedies such as mandatory standstill agreements or arbitration, as the Commission has done in recent mergers.

III. Discussion

A. Exclusive Contract Prohibition

11. Our analysis of whether the exclusive contract prohibition ''continues to be necessary to preserve and protect competition and diversity in the distribution of video programming'' proceeds in five parts. Based on this five-part analysis, we conclude as explained below 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.

1. Standard of Review

12. Various cable MSOs repeat arguments made in response to the *2001 Sunset NPRM* that the Commission should construe the term ''necessary'' as used in Section 628(c)(5) as requiring the exclusive contract prohibition to be ''indispensable'' or ''essential'' to prevent harm to competition. In the *2002 Extension Order,* the Commission explained that the term ''necessary'' has been interpreted differently depending on the statutory context. In some cases, courts have interpreted the term to mean ''useful,'' ''convenient,'' or ''appropriate'' while in other contexts courts have interpreted the term in a more restrictive sense to mean ''indispensable'' or ''essential.'' Consistent with judicial precedent, the Commission construed the term ''necessary'' in its statutory context and determined that the exclusive contract prohibition continues to be ''necessary'' if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected. We find no basis to revisit the conclusions reached in the *2002 Extension Order,* which, we note, were never challenged. We continue to believe that Section 628(c)(5), when construed in its statutory context, requires the exclusive contract prohibition to be extended if we find that, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.

2. Status of the MVPD Market: 2002–2007

13. We examine below the changes that have occurred in the programming and distribution markets since 2002 when the Commission last reviewed whether the exclusive contract prohibition continued to be necessary to preserve and protect competition.

14. *Satellite-Delivered National Programming Networks.* The number of satellite-delivered national programming networks available to MVPDs has increased by 237 since 2002, from 294 networks to 531 networks. This amounts to an eighty percent increase in satellite-delivered national programming networks available to MVPDs.

15. *Vertically Integrated Satellite-Delivered National Programming Networks.* The number of satellite-delivered national programming networks that are vertically integrated with cable operators has increased by twelve since 2002, from 104 networks to 116 networks. The percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators has declined since 2002, from 35 percent to 22 percent.

16. The amount of the most popular programming that is vertically integrated with cable operators has declined slightly since 2002. While nine of the Top 20 (45 percent) satellite-delivered national programming networks (as ranked by subscribership) were vertically integrated in 2002 when the Commission last reviewed the exclusive contract prohibition, commenters state that this number has decreased to seven (35 percent). As discussed below, we find that this number has decreased to six. These networks are The Discovery Channel, CNN, TNT, TBS, TLC, and Headline News.

17. Only the largest cable MSOs tend to own vertically integrated programming. In the *2002 Extension Order,* the Commission noted that all vertically integrated programming was attributable to five cable operators, four of which were among the seven largest cable MSOs. Today, all vertically integrated programming is attributable to five cable operators, all of which are among the six largest cable MSOs: Comcast, Time Warner, Cox, Cablevision, and Advance/Newhouse.

18. *Regional Programming Networks.* The number of regional programming networks available to MVPDs has increased by sixteen since 2002, from 80 networks to 96 networks. This amounts to a 20 percent increase since 2002 in regional programming networks available to MVPDs. The number of regional sports networks (''RSNs'') has increased by approximately 36 percent since 2002, from 28 networks to 39 networks, by some estimates. We note that, according to the Commission's most recent annual competition report, there were 37 RSNs as of June 2005. *See 12th Annual Report,* 21 FCC Rcd at 2510 and 2586. More recent data indicates that there are now 39 RSNs.

19. *Vertically Integrated Regional Programming Networks.* The number of regional programming networks that are vertically integrated with cable operators has increased by five since 2002, from 39 networks to 44 networks. The percentage of all regional programming networks that are vertically integrated with cable operators, however, has declined slightly since 2002, from 49 percent to 46 percent. The number of RSNs that are vertically integrated with cable operators has decreased by six since 2002, from 24 networks to 18 networks, by some estimates. We note that, according to the Commission's most recent annual competition report, there were 17 vertically integrated RSNs as of June 2005. *See* 12th *Annual Report,* 21 FCC Rcd at 2510 and 2586. More recent data indicates that there are now 18 vertically integrated RSNs. The percentage of all RSNs that are vertically integrated has declined since 2002, from 86 percent to approximately 46 percent. We note that, according to the Commission's most recent annual competition report, 45.9 percent of RSNs were vertically integrated as of June 2005. If the unaffiliated MASN and the cable-affiliated SportsNet New York are included, then 18 out of 39 RSNs, or 46.1 percent, are vertically integrated.

20. *MVPD Market.* Since the Commission last examined the exclusive contract prohibition in 2002, the percentage of MVPD subscribers receiving their video programming from a cable operator has declined from 78 percent to 67 percent, by some estimates. We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from a cable operator was 78.11 percent as of June 2001 and 69.41 percent as of June 2005. More recent data indicates that the portion of MVPD subscribers served by cable operators is now approximately 67 percent. The number of cable subscribers has declined by 3.4 million since 2002, from 69 million to 65.4 million. During this

same period, the percentage of MVPD subscribers receiving their video programming from a DBS operator has increased from 18 percent to over 30 percent, by some estimates. We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from a DBS operator was 18.2 percent as of June 2001 and 27.72 percent as of June 2005. Compare *8th Annual Report*, 17 FCC Rcd at 1388, Table C–1 (18.2 percent) with *12th Annual Report*, 21 FCC Rcd at 2617, Table B–1 (27.72 percent). More recent data indicates that the portion of MVPD subscribers served by DBS operators is now over 30 percent. The number of DBS subscribers has increased by 11.6 million since 2002, from 18 million to 29.6 million, by some estimates. We note that, according to the Commission's annual competition reports, the number of MVPD subscribers receiving their video programming from a DBS operator was 16.07 million as of June 2001 and 26.12 million as of June 2005. More recent data indicate that the number of DBS subscribers is now 29.6 million.

21. A significant development since 2002 is the emergence of video services offered by telephone companies, including AT&T, Qwest, and Verizon. As of the end of the second quarter of 2007, AT&T's U-Verse fiber-based video and Internet service passed over 4 million households. AT&T also recently announced that its U-Verse video service has more than 100,000 customers. Qwest has twenty-one cable franchises and provides nearly 60,000 subscribers with multichannel video service in Arizona, Colorado, Nebraska, and Utah. Verizon, which introduced its fiber-based FiOS TV service in September 2005, had 515,000 video subscribers at the end of the second quarter of 2007. Verizon's FiOS TV was available for sale to nearly 3.9 million premises in nearly 500 communities in 12 states as of the end of the second quarter of 2007. Other wireline Broadband Service Providers (''BSPs'') also offer video services in competition with cable operators, including RCN, WideOpenWest, Knology, and Grande. Some wireline entrants cite a 2004 Government Accountability Office (''GAO'') Report which concludes that wireline video entry provides more price discipline to cable than DBS and is more likely to cause cable operators to enhance their own services and to improve customer service. In response, cable MSOs argue that wireline entry does not have a greater impact on cable prices than DBS entry. Despite the significant investments made in competitive wireline networks, AT&T notes NCTA's estimate that wireline entrants have no more than 1.9 percent of all MVPD subscribers.

22. The cable industry also cites other potential sources of video competition, such as SMATV systems, providers of video on the Internet (such as YouTube, Google, and Akimbo), over-the-air broadcast television, DVDs and videotape purchases and rentals, municipal and non-municipal utilities, and providers of mobile video services. Comcast also argues that in every community, consumers can choose from a minimum of three MVPDs, and states that in many communities a fourth or fifth MVPD is available or will be soon. Cablevision states that DIRECTV and EchoStar have at least double the number of subscribers of every cable MSO, with the exception of Time Warner and Comcast.

