

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

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

COMMENTS OF THE



NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Daniel L. Brenner
Michael S. Schooler
Steven F. Morris
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431

January 4, 2008

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THE ORDER AND NPRM SIGNIFICANTLY UNDERSTATES THE EFFECT OF COMPETITION IN THE VIDEO DISTRIBUTION MARKETPLACE	3
A. The Marketplace Is Intensely Competitive	3
B. The <i>Order and NPRM</i> Rests On a Faulty Analysis of the Marketplace.....	7
II. THE COMMISSION SHOULD NOT EXTEND THE PROGRAM ACCESS RULES AS PROPOSED IN THE ORDER AND NPRM.....	10
A. There Should Be Less Regulation of the Video Programming Marketplace, Not More	10
B. The Commission Should Not Adopt Any of the Section 628 Rules Proposed In the <i>Order and NPRM</i>	12
CONCLUSION.....	18

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

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

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high speed Internet access after investing more than \$110 billion since 1996 to build a two-way interactive network with fiber optic technology. Cable companies also provide voice services to millions of American consumers.

In the *Order and NPRM*, the Commission extended Section 628(c)'s prohibition on the use of exclusive programming arrangements by vertically integrated program networks for a period of five years. It also adopted new procedures to govern program access complaints under Section 628. In addition, the Commission sought comment on the need for additional rules

¹ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution; Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, FCC 07-169 (rel. Oct. 1, 2007) (*Order and NPRM*), *appeal pending sub nom. Comcast Corp. v. FCC*, Case No. 07-1487 (D.C. Cir. filed Dec. 3, 2007). In light of the diversity of NCTA's membership and the importance of the issues raised in the *Order and NPRM*, a number of NCTA members will be filing separate comments that address issues of particular concern to those companies.

under Section 628, including possible rules regulating the manner in which programming is offered to MVPDs.

The Commission's continuing interest in additional regulation of the video programming marketplace is difficult to understand. The current marketplace for multichannel video programming services bears no resemblance to that which existed in 1992, when Congress adopted Section 628. At that time, cable operators served well over 90 percent of MVPD customers. Today, virtually all customers have a choice of at least three providers and one out of three customers takes service from a competitor to the incumbent cable operator. Growth in the wholesale programming marketplace also has been explosive. As Commissioner McDowell recently observed, "the unwritten story here is that, back then, fewer than 100 national programming networks existed; now there are about 550. That's more diversity, not less."²

Given this vibrant competition, this is hardly the time for the Commission to impose new regulation under Section 628. To the contrary, it is time for a less regulatory, more market-driven approach that promotes regulatory parity and respects the limits of the Commission's legal authority. To the extent that the Commission reached a different conclusion in its recent decision to retain Section 628's prohibition on exclusive agreements, it relied on a flawed analysis that should not serve as the basis for any future decision in this proceeding.

² *Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Fourth Report and Order and Further Notice of Proposed Rulemaking, Statement of Commissioner Robert M. McDowell Dissenting (rel. Dec. 18, 2007) (McDowell Ownership Statement).

I. THE ORDER AND NPRM SIGNIFICANTLY UNDERSTATES THE EFFECT OF COMPETITION IN THE VIDEO DISTRIBUTION MARKETPLACE

A. The Marketplace Is Intensely Competitive

As the Commission repeatedly has found in its annual video competition reports, there is intense competition among MVPDs.³ Year after year the share of MVPD customers served by traditional cable operators declines and the share of customers served by cable's competitors increases. In 1996, one out of ten multichannel video customers purchased their service from a competitor to their incumbent cable operator. Today, one out of three do so.⁴

DBS providers have emerged as prodigious competitors to cable operators. DirecTV has more than 16 million subscribers, making it the second largest MVPD.⁵ EchoStar, with more than 13 million subscribers, is now the third largest MVPD.⁶ The success these two companies have enjoyed far exceeds what Congress could reasonably have expected when it first adopted Section 628 fifteen years ago.

In this competitive environment, several aspects of the disparate regulatory regimes governing DBS and cable distort competition rather than promote it. For example, DBS providers are not subject to any of the Commission's rate regulations and therefore they have more flexibility than cable operators with respect to packaging their retail services. DBS providers also are not subject to the requirements of Section 628, so they have no program access

³ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, at ¶ 5 (2006) ("Competition in the delivery of video programming services has provided consumers with increased choice, picture quality, and greater technical innovation."). NCTA provided an extensive summary of the state of video competition in its comments submitted in the proceeding on the Commission's 13th video competition report. See Comments of the National Cable & Telecommunications Association, MB Docket No. 06-189 (filed Nov. 29, 2006) (NCTA Video Competition Comments). Our comments here provide a brief overview of the marketplace, with particular emphasis on developments since the 2006 comments.

