

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of the Cable Television	)	CC Docket No. 07-7
Consumer Protection and Competition	)	
Act of 1992 Development of Competition and	)	
Diversity in Video Programming Distribution:	)	
Section 628 (c)(5) of the Communications Act:	)	
Sunset of Exclusive Contract Prohibition	)	MB Docket No. 07-29

**COMMENTS OF THE  
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION,  
ON THE NOTICE OF PROPOSED RULEMAKING  
AND INITIAL REGULATORY FLEXIBILITY ANALYSIS**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the Notice of Proposed Rulemaking (“NPRM” or “proposed rule”) in the above-captioned proceeding.<sup>1</sup> The FCC seeks comment on a proposed rule that reviews whether the prohibition on exclusive programming contracts is still needed to foster competition and diversity in the distribution of video programming services.<sup>2</sup> Additionally, the Commission seeks comment on whether and how the program access complaint system should be amended.<sup>3</sup>

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”)<sup>4</sup> to foster competitive entry into the multichannel video programming distribution (“MVPD”) market. The original drafters of the Cable Act found that vertically

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<sup>1</sup> See *Notice of Proposed Rulemaking*, CC Dkt. No. 07-7, MB Dkt. No. 07-29 (rel. February 20, 2007).

<sup>2</sup> 47 U.S.C. § 548 (c)(5); 47 C.F.R. § 76.1002 (c)(6).

<sup>3</sup> 47 U.S.C. § 548 (c)(5); 47 C.F.R. § 76.1002 (c)(6).

<sup>4</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

integrated suppliers had an incentive to favor their affiliated cable operators, and promulgated the ban on exclusive programming contracts to address this problem.<sup>5</sup> The ban on exclusive contracts prohibits affiliated cable companies from discriminating against nonaffiliated providers, in order to prevent the denial of access from reducing diversity and competition in the MVPD market.<sup>6</sup> The Commission's proposed rule asks whether this prohibition on exclusive contracts should be extended again, and also seeks comment to strengthen the current procedures for resolving program access disputes under Section 628.

Small businesses have taken an active interest in this issue since the FCC examined Section 628's original October 5, 2002 sunset date.<sup>7</sup> To best understand their concerns, Advocacy spoke with members of the National Telephone Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Coalition for Competitive Access to Content (CA2C) which represents the shared views of small and large telecom companies on this issue.<sup>8</sup> Advocacy is pleased to note that the FCC prepared an initial regulatory flexibility analysis ("IRFA") for the proposed rule which recognizes that the sunset of the ban would negatively impact small businesses and asked for comment on a number of related issues surrounding the sunset of Section 628 (c)(2)(D). However, the IRFA lacks a complete economic analysis of the rule's impact and fails to list any

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<sup>5</sup> House Committee on Energy and Commerce, H.R. Rep. No. 102-628 (House Report), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92 (Senate Report) 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 (Conference Report) 102d Cong. 2nd Sess. (1992), reprinted at Cong. Rec. H. 8308 (Sept. 14, 1992).

<sup>6</sup> 47 U.S.C. §548(c)(5).

<sup>7</sup> *Sunset Report and Order*, 17 FCC Rcd at 12161.

<sup>8</sup> CA2C members include: AT&T, Broadband Service providers Association, DirecTV, Echostar, Embarq, Independent Telephone and Telecommunications Alliance (ITTA), Knology, Media Access Project (MAP), National Hispanic Media Coalition (NHMC), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), PrarieWave, RCN, SureWest, US Telecom, and WOW! Internet Cable and Phone.

significant alternatives as required under the RFA.<sup>9</sup> To assist the FCC in its analysis, Advocacy solicited input from small entities, reviewed their recommendations, and has prepared these comments in response to the FCC's regulatory flexibility analysis.

## **1. Advocacy Background.**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory Flexibility Act ("RFA") requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>10</sup>

Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.<sup>11</sup> To this end, the RFA requires agencies to analyze the economic impact of draft regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.<sup>12</sup>

On August 13, 2002, President George W. Bush signed Executive Order 13272 requiring federal agencies to implement policies protecting small entities when writing new rules and

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<sup>9</sup> The IRFA provided by the FCC listed a number of small entities according to relevant small business size standards, but did not explain how this rulemaking would impact them, and did not offer any steps taken to minimize the significant impact on these entities or list significant alternatives considered.

<sup>10</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

<sup>11</sup> Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

<sup>12</sup> See generally, Office of Advocacy, U.S. Small Business Administration, A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act (2003), available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

regulations.<sup>13</sup> This Executive Order highlights the President's goal of giving small business owners a voice in the complex and confusing federal regulatory process by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>14</sup>

## **2. Allowing the Exclusive Contract Prohibition to Expire Will Have a Significant Impact on Small Businesses**

For small providers of video service, access to video programming is crucial to their ability to operate in today's MVPD market.<sup>15</sup> Without the ability to offer the content produced in response to consumer demand, suppliers of multichannel video programming can not exist within the MVPD market. Barriers to video content access also dilute program diversity in the distribution of video programming, to the detriment of consumers.<sup>16</sup> In recognition of this fact, Congress created program access provisions to ensure that video content owned by cable operators would be accessible to small providers and market innovators.<sup>17</sup> In recent years, both

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<sup>13</sup> Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

<sup>14</sup> *Id.* at § 3(c).