23. Commenters in favor of extending the prohibition state that the figures cited by the cable industry are misleading. EchoStar claims that national DBS penetration figures obscure the extent of competition on a local or regional basis where DBS penetration is much lower than the national average. While the number of DBS subscribers has increased by 11.6 million since the *2002 Extension Order*, CA2C notes that cable subscribership during the same period decreased by less than one million, demonstrating that cable operators have maintained their position in the market. Some competitive MVPDs argue that the continued ability of cable operators to raise prices in excess of inflation demonstrates the lack of competition in the video marketplace. Competitive MVPDs also assert that barriers in the MVPD market still persist, as demonstrated by the Commission's efforts to promote greater competition. CA2C notes that the Commission in its decision on cable franchising reform found that in the vast majority of communities around the country, ''cable competition simply does not exist.'' Some competitive MVPDs disagree with the assertion by the cable industry that mobile video, Internet video, and DVDs are substitutes for cable television. Moreover, competitive MVPDs state that only 2.9 percent of MVPD subscribers receive service from an alternative provider to cable or DBS.

24. *Consolidation of the Cable Industry*. The cable industry has continued to consolidate since 2002. During this period, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased from 48 percent to between 53 and 60 percent, by some estimates, after taking into account the recent acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia. We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs was 47.67 percent as of June 2001 and 47.78 percent as of June 2005. More recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased to between 53 and 60 percent. Moreover, the percentage of MVPD subscribers receiving their video programming from one of the four largest *vertically integrated* cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased significantly since 2002, from 34 percent to between 54 and 56.75 percent, by some estimates. We note that, according to the Commission's annual competition reports, the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs was 34.26 percent as of June 2001 and 44.63 percent as of June 2005. *Compare 8th Annual Report*, 17 FCC Rcd at 1341, Table C–3 (34.26 percent) with *12th Annual Report*, 21 FCC Rcd at 2620, Table B–3 (44.63 percent). More recent data indicates that the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased to between 54 and 56.75 percent.

25. *Clustering of Cable Systems*. The amount of regional clustering of cable systems has remained significant. Clustering refers to a strategy whereby cable MSOs concentrate their operations in regional geographic areas by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems, or by system ''swapping'' among MSOs. The percentage of cable subscribers that are served by systems that are part of regional clusters has increased since 2002, from 80 percent to as much as 85 to 90 percent, by some estimates, taking into account the acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia. We note

that, according to the Commission's annual competition reports, the percentage of cable subscribers served by systems that are part of regional clusters was 80.4 percent as of 2000 and 77.9 percent as of 2004. *Compare 8th Annual Report*, 17 FCC Rcd at 1340, Table C–2 (stating that, as of 2000, 108 cable system clusters were serving 54.4 million subscribers, or 80.4 percent of cable subscribers) *with 12th Annual Report*, 21 FCC Rcd at 2619, Table B–2 (stating that, as of 2004, 118 cable system clusters were serving 51.5 million subscribers, or 78.7 percent of cable subscribers). More recent data indicates that the percentage of cable subscribers that are served by systems that are part of regional clusters has increased to between 85 and 90 percent.

3. Ability and Incentive

26. Our analysis of whether the exclusive contract prohibition continues to be necessary requires us to assess whether, in the absence of the exclusive contract prohibition, vertically integrated programmers would have the ability and incentive to favor their affiliated cable operators over nonaffiliated competitive MVPDs and, if so, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming.

a. Ability

27. As discussed in this section, we conclude that satellite-delivered vertically integrated programming remains programming for which there are often no good substitutes and that such programming is necessary for viable competition in the video distribution market. In assessing the ability of satellite-delivered vertically integrated programmers to favor their affiliated cable operators to the detriment of competing MVPDs, we consider whether developments in the last five years have diminished the importance of satellite-delivered vertically integrated programming or have affected the ability of satellite-delivered vertically integrated programmers to favor their affiliated cable operators over other MVPDs.

28. *Discussion.* Despite some pro-competitive developments over the past five years, we find that access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable substitutes to the incumbent cable operator in the eyes of consumers. What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace. While there has been a decrease since 2002 in the percentage of the most popular programming networks that are vertically integrated, we find that the four largest cable MSOs (Comcast, Time Warner, Cox, and Cablevision) still have (i) an interest in six of the Top 20 satellite-delivered networks as ranked by subscribership (The Discovery Channel, CNN, TNT, TBS, TLC, and Headline News); (ii) seven of the Top 20 satellite-delivered networks as ranked by prime time ratings (TNT, Adult Swim, HBO, TBS, American Movie Classics, Cartoon Network, and The Discovery Channel); (iii) almost half of all RSNs; (iv) popular subscription premium networks, such as HBO and Cinemax (competitive MVPDs argue that first-run programming produced by HBO and other premium networks are essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator); and (v) video-on-demand (''VOD'') networks, such as iN DEMAND (competitive MVPDs argue that movie libraries owned by VOD networks are essential for a competitive MVPD to offer to potential subscribers in order to compete with the incumbent cable operator). The record thus reflects that popular national programming networks, such as CNN, TNT, TBS, and The Discovery Channel, among many others, in addition to premium programming networks, RSNs, and VOD networks, are affiliated with the four largest vertically integrated cable MSOs and that such programming networks are demanded by MVPD subscribers. We thus find that cable-affiliated programming continues to represent some of the most popular and significant programming available today.

29. We find that access to vertically integrated programming is essential for new entrants in the video marketplace to compete effectively. If the programming offered by a competitive MVPD lacks ''must have'' programming that is offered by the incumbent cable operator, subscribers will be less likely to switch to the competitive MVPD. We give little weight to the claims by cable operators that recent entrants, such as telephone companies, have not experienced ''any trouble'' to date in acquiring access to satellite-delivered vertically integrated programming. As an initial matter, we note that competitive MVPDs state that they pay significant amounts for access to satellite-delivered vertically integrated programming. Moreover, because the exclusive contract prohibition is currently in effect and has been since 1992, vertically integrated programmers delivering programming to MVPDs via satellite were not able to deny competitors access to their programming. We also reject the cable MSOs' suggestion that the resources of some competitors in the video distribution market (i.e., telephone companies) should change our analysis of whether to extend the prohibition at this time. The competitors to which the cable operators refer are new entrants to the video distribution market, and have no established customer base. If cable operators have exclusive access to content that is essential for viable competition and for which there are no close substitutes, and they have the incentive to withhold such content, they can significantly impede the ability of new entrants to compete effectively in the marketplace, regardless of their level of resources. As competitive MVPDs note, DBS providers have been able to attract and retain millions of subscribers because of their ability to offer ''must have'' programming that is affiliated with cable operators.

30. For the reasons discussed above, we 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. Accordingly, assuming vertically integrated programmers continue to have the incentive to favor their affiliated cable operators, allowing vertically integrated programmers to enter into exclusive arrangements with their affiliated cable operators will fail to protect and preserve competition and diversity in the distribution of video programming.

b. Incentive

31. We next assess whether vertically integrated programmers continue to have the incentive to favor their affiliated cable operators over competitive MVPDs. This requires us to analyze (i) whether cable operators, through the number of subscribers they

serve, the number of homes they pass, and their affiliations with programmers, continue to have market dominance of sufficient magnitude that, in the absence of the prohibition, they would be able to act in an anticompetitive manner; and (ii) whether there continues to be an economic rationale for vertically integrated programmers to engage in exclusive agreements with cable operators that will cause such anticompetitive harms.

32. While cable MSOs argue that they have no incentive to withhold programming, competitive MVPDs provide the following examples which they claim demonstrate that cable MSOs will withhold programming if advantageous and permitted. Competitive MVPDs argue that many of the examples listed below, involving terrestrially delivered programming (sports as well as non-sports)—for which the exclusive contract prohibition does not apply—demonstrate the incentive and ability of vertically integrated cable operators to deny access to programming where permitted by the statute.