⁴ *Order and NPRM* at ¶ 23 (finding the cable operators serve an estimated 67 percent of the MVPD marketplace).

⁵ Press Release, *The DirecTV Group Announces Third Quarter 2007 Results* (Nov. 7, 2007) (reporting 16.6 million subscribers).

⁶ Press Release, *EchoStar Reports Third Quarter 2007 Results* (Nov. 9, 2007) (reporting 13.7 million subscribers).

obligations.⁷ The Commission's recent decisions prohibiting the use of exclusive access agreements in multiple dwelling units (MDUs)⁸ and establishing a horizontal ownership cap,⁹ both of which apply only to cable operators, will only serve to exacerbate these distortions.

The entry of telephone companies with the resources of AT&T and Verizon into the video marketplace ensures that the competitive trends affecting cable's share of MVPD customers are likely to continue. Verizon already provides FiOS TV service to more than 700,000 subscribers, while AT&T is adding more than 10,000 subscribers a week for its U-Verse video service.¹⁰ Both companies have plans to expand their video footprint significantly in the next few years. In carrying out those plans, they will benefit from the extremely favorable regulatory regime that the Commission has established for new cable entrants. In the last year alone, the Commission has issued orders that provide new cable entrants with regulatory

⁷ DirecTV is currently subject to program access requirements as a result of a condition imposed by the Commission when News Corporation acquired an interest in the company. *Application of General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp., Ltd., Transferee, for Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 531-32, ¶ 127 (2004). News Corp. is now selling its interest to Liberty Media, which has agreed to bound by that same condition. *Application of News Corp. and the DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Consolidated Application for Authority to Transfer Control at 2 (filed Jan. 29, 2007).

⁸ *Exclusive Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 (rel. Nov. 13, 2007) (*MDU Order*). NCTA does not believe that the Commission has authority to regulate MDU access agreements under Section 628 and it intends to appeal this order.

⁹ News Release, *FCC Adopts Rules to Promote Video Programming Diversity by Ensuring New Video Providers Can Enter and Compete in Video Market*, MB Docket No. 92-264 (rel. Dec. 18, 2007).

¹⁰ Press Release, *Verizon Reports Continued Success in 3Q 2007* (Oct. 29, 2007) (reporting 717,000 FiOS TV customers); Press Release, *AT&T Delivers Strong Third Quarter Results* (Oct. 23, 2007) (reporting 126,000 U-Verse subscribers). While we focus on the two largest telephone companies here, smaller telephone companies increasingly are adding video programming to the mix of services they offer their customers. See, e.g., Press Release, *More Rural Telcos Sign on to IP-PRIME: Innovative IPTV Solution Gains Wider Adoption*, National Rural Telecommunications Cooperative, Oct. 24, 2007.

assistance in their dealings with local franchise authorities,¹¹ building owners,¹² and programmers.¹³

Significantly, both the DBS providers and the telephone companies have adopted strategies that focus on quantity and quality of programming, rather than focusing solely on price. Verizon, for example, recently announced that it will offer over 150 HD channels by the end of next year.¹⁴ DirecTV also has based its marketing on the supposed superiority of its HD offerings.¹⁵ Both companies also claim to make available programming that is not found on any cable system.¹⁶ When the marketplace has reached a point where new and established competitors claim that they have better programming than incumbent cable operators, it is almost impossible to justify retention of the existing regulation of cable-affiliated programming, let alone expansion of those regulations.

There also are an increasing number of sources of competing programming. As the Commission found in the *Order and NPRM*, 237 new networks were introduced in the last five years.¹⁷ Most of these networks have no affiliation with a cable operator and many of them are

¹¹ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2006).

¹² *MDU Order* at ¶ 1.

¹³ *Order and NPRM* at ¶¶ 1-2 (extending exclusivity prohibition and adopting new complaint procedures).

¹⁴ *Verizon Targets 150 HD Channels in 2008*, Steve Donohue, Multichannel News, Nov. 1, 2007, available at <http://www.multichannel.com/article/CA6496411.html?q=verizon>.