<sup>15</sup> The FCC indicates in its Notice of Proposed Rulemaking (NPRM) that these small entities may include cable and other program distributors, cable companies and systems, cable system operators, private cable operators, wireless cable systems, open video systems, cable and other subscription programming, incumbent local exchange carriers (LECs), competitive local exchange carriers (CLECs), and firms involved in electric power generation, transmission and distribution. *See Notice of Proposed Rulemaking*, CC Dkt. No. 07-7, MB Dkt. No. 07-29, pgs. 12-19 (rel. February 20, 2007).

<sup>16</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(5) (1992). *See also First Report and Order*, 8 FCC Rcd at 3366.

<sup>17</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460,

Congress and the FCC have expressed their continued belief that access to programming is a key component of the MVPD market.<sup>18</sup> When the FCC reviewed the sunset rule in 2002, the Commission decided that access to video content was essential, and extended the application of the ban on exclusive contracts for five more years.<sup>19</sup> Because the MVPD market has not changed significantly since that 2002 analysis, Congress has made further attempts to legislate a time extension for the ban.<sup>20</sup> Advocacy submits that based upon these findings an additional time extension is warranted.

The importance of keeping access open has also influenced the imposition of merger conditions dealing specifically with video programming access in recent transactions.<sup>21</sup> As the U.S. telecommunications market continues to converge, certain strategic mergers have been approved with key concessions aimed at balancing market forces and most importantly, protecting the interests of the American consumer. Most recently, the acquisition of Adelphia Communications assets by Comcast Corporation and Time Warner, Inc. has created a stronger incumbent with unprecedented regional operations clusters.<sup>22</sup> With regard to cable and media mergers, conditions that protect access to video content have been enforced to balance the

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(1992).

<sup>18</sup> Sunset Report and Order 17 FCC Rcd at 12153 (explaining that despite the decline in cable's overall market share according to FCC calculations, "that in the absence of regulation, vertically integrated programmers [still] have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected—persists in the current marketplace.")

<sup>19</sup> Sunset Report and Order 17 FCC Rcd at 12161.

<sup>20</sup> See, The Communications Consumer's Choice, and Broadband Deployment Act of 2006, S. 2682 109th Cong. (2006) (extending the program access provisions for ten more years and specifically applying them to terrestrially-delivered programming); and see, The Communications, Promotion and Enhancement Act of 2006 H.R. 5252, 109th Cong. (2006) (imposing restrictions on content providers where a cable operator has an attributable interest).

<sup>21</sup> See, Mergers, available at: <http://www.ftc.gov/bc/compguide/mergers.htm> (explaining how the FTC's concerns that Time Warner, Inc. could refuse to sell popular programming to competitors of cable TV lead to the agency's imposition of access terms on the company's vertical merger with Turner Corp.).

<sup>22</sup> *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc., Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee*, 21 FCC Rcd 8203 (2006).

market. The implementation of these conditions indicates the importance of video programming access in the midst of heightened market consolidation.<sup>23</sup>

Because a number of small businesses comprise this MVPD market, and these businesses deliver video service to other small businesses,<sup>24</sup> the RFA requires that the FCC fully analyze the economic impact of this rulemaking on those businesses before allowing the ban on exclusive programming contracts to expire. As an alternative to a five-year extension of this ban, Advocacy recommends that the FCC consider a smaller extension, such as a three-year extension, to allow time to collect sufficient data on the post-merger market. Ultimately, if the Commission finds that the expiration of the ban is a necessary regulatory goal, the RFA would require that the FCC investigate significant alternatives before the conclusion of its rulemaking.<sup>25</sup>

### **3. The FCC Did Not Prepare a Proper IRFA in this Rulemaking**

While the FCC did publish an IRFA in this rulemaking, Advocacy submits that the IRFA was inadequate. A complete IRFA requires that the Commission collect data and analyze the economic impact of its rulemakings on small entities within the U.S. telecommunications market.<sup>26</sup> Congress created the FCC pursuant to the Communications Act of 1934, (as amended by the Telecommunications Act of 1996) and granted the Commission the authority as an independent agency to regulate the interstate and international communications by radio,

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<sup>23</sup> See *Competitive Video Distributors, Consumer Interest Groups, Media Artists, Independent Programmers Unite to Form Competition, Diversity Coalition on Adelphia Transaction (CADCAT) to preserve Competitive Video Marketplace*, available at: <http://investor.rcn.com/ReleaseDetail.cfm?ReleaseID=184758>

<sup>24</sup> Advocacy estimates that these other affected small businesses may include sports bars, small entities within the hospitality industry such as bed and breakfasts and certain housing developments. Advocacy recommends the collection of data on this to better understand the effects on these small business customers.