Sports Programming

- *Comcast SportsNet Philadelphia.* Some competitive MVPDs state that Comcast refuses to make the terrestrially delivered Comcast SportsNet Philadelphia channel available to EchoStar and DIRECTV. Competitive MVPDs cite the Commission's conclusion in the *Adelphia Order* that the percentage of households that subscribe to DBS service in Philadelphia is 40 percent below what would otherwise be expected. In response, Comcast notes that Comcast SportsNet Philadelphia is available to RCN.
- *Channel 4 San Diego.* Some competitive MVPDs claim that Cox makes available its Channel 4 San Diego network, which has exclusive rights to San Diego Padres baseball games, only to cable operators that do not directly compete with Cox and not to DIRECTV, EchoStar, and AT&T. While competitive MVPDs state that DIRECTV's market penetration in San Diego is half of its national average, Cablevision notes that DIRECTV in the *Adelphia* proceeding reported that it did not find a statistically significant effect on its market penetration in San Diego resulting from its inability to access this RSN.
- *Overflow sports programming in New York, NY.* RCN notes that it was deprived of access to overflow sports programming from Cablevision after Cablevision revised its distribution system from satellite to terrestrial delivery.
- *RSNs Affiliated with Cablevision in New York and New England.* Verizon notes that it was forced to file a program access complaint against Cablevision and its vertically integrated programming subsidiary, Rainbow Media Holdings, LLC, in order to obtain access to RSNs in the New York City metropolitan area and New England.
- *High Definition (''HD'') Feeds of RSNs Affiliated with Cablevision.* While Rainbow has made available standard definition feeds of its RSNs, Verizon states that Rainbow is delivering HD feeds of this programming terrestrially to avoid the program access rules.

Non-Sports Programming

- *New England Cable News (''NECN'') in Boston, MA.* One commenter claims that RCN was provided with access to NECN, a terrestrially delivered network that is 50 percent owned by Comcast, only after the Senate Judiciary Committee indicated that they were considering legislative action to apply an exclusive contract prohibition to terrestrially delivered programming.
- *PBS Kids Sprout.* AT&T and RCN claim that after PBS Kids Sprout became vertically integrated with Comcast, RCN lost access to the network, resulting in an 83 percent drop in the usage of its children's VOD service.
- *iN DEMAND.* CA2C notes that iN DEMAND is jointly owned by Time Warner, Comcast, and Cox. CA2C argues that iN DEMAND has taken the position that its programming is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D) because iN DEMAND programming is delivered to MVPDs terrestrially. CA2C claims that iN DEMAND initially refused to provide its service to BSPs that competed with incumbent cable operators and that it reversed this position only after meetings were held with the Antitrust Subcommittee of the Senate Judiciary Committee.
- *CN8—The Comcast Network.* Qwest claims that CN8—The Comcast Network is a local news and information channel that serves 12 states and 20 television markets but is only available to Comcast and Cablevision subscribers because it is terrestrially delivered and therefore beyond the scope of Section 628(c)(2)(D).
- *NRTC.* 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.

33. *Discussion.* We conclude that vertically integrated cable programmers retain the incentive to withhold programming from their competitors. We recognize the pro-competitive developments in the MVPD market since the *2002 Extension Order*, such as the reduction in the cable industry's share of MVPD subscribers from 78 percent to an estimated 67 percent and the increase in the DBS industry's market share from 18 percent to approximately 30 percent. Despite these positive trends, however, almost seven out of ten subscribers still choose cable over competitive MVPDs, the percentage of all MVPD subscribers nationwide served by one of the four largest vertically integrated cable operators has increased substantially since 2002, and cable operators have continued to raise prices in excess of inflation. While cable MSOs claim that the emergence of telephone companies as new video competitors demonstrates that competition is flourishing, the fact is that, based on estimates provided by the cable industry, competitive MVPDs, excluding DBS operators, serve approximately three percent of all MVPD subscribers nationwide, which accounts for less than three million total MVPD subscribers. Although we are encouraged by developments since 2002, we do not believe these developments have been significant enough for us to reverse the Commission's previous conclusion that cable operators have market dominance of sufficient magnitude that, in the absence of the prohibition, they would be able to act in an anticompetitive manner.

34. We also conclude that cable-affiliated programmers continue to have an economic incentive to favor their affiliated cable operators over competitive MVPDs by entering into exclusive agreements. We agree that in many instances a cable-affiliated programmer may choose to provide its programming to as many platforms as possible in order to maximize advertising and subscription revenues. In other cases, however, cable-affiliated programmers will have an incentive to withhold programming from competitive MVPDs in order to favor their affiliated cable operator. Our conclusion that vertically integrated cable programmers retain the incentive to withhold programming from their competitors is reinforced by specific factual evidence that vertically integrated programmers have withheld and continue to withhold programming, including both sports and non-sports programming, from competitive MVPDs. 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.

35. 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. We thus conclude that the one-third share of the MVPD market held by competitive MVPDs remains limited enough to allow cable-affiliated programmers to successfully and profitably implement a withholding strategy.

36. We also find that three additional developments since 2002 provide cable-affiliated programmers with an even greater economic incentive to withhold programming from competitive MVPDs: (i) the increase in horizontal consolidation in the cable industry; (ii) the increase in clustering of cable systems; and (iii) the recent emergence of new entrants in the video market place, such as telephone companies.

37. *Horizontal Consolidation.* The cable industry has continued to consolidate since 2002. Since this time, the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs (Comcast, Time Warner, Cox, and Cablevision) has increased from 34 percent to between 54 and 56.75 percent. Moreover, the percentage of MVPD subscribers receiving their video programming from one of the four largest cable MSOs (Comcast, Time Warner, Cox, and Charter) has increased from 48 percent to between 53 and 60 percent after taking into account the recent acquisition by Comcast and Time Warner of cable systems formerly owned by Adelphia. Thus, while the evidence demonstrates that the market share of small-to-medium sized, non-vertically integrated cable operators has declined, the market share of large cable operators, and in particular those that own cable programming, has increased substantially since 2002. In the *2002 Extension Order*, the Commission observed that because four of the five largest vertically integrated cable operators served 34 percent of all MVPD subscribers, they could reap a substantial portion of the gains from withholding programming from their rivals. Now that the market share of the four largest vertically integrated cable MSOs has increased to between 54 and 56.75 percent, the largest vertically integrated cable operators stand to gain even more from a withholding strategy. Thus, the increase in horizontal consolidation in the cable industry since 2002 increases the incentive to pursue anticompetitive withholding strategies.

38. *Clustering.* The cable industry has continued to form regional clusters since the *2002 Extension Order*, when approximately 80 percent of cable subscribers were served by systems that were part of regional clusters. Today, taking into account the sale of Adelphia's systems to Comcast and Time Warner, some estimate that the percentage of cable subscribers served by systems that are part of regional clusters has increased to between 85 and 90 percent. The Commission concluded in the *2002 Extension Order* that horizontal consolidation and clustering combined with affiliation with regional programming contributed to the cable industry's overall market dominance. Given the increase in horizontal consolidation and regional clustering since 2002, this statement is no less true today. With a regional programming denial strategy, a cable-affiliated programmer foregoes only those revenues associated with the subscribers of competitive MVPDs within the cluster, not the revenues associated with subscribers of competitive MVPDs nationwide. As the Commission concluded previously, in many cities where cable MSOs have clusters, the market penetration of competitive MVPDs is much lower and cable market penetration is much higher than their nationwide penetration rates. For example, according to data from Nielsen Media Research, the collective market penetration of competitive MVPDs in many DMAs where cable MSOs have clusters is far less than their collective nationwide market penetration rate (approximately 33 percent): San Diego (13.7 percent), New York (18.2 percent), Philadelphia (19.8 percent), and San Francisco (26.9 percent). As the Commission acknowledged in the *2002 Extension Order*, this market penetration data may not correspond exactly to cable MSO cluster boundaries, and there are likely other factors, such as line-of-sight, in addition to cable competition that affect city market penetration. Nevertheless, we believe that this market penetration data provide support for the position that market penetration of competitive MVPDs is lower in certain cable cluster areas than nationwide. Moreover, due to the national distribution of DBS services and the insufficient mass of DBS subscribers on a regional basis, DBS operators do not have an economic base for substantial regional programming investments on a market-by-market basis. As a result, the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming. Moreover, the affiliated cable operator will obtain a substantial share of the benefits of a withholding strategy because its share of subscribers within the cluster is likely to be inordinately high.