¹⁵ A number of cable operators have challenged the accuracy of DirecTV's claims. *See, e.g., Judge Bars DirecTV From Running Anti-Cable Ads*, Linda Moss, Multichannel News, Aug. 17, 2007, available at <http://www.multichannel.com/article/CA6469831.html?industryid=47202&q=time+warner+directv+hd>. But the relevant point for purposes of this proceeding is that the quantity and quality of programming is an issue for which there is fierce competition among MVPDs.

¹⁶ *See* NCTA Program Access Reply Comments at 7 (describing DirecTV's "Sunday Ticket" football package and Verizon's "FiOS 1" local news channel).

¹⁷ *Order and NPRM* at ¶ 17.

serving segments of the marketplace that previously may have been underserved.¹⁸ In addition, the upcoming DTV transition should provide additional programming choices. Broadcasters have been given digital spectrum in which they can provide not only their primary signal, but also a number of multicast channels. Many broadcasters have indicated that they plan to use these multicast channels to offer additional programming options, and already a new “network” has been formed that will offer programming to broadcasters to fill these multicast channels.¹⁹ As Commissioner McDowell recently stated, “today’s video market will only become more competitive as broadcasters beam new HDTV and multi-cast programming, over-the-air, for free”²⁰

In addition, there is now a wide array of programming available over the Internet. According to one recent report, 16 percent of American households already watch at least some television programming over the Internet, and that number is expected to grow over time.²¹ Not only does the growth in broadband Internet access services mean that existing programmers have an alternative distribution mechanism for their programming, it also has spurred the creation of new programming services. In some cases these services offer programming that is available on cable systems, *e.g.*, streaming of old and new shows from popular series,²² and in some cases

¹⁸ *Id.* at ¶ 32.

¹⁹ *New .2 Network Inks Sony Deal*, Jon Hemingway, *Broadcasting & Cable*, Nov. 2, 2007, available at <http://www.broadcastingcable.com/article/CA6496983.html>.

²⁰ McDowell Ownership Statement at 2.

²¹ Press Release, *More Consumers Are Watching TV Broadcasts Online*, The Conference Board, Oct. 15, 2007, available at http://www.conference-board.org/utilities/pressDetail.cfm?press_ID=3233.

²² *See, e.g., CenturyTel brings Broadband TV to 25 states*, Tim McElligott, *Telephony*, Nov. 1, 2007, available at http://telephonyonline.com/home/news/centurytel_broadband_tv_110107/; *Hulu Hullabaloo: Early Reviews Positive for NBCU-News Corp. JV*, Anne Becker, *Broadcasting & Cable*, Nov. 3, 2007, available at <http://www.broadcastingcable.com/article/CA6497232.html?q=hulu>.

these services offer completely original programming not available anywhere else.²³

Increasingly, this programming will be available not just on computers or televisions in the home, but also on mobile devices.²⁴ With the Internet marketplace working to expand the breadth of programming choices and to create alternative distribution models to the subscription-based services offered by cable operators, the Commission should be extremely hesitant to impose new regulatory obligations on programmers or cable operators.

B. The *Order and NPRM* Rests On a Faulty Analysis of the Marketplace

The Commission's decision in the *Order and NPRM* to extend the exclusivity ban was premised on a flawed analysis of the video programming marketplace. The Commission acknowledged the increasing share of consumers that are served by DBS and other competitors to cable and the increasing variety of programming available from non-cable sources.²⁵ Yet instead of concluding that the exclusivity prohibition no longer was needed to foster competition, the Commission mistakenly retained the prohibition on the spurious ground that increased consolidation and clustering of cable systems gives cable operators the incentive and ability to withhold "must have" programming from competitors.²⁶ For a variety of reasons, the Commission's analysis is wrong.

The Commission's basic theory is that there is some programming owned by cable operators that is vital to competitors and therefore exclusivity should be prohibited with respect to all cable-affiliated satellite-delivered programming. This theory runs counter to the purpose of the statute and ignores the facts on the ground. The exclusivity prohibition was adopted at a time

²³ See, e.g., Press Release, *Joost launches commercially*, May 1, 2007 (describing Joost as "the world's first broadcast quality Internet television service.").

²⁴ See, e.g., *AT&T to Offer Eight Mobile TV Nets*, Todd Spangler, Multichannel News, Dec. 14, 2007, available at <http://www.multichannel.com/article/CA6513031.html?industryid=47198&q=AT%26T+mobile>.

²⁵ *Order and NPRM* at ¶ 50.