<sup>25</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. §603(c)

<sup>26</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. §603(b)

television, wire, satellite and cable.<sup>27</sup> Based upon its position as the agency responsible for the communications infrastructure within the United States, the FCC maintains the best resources to collect and analyze data on how its proposed policy goals may or may not impact small entities that operate within its regulatory jurisdiction. Additionally, the Commission maintains the best position to offer significant regulatory alternatives as required in each IRFA, to which the public and private sectors may then respond during the appropriate notice and comment period. This process as established by the IRFA requirement is intended to enhance the rulemaking and afford outside comments the best channels for improving the final rule. Based on the abovementioned facts, Advocacy strongly suggests that the Commission publish a new IRFA that includes the relevant data.

#### **4. The Current Programming Access Complaint System Could be Amended to Minimize Negative Impacts on Small Businesses**

Small businesses have noted that the current video programming access complaint system has caused confusion and uncertainty.<sup>28</sup> The FCC's programming access dispute mechanism needs to address the disproportionate bargaining power among providers, the cumbersome discovery process, and questions regarding FCC authority concerning disputes. The current program complaint system calls for negotiation among the parties.<sup>29</sup> However, this system leaves small entities without any real negotiating capabilities, which has rendered the overall process ineffective.<sup>30</sup> In situations where an agreement cannot be reached, customers have lost

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<sup>27</sup> Telecommunications Act of 1996, Pub. L. No. 104-104 (codified as amended at 47 U.S.C. § 157 (2000)).

<sup>28</sup> In Advocacy's discussion with OPATSCO and NTCA, their representatives explained that the program access dispute rules fail to clarify the FCC's authority in dispute resolution. Additionally, these rules leave small entities without adequate negotiating power.

<sup>29</sup> 47 C.F.R. § 76.1003.

<sup>30</sup> NTCA representatives believe that the current complaint system places small entities at a disadvantage when they engage in the negotiation process.

access to the channels that they receive.

Based upon comments made by small businesses, Advocacy believes that as an alternative to the current process, the imposition of binding arbitration,<sup>31</sup> may strengthen the programming access complaint system.<sup>32</sup> Binding arbitration creates a useful alternative to dispute resolution by allowing a party or a representative to bring a dispute before an impartial or neutral arbitration panel.<sup>33</sup> Employing a binding arbitration system could help to reduce problems associated with timing and expenses experienced by small entities. Because carriage disputes maintain a certain level of sensitivity and may disrupt customer programming, Advocacy also recommends that the FCC consider establishing a new time limit to assist in the overall reform of the dispute mechanism.<sup>34</sup>

The document discovery provisions of the access complaint system are also in need of repair. The current system fails to provide the aggrieved party with access to necessary paperwork, which adds difficulty to the complaint process. Advocacy submits that the Commission should further consider the provisions related to the discovery process and seek further input from industry on how these provisions can be strengthened.

Small businesses<sup>35</sup> have also expressed confusion over the FCC's authority in programming access disputes. The fact that this issue was addressed by the Senate's telecommunications

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<sup>31</sup> Binding arbitration operates as an alternative to courts settling disputes and utilizes an independent, third party body. The arbitrator's decision is final and not subject to dispute or appeal.

<sup>32</sup> OPATSCO and NTCA believe that a binding arbitration option would assist small entities by granting them some bargaining power.

<sup>33</sup> Language providing for arbitration in video programming disputes was also offered in an amendment to Congress' Cope Act by Congressman Deal (R-GA). The amendment provided that MVPDs could opt for baseball-style arbitration following 90 days of failed retransmission. While this amendment was not ultimately adopted, a similar mechanism was also included in the FCC's News-Hughes merger conditions.

<sup>34</sup> A set time limit of 120 days would help to streamline the process has gained support from small entities working through the CA2C Coalition.

<sup>35</sup> NTCA has noted that further clarity could be provided on this issue.



reform package further underscores the importance of clarity on this issue.<sup>36</sup> Advocacy recommends that the FCC provide a clear statement with regard to what authority it maintains over access disputes to resolve any existing confusion.

## **5. Conclusion.**

Advocacy urges the FCC to consider these comments from small businesses and to consider the regulatory impact of the sunset of the ban on exclusive programming contracts. Additional alternatives may be received through small business comments on an improved IRFA.

Advocacy recommends that the Commission analyze the alternatives recommended above and other significant alternatives presented by commenters to reduce the impact on small businesses.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Cheryl Johns of my staff at (202) 205-6949 or [cheryl.johns@sba.gov](mailto:cheryl.johns@sba.gov).

Respectfully submitted,

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<sup>36</sup> The Communications Consumer's Choice, and Broadband Deployment Act of 2006, S. 2682 109th Cong. §402 (2006) (granting the Commission express authority under Title IV, Subtitle A to require the submission of a defendant's carriage agreement to the Commission in discrimination proceedings).

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March 26, 2007

cc:

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Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell  
Steven D. Aitken, Acting Administrator, Office  
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*via electronic filing*

## Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this March 26, 2007, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

/s/ \_\_\_\_\_  
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