39. As we concluded in the *2002 Extension Order*, Sections 628(b), 628(c)(2)(A), and 628(c)(2)(B) of the Communications Act are not adequate substitutes for the particularized protection afforded under Section 628(c)(2)(D). We stated that (i) Section 628(c)(2)(D) places the burden on the party seeking exclusivity to show that an exclusive contract meets the statutory public interest standard and that no other program access provision provides this protection; (ii) these other provisions were all enacted as part of the 1992 Cable Act, indicating that, despite the existence of these other program access provisions, Congress found the exclusive contract prohibition to be necessary to preserve and protect competition and diversity; (iii) as compared to Section 628(c)(2)(D), Section 628(b) carries with it an added burden ''to demonstrate that the purpose or effect of the conduct complained of was to ''hinder significantly or to prevent'' an MVPD from providing programming to subscribers or customers''; (iv) conduct of undue influence necessary to establish a violation of Section 628(c)(2)(A) ''may be difficult for the Commission or complainants to establish''; and (v) the prohibition of ''non-price discrimination'' in Section 628(c)(2)(B) requires the complainant to

demonstrate the conduct was ''unreasonable'' which may be difficult to establish. No commenter provides any basis for us to revisit these conclusions. Moreover, we note that some competitive MVPDs argue that allowing the exclusive contract prohibition to sunset would provide cable-affiliated programmers with an incentive to enter into exclusive contracts with their affiliated cable operators to avoid allegations of unfair acts or practices or discrimination with respect to their dealings with unaffiliated distributors.

40. We recognize the benefits of exclusive contracts and vertical integration cited by some cable MSOs, such as encouraging innovation and investment in programming and allowing for ''product differentiation'' among distributors. We do not believe, however, that these purported benefits outweigh the harm to competition and diversity in the video distribution marketplace that would result if we were to lift the exclusive contract prohibition. In addition, the Commission's rules permit cable-affiliated programmers to seek approval to enter into an exclusive contract based on a demonstration that the exclusive arrangement serves the public interest consistent with factors established by Congress.

c. Impact on Programming

41. We find above that the exclusive contract prohibition continues to be necessary to preserve and protect diversity in the distribution of programming. As we stated in the *2002 Extension Order*, while we recognize that the exclusive contract prohibition's impact on programming diversity is one component of our analysis, Congress directed that ''our primary focus should be on preserving and protecting diversity in the *distribution* of video programming—i.e., ensuring that as many MVPDs as possible remain viable distributors of video programming.'' While cable MSOs contend that the exclusive contract prohibition reduces incentives for cable operators and competitive MVPDs to create and invest in new programming, we find no evidence to support this theory. To the contrary, the number of vertically integrated satellite-delivered national programming networks has more than doubled since 1994 when the rule implementing the exclusive contract prohibition took effect and has continued to increase since 2002 when the Commission last examined the exclusive contract prohibition. There is also evidence that some competitive MVPDs have begun to invest in their own programming despite their ability to access cable-affiliated programming based on the exclusive contract prohibition and the program access rules. Accordingly, we find no basis to conclude that extending the exclusive contract prohibition will create a disincentive for the creation of new programming.

42. We are mindful that our decision to extend the exclusive contract prohibition must withstand an intermediate scrutiny test pursuant to First Amendment jurisprudence. As the D.C. Circuit explained in rejecting a facial challenge to the constitutionality of the exclusive contract prohibition in Section 628(c)(2)(D), the prohibition will survive intermediate scrutiny if it ''furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'' For the reasons discussed herein, our decision to extend the exclusive contract prohibition satisfies this intermediate scrutiny test. First, in *Time Warner*, the court found that the governmental interest Congress intended to achieve in enacting the exclusive contract prohibition was ''the promotion of fair competition in the video marketplace,'' and that this interest was substantial. Moreover, one of Congress' express findings in enacting the 1992 Cable Act was that ''[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.'' Moreover, the court noted Congress' conclusion that ''the benefits of these provisions—the increased speech that would result from fairer competition in the video programming marketplace—outweighed the disadvantages [resulting in] the possibility of reduced economic incentives to develop new programming.'' We disagree with cable MSOs to the extent they argue that the substantial government interest in achieving competition in the video distribution market has been met. As discussed above, cable operators still have a dominant share of MVPD subscribers (approximately 67 percent), have raised prices in excess of inflation despite the emergence of new competitors, and still own significant programming networks. Accordingly, we conclude that competition and diversity in the video distribution market has not reached the level at which Congress intended the exclusive contract prohibition would sunset. Second, in *Time Warner*, the court held that the governmental objective in adopting the exclusive contract prohibition in Section 628(c)(2)(D) was unrelated to the suppression of free speech. In this *Order*, we extend the exclusive contract prohibition for an additional five years but do not otherwise modify the prohibition. Thus, the prohibition remains unrelated to the suppression of free speech, as the D.C. Circuit Court of Appeals previously held. Third, in *Time Warner*, the court rejected claims that the exclusive contract prohibition was not narrowly tailored to achieve the stated government interest. In this *Order*, we extend the exclusive contract prohibition for a term of five years but do not otherwise modify the prohibition. Thus, the prohibition remains narrowly tailored to meet the statute's objective, and any incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that objective.

43. We note that cable MSOs argue that the exclusive contract prohibition is not narrowly tailored because it is allegedly both overinclusive (in that it applies to ''new,'' ''unpopular,'' and other types of programming that are arguably not essential to the viability of competition in the video distribution market) and underinclusive (in that it does not apply to certain non-cable-affiliated programming that may be necessary for viable competition in the MVPD market). Moreover, we note that the exclusive contract prohibition in Section 628(c)(2)(D) is not absolute. Rather, cable-affiliated programmers may seek approval to enter into exclusive programming contracts that satisfy the criteria set forth by Congress in Section 628(c)(2) and (4). Despite claims that the exclusive contract prohibition deprives cable operators and others of the incentive to invest in new programming, thereby restricting the creation of new programming, the record reflects the opposite. Thus, contrary to these contentions, the prohibition has fostered, not restricted, speech.

4. Scope of Exclusive Contract Prohibition

44. Various commenters argue that the exclusive contract prohibition is both overinclusive and underinclusive with respect to the type of programming and MVPDs it covers. As discussed below, we decline to either narrow or expand the exclusive contract prohibition.

a. Narrowing the Prohibition

(i) Narrowing Based on Status of Programming Network

45. For the reasons discussed below, we decline to narrow the scope of the exclusive contract prohibition based on the status of the programming network. The exclusive contract prohibition in Section 628(c)(2)(D) and the implementing rules pertain to all satellite-delivered programming networks that are vertically integrated with a cable operator, regardless of their popularity.

46. As an initial matter, we note that in adopting the exclusive contract prohibition in Section 628(c)(2)(D), Congress applied the prohibition to all cable-affiliated programming. Congress did not distinguish between different types of cable-affiliated programming. Accordingly, as the Commission concluded in the *2002 Extension Order*, we believe that treating all satellite cable programming and satellite broadcast programming uniformly for purposes of the exclusive contract prohibition is consistent with Section 628(c)(2)(D) and the definitions set forth in Sections 628(i)(1) and (3). Moreover, no commenter has provided a rational and workable definition of ''must have'' programming that would allow us to apply the exclusive contract prohibition to only this type of programming.

(ii) Narrowing Based on Status of Cable Operator

47. For the reasons discussed below, we decline to narrow the scope of the exclusive contract prohibition based on the status of the cable operator. Cable MSOs argue that we should narrow the exclusive contract prohibition by allowing certain types of exclusive arrangements based on the status of the cable operator, such as (i) those involving an affiliated cable operator whose network passes only a small number of households throughout the nation; (ii) those between a cable operator and an affiliated programming network outside the footprint of the affiliated cable operator; and (iii) those involving affiliated cable operators that face competition from both DBS and telephone companies.

48. In adopting the exclusive contract prohibition in Section 628(c)(2)(D), Congress applied the prohibition to all cable operators. Congress did not distinguish between different types of cable operators for purposes of Section 628(c)(2)(D). Moreover, in adopting the exclusive contract prohibition, Congress has already delineated a geographic demarcation applicable to the prohibition—''areas served by a cable operator.'' Congress did not provide that the exclusive contract prohibition should vary based on the competitive circumstances in individual geographic areas served by a cable operator.

49. We also find that these attempts to narrow the exclusive contract prohibition would harm competition in the video distribution marketplace. One of the key anticompetitive practices that the exclusive contract prohibition addresses is the practice of leveraging cable's market power collectively by withholding affiliated programming from rival MVPDs while selling the affiliated programming to other cable operators which do not compete with one another. A cable operator may gain by weakening a current or potential rival (such as a DBS operator) even in markets that the cable operator itself does not serve. Thus, proposals to narrow the exclusive contract prohibition by allowing exclusive arrangements outside of the footprint of the affiliated cable operator or with cable operators whose networks pass only a small number of households throughout the nation will impede competition in the video distribution marketplace. We similarly find that allowing exclusive arrangements for affiliated cable operators that face competition from both DBS and telephone companies would harm competition in the video distribution marketplace. We conclude herein that a cable operator will not lose the incentive and ability to enter into an exclusive arrangement in a given geographic area simply because it faces competition from both DBS operators and telephone companies in that area.

(iii) Narrowing Based on Status of Competitive MVPD

50. For the reasons discussed below, we decline to narrow the exclusive contract prohibition by precluding certain competitive MVPDs from benefiting from the prohibition. Comcast and Cablevision ask us to narrow the exclusive contract prohibition by precluding certain competitive MVPDs from benefiting from the prohibition, such as competitive MVPDs that (i) have been in the MVPD market for more than five years; (ii) have extensive resources; or (iii) enter into exclusive contracts for programming.

51. Section 628 makes no distinction among MVPDs of the kind suggested by these commenters. Moreover, we find that adopting such restrictions on the entities that can benefit from the prohibition will limit competition in the video distribution market and will result in no discernible public interest benefits. The resources of competitors or the number of years they have spent in the market has no bearing on the goal of Section 628(c)(2)(D) to preclude exclusive contracts in order to facilitate competition in the video distribution market. Rather, if cable operators have exclusive access to non-substitutable content that is essential for viable competition and they have the incentive to withhold such content, the amount of resources of competitive MVPDs or their longevity in the market will not be able to overcome that competitive advantage. Comcast asks us to prevent competitive MVPDs that themselves enter into exclusive programming contracts from being the beneficiaries of the exclusive contract prohibition applied to cable-affiliated programmers. Section 628, however, does not exempt cable operators from its restrictions based on the contracting practices of non-cable MVPDs.

b. Expanding the Prohibition

(i) Expanding the Prohibition to Non-Cable-Affiliated Programming

52. For the reasons discussed below, we decline to apply an exclusive contract prohibition to non-cable-affiliated programming. The exclusive contract prohibition in Section 628(c)(2)(D) and the implementing rules pertain only to programming networks that are vertically integrated with a ''cable operator,'' as that term is defined in the Communications Act. Competitive MVPDs, as well as some cable MSOs, argue that the prohibition is thus underinclusive because it does not pertain to certain non-cable-affiliated programming that is necessary for MVPDs to compete.

53. As an initial matter, to the extent that an MVPD meets the definition of a ''cable operator'' under the Communications Act, the exclusive contract prohibition in Section 628(c)(2)(D) already applies to its affiliated programming and, thus, no further action is required on our part. Moreover, as AT&T notes, Section 628(j) of the Communications Act provides that any provision of Section 628 that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming. *See* 47 U.S.C. 548(j). We have previously explained that the exclusive contract prohibition in Section 628(c)(2)(D) does not extend to unaffiliated programming networks and programming networks affiliated with non-cable MVPDs, such as DBS operators. Moreover, the record before us in this proceeding does not provide sufficient evidence upon which to conclude that non-cable-affiliated

programming is being withheld from MVPDs to a significant extent or that such withholding is adversely impacting competition in the video distribution market.

(ii) Expanding the Prohibition to Terrestrially Delivered Programming

54. We decline to apply an exclusive contract prohibition to terrestrially delivered programming at this time. Some competitive MVPDs argue that the Commission should apply the exclusive contract prohibition to terrestrially delivered programming networks, citing various provisions of the Communications Act in addition to Section 628(c) for statutory support. The Commission previously declined to address arguments regarding the Commission's statutory authority to address terrestrially delivered programming under Sections 4(i) and 303(r) of the Communications Act. Commenters have failed to provide any new evidence or arguments that would lead us to reconsider our previous conclusion that terrestrially delivered programming is ''outside of the direct coverage'' of Section 628(c)(2)(D). We continue to believe that the plain language of the definitions of ''satellite cable programming'' and ''satellite broadcast programming'' as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D).

5. Length of New Term

55. We conclude that the exclusive contract prohibition will be extended for five years subject to review during the last year of this extension period (*i.e.*, between October 2011 and October 2012). We believe that five years could be a sufficient amount of time for competition to develop in the video distribution and programming markets. Accordingly, we believe that five years is an appropriate period of time to revisit the exclusivity prohibition. We also emphasize that, if adequate competition emerges before five years, the Commission could initiate its review earlier either on its own motion or in response to a petition. Moreover, we will continue to evaluate petitions for exclusivity under the public interest factors established by Congress.

6. Other Programming Issues

56. Small and rural telephone MVPDs raise additional concerns in their comments regarding the difficulties they face in trying to obtain access to programming, such as tying of desired with undesired programming and unwarranted security requirements. We find that these concerns are beyond the scope of the programming issues raised in the *NPRM*, which pertained only to the prohibition on exclusive contracts for satellite-delivered vertically integrated programming under Section 628(c)(2)(D) and the extension of that prohibition pursuant to Section 628(c)(5). We did not seek comment on these issues in the *NPRM* and, accordingly, do not have a sufficient record upon which to address these concerns in this *Order.* We seek further comment on these issues in the *Notice of Proposed Rulemaking* in MB Docket No. 07–198.

B. Modification of Program Access Complaint Procedures

57. As discussed below, we revise our program access complaint procedures. Specifically, we codify the existing requirement that respondents to program access complaints must attach to their answers copies of any documents that they rely on in their defense; find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; codify the Commission's authority to issue default orders granting a complaint if a respondent fails to comply with discovery requests; and allow parties to choose, within 20 days of the close of the pleading cycle, to engage in voluntary commercial arbitration of their program access complaints.

58. In the *NPRM*, the Commission sought comment on whether and how the procedures for resolving program access disputes under Section 628 should be modified.

1. Pleading Cycle

59. In this *Order*, we retain our existing pleading cycle. The Commission's existing rules provide that an MVPD aggrieved by conduct that it believes constitutes a violation of Section 628 and the Commission's program access rules may file a complaint with the Commission. *See* 47 CFR 76.7 and 76.1003. A complainant must first notify the programming vendor that it intends to file the complaint and allow the vendor 10 days to respond. Once a complaint is filed, the cable operator or satellite programming vendor must answer within 20 days of service of the complaint. Replies to the answer are due within 15 days of service of the answer.

60. *Discussion.* A shorter pleading cycle would not necessarily improve the overall time for complaint resolution because incomplete or rushed responses could lead to the need for further pleadings and discovery. We therefore decline to adopt a more expedited pleading cycle. However, we believe that electronic filing may help improve the speed of resolution and, therefore, we will continue to study this issue internally to determine if it is technologically feasible to require electronic filing for program access complaints, which necessarily involve a number of confidential documents. Currently, parties may voluntarily submit electronic copies of their pleadings to staff via e-mail in order to expedite review.

2. Discovery

61. In this *Order*, after reviewing our discovery rules pertaining to program access disputes, we codify the existing requirement that respondents to program access complaints must attach to their answers copies of any documents that they rely on in their defense; find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; and emphasize that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with its discovery requests. The respondent shall have the opportunity to object to any request for documents. Such request shall be heard, and determination made, by the Commission. The respondent need not produce the disputed discovery material until the Commission has ruled on the discovery request.

62. *Discussion.* We take measures to ensure that the Commission has the information necessary to expeditiously resolve program access complaints.

63. *Respondent's Answer.* In the *1998 Program Access Order*, the Commission clarified that, to the extent that a respondent expressly references and relies upon a document or documents in defending a program access claim, the respondent must attach that document or documents to its answer. In this *Order*, we expressly codify that requirement in the Commission's rules. To the extent that there has been any confusion about this requirement in the past, we clarify that a respondent must attach the necessary documentation to its answer to a program access complaint, subject to our rules on

confidential filings. Subsequent to the *1998 Program Access Order*, the Commission, in the *1998 Biennial Review* (64 FR 6565, February 10, 1999), further clarified the response requirements for specific types of program access complaints. To the extent that a respondent fails to include the permissive attachments identified in our rules that are necessary to a resolution of the complaint, the Commission may require the production of further documents. *See* 47 CFR 76.1003(e); 47 CFR 76.7(e)(2). Moreover, a program access complainant is entitled, either as part of its complaint or through a motion filed after the respondent's answer is submitted, to request that Commission staff order discovery of any evidence necessary to prove its case. *See* 47 CFR 76.7(e), (f). Respondents are also free to request discovery.

64. *Submission of Necessary Information.* We believe that expanded discovery will improve the quality and efficiency of the Commission's resolution of program access complaints. Accordingly, we find that it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission (indeed, in such circumstances, failure to produce the subject documents would also be a violation of a Commission order), provided that such documents are in its control and relevant to the dispute. While we retain the existing process for the Commission to order the production of documents and other discovery, we will also allow parties to a program access complaint to serve requests for discovery directly on opposing parties.

65. Parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. If the respondent refuses to produce the requested documents, the requesting party may file a petition with the Commission seeking to compel production of the documents. Such discovery dispute shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the respondent need not produce the disputed material. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

66. We reiterate that respondents to program access complaints must produce in a timely manner, the contracts and other documentation that are necessary to resolve the complaint, subject to confidential treatment. *See* 47 CFR 76.9. In order to prevent abuse, the Commission will strictly enforce its default rules against respondents who do not answer complaints thoroughly or do not respond in a timely manner to permissible discovery requests with the necessary documentation attached. Respondents that do not respond in a timely manner to all discovery ordered by the Commission will risk penalties, including having the complaint against them granted by default. Likewise, a complainant that fails to respond promptly to a Commission order regarding discovery will risk having its complaint dismissed with prejudice. Finally, a party that fails to respond promptly to a request for discovery to which it has not raised a proper objection will be subject to these sanctions as well.

67. *Confidential Material.* We understand that this approach requires the submission of confidential and extremely competitively-sensitive information. *See, e.g.*, 47 CFR 0.457(d)(iv). Accordingly, in order to appropriately safeguard this confidential information we believe it is necessary to revise the standard protective order and declaration (''Protective Order'') for use in program access proceedings.

68. To ensure that confidential information is not improperly used for competitive business purposes, we intend to make an important revision to the Protective Order. Specifically, we revise it to reflect that any personnel, including in-house counsel, involved in competitive decision-making are prohibited from accessing the confidential information.

69. In order to appropriately safeguard confidential information, we revise the Protective Order for use in program access proceedings to find that any personnel, including in-house counsel, (i) that are involved in competitive decision-making, (ii) are in a position to use the confidential information for competitive commercial or business purposes, or (iii) whose activities, association, or relationship with the complainant, client, or any authorized representative involve rendering advice or participation in any or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor, are prohibited from accessing the confidential information. *See* Appendix.

70. A protective order constitutes both an order of the Commission and an agreement between the party executing the declaration and the submitting party. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings. We intend to vigorously enforce any transgressions of the provisions of our protective orders.

3. Time Frame for Resolving Program Access Complaints

71. In this *Order*, we retain our current goals for resolving program access complaints with the intent to expedite complaints filed by small companies without existing carriage contracts. Under the current process, the Commission has set forth goals for the resolution of program access complaints as five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases.

72. *Discussion.* We agree that program access complaints should be resolved in a timely manner, but the time frames for resolving complaints must be realistic. We will retain our goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases.

73. However, we are concerned with delays in the resolution of complaints filed by new entrants, especially small businesses, and therefore, the Commission will expedite the resolution of such complaints and, as discussed above in Section III.B.2, will strictly enforce its default rules against respondents who do not answer complaints thoroughly with the necessary documentation attached. *See* 47 CFR 76.7(b)(2)(iii).

4. Arbitration

74. In this *Order*, we expand the use of voluntary arbitration for resolution of program access disputes, by increasing opportunities for parties to choose arbitration in lieu of Commission resolution of a pending complaint, and refrain from imposing a mandatory arbitration requirement at this time.

75. *Discussion.* We decline to impose mandatory arbitration as a rule in all

program access cases at this time. We would like to see how arbitration of program access disputes, either through a merger condition or through voluntary arbitration, is working over time, to determine if modifications to the arbitration process are necessary prior to imposing a mandatory requirement on all parties to all program access complaints. Once there is a track record for arbitration of program access disputes, we will be able to determine which types of disputes lend themselves more readily to resolution by arbitration and which may be more judiciously resolved by the Commission in the first instance.

76. The current rules allow parties to voluntarily engage in ADR, including arbitration, in lieu of an administrative hearing. *See* 47 CFR 76.7(g)(2). However, we believe that parties to program access complaints should be able to voluntarily choose arbitration prior to the Commission making a determination to forward the complaint to an administrative law judge and that the *Adelphia Order* provides adequate guidance for the arbitration process. Therefore, the Commission will suspend action on a complaint where both parties agree to use ADR, including commercial arbitration, within 20 days following the close of the pleading cycle. Parties may agree that voluntary arbitration is a quick and productive way to resolve their commercial disputes. Moreover, we will continue to monitor developments in the marketplace and will, if necessary, revisit in the future whether to adopt a mandatory arbitration requirement.

IV. Procedural Matters

A. Paperwork Reduction Act Analysis

77. This document contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the OMB for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

78. We have assessed the effects of the information collection requirements, and find that those requirements will benefit companies with fewer than 25 employees by facilitating the resolution of program access complaints and that these requirements will not burden those companies.

B. Congressional Review Act

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

C. Final Regulatory Flexibility Analysis

80. As required by the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 604, the Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') relating to the *Order.* An Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *NPRM* in MB Docket No. 07–29 (72 FR 9289, March 1, 2007). The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are discussed below. This present FRFA conforms to the RFA. We note that, because our action with respect to the exclusive contract prohibition in Section 628(c)(2)(D) retains the status quo in this context, we could have certified our action under the RFA. *See generally* 5 U.S.C. 605.

Need for, and Objectives of, the Rules Adopted

81. *Background.* Congress enacted the program access provisions contained in Section 628 of the Communications Act of 1934, as amended (the ''Communications Act''), as part of the Cable Television Consumer Protection and Competition Act of 1992 (''1992 Act''). Section 628 is intended to encourage entry into the multichannel video programming distribution (''MVPD'') market by existing or potential competitors to traditional cable operators by requiring cable operators to make available to MVPDs the programming necessary for them to become viable competitors. Specifically, this proceeding involves (i) Section 628(c)(2)(D), which prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators unless the Commission determines that such exclusivity is in the public interest; and (ii) the Commission's procedures for resolving program access disputes under Section 628.

82. *Extension of Exclusive Contract Prohibition.* Section 628(c)(5) of the Communications Act directed that the exclusive contract prohibition in Section 628(c)(2)(D) would cease to be effective on October 5, 2002, unless the Commission found in a proceeding conducted between October 2001 and October 2002 that the prohibition ''continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.'' 47 U.S.C. 548(c)(5). In October 2001, the Commission issued a *Notice of Proposed Rulemaking* in CS Docket No. 01–290 seeking comment on whether the exclusive contract prohibition continued to be ''necessary'' pursuant to the criteria set forth in Section 628(c)(5). *See* 66 FR 54972, October 31, 2001. In June 2002, the Commission issued a decision concluding that the exclusive contract prohibition continued to be ''necessary'' pursuant to these criteria and therefore extended the prohibition for five years (*i.e.*, through October 5, 2007). *See* 67 FR 49247, July 30, 2002. The Commission also provided that, during the year before the expiration of the five-year extension of the exclusive contract prohibition, it would conduct another review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. We issued the *NPRM* in February 2007 to initiate this review. *See* 72 FR 9289, March 1, 2007.

83. The *Order* herein adopted retains for five years (until October 5, 2012) the prohibition on exclusive contracts for satellite cable programming and satellite broadcast programming between vertically integrated programming vendors and cable operators as set forth in Section 628(c)(2)(D) of the Communications Act and Section 76.1002(c)(2) of the Commission's rules.

84. In the *Order*, we analyze the changes that have occurred in the video programming and distribution markets since 2002 when we last decided that the exclusive contract prohibition continued to be necessary to preserve and protect competition. While the markets for both programming and distribution reflect some pro-competitive trends since 2002, we conclude that these developments are not sufficient to allow us to decide that the exclusive contract prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming. We then assess whether vertically integrated programmers today retain both the ability and incentive to favor their affiliated cable operators over nonaffiliated MVPDs such that competition and diversity in the distribution of video programming

would not be preserved and protected. We conclude that vertically integrated programmers retain this ability and incentive. Thus, we find that the exclusive contract prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming. We therefore extend the exclusive contract prohibition for five years subject to review during the last year of this extension period.

85. In the *Order*, we also reject proposals presented by some commenters to narrow the exclusive contract prohibition based on the status of the programming, the cable operator, or the competitive MVPD. We find that narrowing the prohibition in this manner is not supported by the Communications Act and would not promote competition. We also reject proposals presented by some commenters to expand the exclusive contract prohibition to non-cable-affiliated programming and unaffiliated programming. We find that expanding the prohibition is not supported by the Communications Act and that there is no record evidence to support such an expansion of the prohibition. We also considered the possibility of allowing the exclusive contract prohibition to sunset. Because we conclude that the exclusive contract prohibition is necessary to preserve and protect competition and diversity in the video distribution market, we decide not to allow the exclusive contract prohibition to sunset. The decision to retain the exclusive contract prohibition will facilitate competition in the video distribution market, thereby benefiting various competitive MVPDs including those that are smaller entities. Therefore, we conclude that our decision to retain the exclusive contract prohibition set forth in Section 628(c)(2)(D) benefits smaller entities as well as larger entities.

86. *Modification of Program Access Complaint Procedures.* The Commission's rules provide that any MVPD aggrieved by conduct that it believes constitutes a violation of Section 628 and the Commission's program access rules may file a complaint at the Commission. 47 CFR 76.7 and 76.1003. In the *NPRM*, we considered whether and how our procedures for resolving program access disputes under Section 628 should be modified. Among other things, we considered (i) whether specific time limits on the Commission, the parties, or others would promote a speedy and just resolution of these disputes; (ii) whether our rules governing discovery and protection of confidential information are adequate; and (iii) whether the Commission should adopt alternative procedures or remedies such as mandatory standstill agreements and arbitration.

87. In the *Order*, to facilitate the resolution of program access complaints, we modify our procedures for resolving such complaints by (i) codifying the requirements that a respondent in a program access complaint proceeding who expressly relies upon a document in asserting a defense must include the document as part of its answer; (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; (iii) codifying the Commission's authority to issue default orders granting a complaint if the respondent fails to comply with discovery requests; and (iv) allowing parties to a program access complaint proceeding to voluntarily engage in alternative dispute resolution, including commercial arbitration, during which time Commission action on the complaint will be suspended. We also retain our goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and within nine months for all other program access complaints, such as price discrimination cases.

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

88. In its Comments on the IRFA, the Office of Advocacy of the United States Small Business Administration (''SBA Office of Advocacy'') claims that the Commission's IRFA in this proceeding was inadequate because it allegedly (i) did not contain a complete economic analysis of the impact of a decision to allow the exclusive contract prohibition to sunset on the small entities listed in the IRFA; (ii) failed to consider alternatives to allowing the prohibition to sunset that will achieve the Commission's goals while minimizing burdens on small entities; and (iii) failed to collect data on the impact of a sunset of the prohibition on small businesses that offer video programming to customers, such as sports bars, smalls entities in the hospitality industry, and certain housing developments. The SBA Office of Advocacy Office argues that without access to video content demanded by subscribers, small providers of video services will not be able to compete in the MVPD market. Accordingly, the SBA Office of Advocacy urges a three-year extension of the exclusive contract prohibition. Although not filed specifically in response to the IRFA, comments were filed in response to the *NPRM* by small competitive MVPDs and small cable operators that urged the Commission to retain the exclusive contract prohibition and to revise the procedures for resolving program access complaints. These commenters argued that they will be unable to viably compete in the video distribution market if denied access to vertically integrated programming. Moreover, they argued that the current program access complaint process is costly and time-consuming such that it makes it impracticable for small carriers to pursue filing a program access complaint. Our response to all such comments is contained below.

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

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

90. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (''NAICS'') defines ''Wired Telecommunications Carriers'' (2007 NAISC Code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS Code 517110), Cable and Other Program Distribution (2002 NAISC Code 517510), and Internet Service Providers (2002 NAISC Code 518111). The 2007 NAISC defines this category 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 Wired Telecommunications Carriers, which is all firms having 1,500 employees or less. According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) that operated for the entire year. Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC Code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC Code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC Code 518111) had less than 100 employees. Thus, under this size standard, the majority of firms can be considered small.

91. *Cable and Other Program Distribution.* The 2002 NAICS defines this category as follows: ''This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.'' This category includes, among others, cable operators, direct broadcast satellite (''DBS'') services, home satellite dish (''HSD'') services, satellite master antenna television (''SMATV'') systems, and open video systems (''OVS''). The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, under this size standard, the majority of firms can be considered small.

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

93. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' There are approximately 65.4 million cable subscribers in the United States today. Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

94. *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. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution. This definition provides that a small entity is one with $13.5 million or less in annual receipts. Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. (''Dominion'') (marketed as Sky Angel). All three currently offer subscription services. Two of these three DBS operators, DIRECTV and EchoStar Communications Corporation (''EchoStar''), report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels. Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

95. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less in annual receipts. Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs. Individual PCOs often serve

approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, PCOs currently serve approximately one million subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

96. *Home Satellite Dish (''HSD'') Service*. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in revenue annually. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent. The Commission has no information regarding the annual revenue of the four C-Band distributors.

97. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS). MMDS systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)). We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to MDS and ITFS.

98. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

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

100. *Local Multipoint Distribution Service*. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS. The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a ''very small business,'' which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years. These definitions of ''small business'' and ''very small business'' in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

101. *Open Video Systems (''OVS'')*. 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-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households. Among BSPs, however, those operating under the OVS framework are in the minority. As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers. RCN received approval to operate OVS systems in New York City, Boston, Washington, DC and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least

some of the OVS operators may qualify as small entities.

102. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis * * *. These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.'' The SBA has developed a small business size standard for firms within this category, which is all firms with $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year. Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

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

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

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

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

Description of Reporting, Recordkeeping and Other Compliance Requirements

107. The rules adopted in the *Report and Order* will impose additional reporting, recordkeeping, and compliance requirements on complainants and respondents in program access disputes by (i) codifying the requirements that a respondent in a program access complaint proceeding who expressly relies upon a document in asserting a defense must include the document as part of its answer; and (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute.

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

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

109. The *NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities, including (i) whether the exclusive contract prohibition remains necessary to preserve and protect competition in the video distribution market; and (ii) whether and how our procedures for resolving program access disputes under Section 628 should be modified.

110. *Extension of Exclusive Contract Prohibition.* As discussed above, the decision to extend the exclusive contract prohibition for five years will facilitate competition in the video distribution market by ensuring that

competitive MVPDs continue to have access to the programming they need to compete. The decision therefore confers benefits upon various competitive MVPDs, including those that are smaller entities. Moreover, the decision avoids the adverse impact to smaller entities that the SBA Office of Advocacy Office and others stated would occur if the prohibition were to sunset. Therefore, we conclude that our decision to retain the exclusive contract prohibition set forth in Section 628(c)(2)(D) benefits smaller entities as well as larger entities. The alternative of allowing the exclusive contract prohibition to expire would hinder competition in the video distribution market, thereby harming smaller entities.

111. *Modification of Program Access Complaint Procedures.* As discussed above, the decision to modify the procedures for resolving program access disputes will facilitate the processing and resolution of program access complaints, thereby conferring benefits upon smaller entities as well as larger entities that seek to compete in the video distribution marketplace. The alternative of retaining the current program access complaint procedures would not facilitate the resolution of program access complaints and would thereby harm smaller entities that file such complaints.

Report to Congress

112. The Commission will send a copy of the *Report and Order,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

V. Ordering Clauses

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

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

115. *It is ordered* that the rules adopted herein are effective October 4, 2007, except for § 76.1003(e)(1) and (j) which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for those sections.

116. *It is ordered* that, pursuant to 5 U.S.C. 553(d)(3) and 47 CFR 1.427(b), the Commission finds good cause to make § 76.1002(c)(6) and § 76.1003(i) and (k) effective upon publication in the **Federal Register**. Section 76.1002(c)(6) provides that the exclusive contract prohibition set forth in § 76.1002(c)(2) will expire on October 5, 2007. *See* 47 CFR 76.1002(c)(6). Accordingly, it is necessary for the five-year extension of this prohibition reflected in the amendment to § 76.1002(c)(6) adopted herein to take effect by October 5, 2007. We thus find good cause to make the amendment to § 76.1002(c)(6) effective upon publication in the **Federal Register**. We note further that this amendment extends an existing requirement and does not impose any new requirements on any entity. Accordingly, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the **Federal Register**. We also find good cause to make the amendments to our procedural rules adopted herein, other than those that require OMB approval, effective upon publication in the **Federal Register**. These rules are (i) new § 76.1003(i), which allows parties to a program access dispute to voluntarily engage in ADR; and (ii) new § 76.1003(k), which pertains to the Commission's authority to issue protective orders regarding confidential material submitted in program access complaint proceedings and to issue appropriate sanctions for violations of its protective orders. These new rules are essential to our goal of expeditiously resolving program access complaints. We find good cause to make these amendments effective upon publication in the **Federal Register** so that parties to all program access complaint proceedings, including those currently pending before the Commission, can benefit from these new rules. With respect to new § 76.1003(i) regarding ADR, we note this procedure is voluntary and requires both parties to agree to engage in alternative dispute resolution; thus, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the **Federal Register**. With respect to new § 76.1003(k) regarding protective orders, we note that this rule enhances existing safeguards provided under our form protective order, and will facilitate and expedite the review of privileged and/or confidential documents; thus, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the **Federal Register**.

117. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Report and Order* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

118. *It is further ordered* that the Commission shall send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Administrative practice and procedure and Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

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

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

■ 2. Section 76.1002 is amended by revising paragraph (c)(6) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

* * * * *

(c) * * *

(6) *Sunset provision.* The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

* * * * *

■ 3. Section 76.1003 is amended by adding a sentence to the end of paragraph (e)(1) and by adding paragraphs (i), (j) and (k) to read as follows:

§ 76.1003 Program access proceedings.

* * * * *

(e) *Answer.* (1) * * * To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

* * * * *

(i) *Alternative dispute resolution.* Within 20 days of the close of the pleading cycle, the parties to the program access dispute may voluntarily engage in alternative dispute resolution, including commercial arbitration. The Commission will suspend action on the complaint if both parties agree to use alternative dispute resolution.

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

(k) *Protective Orders.* In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of program access complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.

Note: The attached Appendix *will not be included* in the Code of Federal Regulations (CFR).

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

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

PROTECTIVE ORDER

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

2. *Definitions.*

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

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

c. *Confidential Information.* ''Confidential Information'' means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

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

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

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

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

3. *Procedures for Claiming Information is Confidential.* Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, ''CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION—DO NOT RELEASE.'' Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

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

5. *Access to Confidential Information.* Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

6. *Disclosure.* Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. *Authorized Representatives shall be limited to:*

a. Subject to Paragraph 7.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 7.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 7.d, any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

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

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

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

10. *Filing of Declaration.* Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

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

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

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

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

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

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 12 are not removed.

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

14. *Termination of Proceeding.* Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

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

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

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

18. *Authority.* This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. 154(i), (j) and 47 CFR 0.457(d).

Attachment A to Standard Protective Order

DECLARATION

In the Matter of ____________________
[Name of Proceeding] ________________
Docket No. ________________________

I, ___________, hereby declare under penalty of perjury that I have read the

Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties,' Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) ____________________

(printed name) ____________________

(representing) ____________________

(title) ____________________

(employer) ____________________

(address) ____________________

(phone) ____________________

(date) ____________________

[FR Doc. 07–4935 Filed 10–3–07; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 060824226–6322–02]

RIN 0648–AW07

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures; Inseason Adjustments

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; inseason adjustments to groundfish management measures; request for comments.

SUMMARY: This final rule announces inseason changes to management measures in the commercial and recreational Pacific Coast groundfish fisheries and the reopening of the 2007 Pacific whiting primary season. These actions, which are authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP), are intended to allow fisheries to access more abundant groundfish stocks while protecting overfished and depleted stocks.

DATES: Effective 0001 hours (local time) October 1, 2007. Comments on this final rule must be received no later than 5 p.m., local time on November 5, 2007.

ADDRESSES: You may submit comments, identified by RIN 0648–AW07 by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- Fax: 206–526–6736, Attn: Gretchen Arentzen
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070, Attn: Gretchen Arentzen.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Gretchen Arentzen (Northwest Region, NMFS), phone: 206–526–6147, fax: 206–526–6736 and e-mail *gretchen.arentzen@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is accessible via the Internet at the Office of the **Federal Register**'s Website at *http://www.gpoaccess.gov/fr/index.html*. Background information and documents are available at the Pacific Fishery Management Council's (Council's) website at *http://www.pcouncil.org/*.

Background

The Pacific Coast Groundfish FMP and its implementing regulations at title 50 in the Code of Federal Regulations (CFR), part 660, subpart G, regulate fishing for over 90 species of groundfish off the coasts of Washington, Oregon, and California. Groundfish specifications and management measures are developed by the Pacific Fishery Management Council (Council), and are implemented by NMFS. A proposed rule to implement the 2007–2008 specifications and management measures for the Pacific Coast groundfish fishery and Amendment 16–4 of the FMP was published on September 29, 2006 (71 FR 57764). The final rule to implement the 2007–2008 specifications and management measures for the Pacific Coast Groundfish Fishery was published on December 29, 2006 (71 FR 78638). These specifications and management measures were codified in the CFR (50 CFR part 660, subpart G). The final rule was subsequently amended on: March 20, 2007 (71 FR 13043); April 18, 2007 (72 FR 19390); July 5, 2007 (72 FR 36617); August 3, 2007 (72 FR 43193); and September 18, 2007 (72 FR 53165).

Changes to current groundfish management measures implemented by this action were recommended by the Council, in consultation with Pacific Coast Treaty Indian Tribes and the States of Washington, Oregon, and California, at its September 10–14, 2007, meeting in Portland, Oregon. At that meeting, the Pacific Council recommended adjusting current groundfish management measures to respond to updated fishery information and other inseason management needs.

The Pacific Council recommended: (1) increasing the 2–month cumulative limit in the limited entry fixed gear fishery for shortspine thornyheads south of 34°27′ N. lat.; (2) prohibiting retention of cabezon by recreational ocean boat anglers in Federal waters off Oregon; (3) closing the Federal recreational fishing season for rockfish, cabezon, greenlings, and lingcod from 42° N. lat. to 37°11′ N. lat.; (4) adjust the shoreward boundary of the limited entry non-whiting trawl RCA to a line approximating the 75–fm (137–m) depth contour North of Cape Alava (48°10′ N. lat.) and between Humbug Mountain (43°20.83′ N. lat.) and Cape Arago (42°40.50′ N. lat.); (5) increasing coastwide sablefish limits for large and small footrope trawl gear; (6) increasing longspine thornyhead limits south of 40°10′ N. lat. for large and small footrope trawl gear; (7) increasing shortspine thornyhead limits coastwide for large and small footrope trawl gear; (8) increasing coastwide Dover sole limits for large and small footrope trawl gear; (9) increasing coastwide other flatfish limits for large and small footrope trawl gear; (10) increasing petrale sole limits north of 40°10′ N. lat. for large and small footrope trawl gear; (11) increasing slope rockfish limits for limited entry trawl gear south of 38° N. lat.; (12) increasing the 2007 non-tribal whiting widow rockfish bycatch limit