²⁶ *Id.* at ¶ 50-59.

when there were many fewer programming networks than today, and when a much higher percentage of those networks were owned by cable operators. It was intended to be a limited restriction, applicable to all cable-affiliated satellite-delivered programming, on the theory that competitors would be assured of being able to obtain a critical mass of programming to establish a foothold in the marketplace.²⁷ In the face of substantial evidence that this objective has been achieved and that competition is now firmly established, the *Order and NPRM* erroneously reinterpreted Section 628 as a statute that is focused on the availability of “must have” programming, a concept that does not exist anywhere in the statute.

Moreover, even if the desirability of certain programming were relevant, the Commission has fashioned a ridiculously overinclusive standard for indentifying such programming. The Commission’s assertion, for example, that HBO is “must have” programming because there is no show quite like “The Sopranos” proves far too much.²⁸ Virtually every programming service has programming for which some subset of viewers would say there is no adequate substitute. But it is surely not the case that every such network is so vital that its presence or absence is necessary to the competitive survival of unaffiliated MVPDs.

Rather than identifying “must have” programming based on hard data regarding the factors that influence subscription decisions, the Commission merely repeats its assertion from the *2002 Extension Order* that the impact of withholding a national programming network would be the same as the impact of withholding regional sports networks (RSNs).²⁹ That argument is

²⁷ NCTA Program Access Comments at 2.

²⁸ *Order and NPRM* at ¶ 38.

²⁹ *Id.* at ¶ 38, citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution*, Report and Order, 17 FCC Rcd 12124, 12139, ¶ 33 (*2002 Extension Order*). The only empirical evidence referred to in the *2002 Extension Order* were allegations made by DirecTV and EchoStar regarding the effect of not having access to a Comcast-owned terrestrially-delivered RSN in Philadelphia. Five years later, the Commission’s argument once again is based largely on this one situation and a similar situation in San Diego.

even less convincing than it was five years ago, however, given the significant growth in programming networks that has taken place during that period. Even if it were true that local sports programming possesses a unique set of characteristics that make RSNs “must have” programming, the Commission presents absolutely no evidence to support its theory that any network with ratings comparable to a RSN must be equally vital to competitors.

The record is equally lacking with respect to the Commission’s suggestion that clustering and consolidation increase the incentive to withhold national programming networks. Unable to point to any direct evidence that national programming networks have attempted to withhold programming from MVPDs, the Commission resorts to a statistical analysis that purports to demonstrate that a national programming service would be a rational strategy if as little as 1.9 percent of subscribers were to switch to cable as a result of the withholding.³⁰ But the Commission’s supporting analysis – which consists of a single paragraph in Appendix C of the *Order and NPRM* – is wholly inadequate to support this statement. The Commission fails to identify the channels that were studied, fails to provide any evidence that any significant number of customers – much less a critical mass of customers – would, in fact, change their choice of provider based on the presence or absence of these channels, and fails to provide the underlying data on which this analysis was based.³¹ It is impossible to determine its validity and therefore impossible to rely on it.³²

³⁰ *Order and NPRM* at ¶ 52, Appendix C at 21.

³¹ According to the Media Bureau web site, the Commission did not subject the analysis in Appendix B or Appendix C of the *Order and NPRM* to peer review as it has done with other statistical studies the Bureau has prepared. Although NCTA has concerns with how the Commission has conducted peer review in some of these prior cases (*e.g.*, by having the “peer review” of an “à la carte” study conducted by an FCC staff member, who may have strong incentives to support a result favored by the FCC leadership), the failure to request any review in this case makes its reliability especially problematic.

³² In addition to the flawed analysis, it is difficult to reconcile the Commission’s stated concerns regarding clustering and consolidation with its recent decisions allowing AT&T and Verizon to swallow up a large segment of the telecommunications industry. As a result of mergers approved by the Commission in the last

II. THE COMMISSION SHOULD NOT EXTEND THE PROGRAM ACCESS RULES AS PROPOSED IN THE ORDER AND NPRM

In the *Order and NPRM*, the Commission sought comment on a variety of proposals to expand its program access regulations. As we explain below, there should be less regulation of this marketplace given the degree of competition that exists, not more. Moreover, none of these proposals are consistent with the Commission's limited authority under the Act.

A. There Should Be Less Regulation of the Video Programming Marketplace, Not More

Section 628 is not a grant of unlimited authority pursuant to which the Commission may address all issues related to video programming.³³ As explained above, it was intended to be limited to a specific class of program networks (satellite-delivered networks affiliated with cable operators) for a limited period of time and for the specific purpose of ensuring that competitors could gain a foothold in the marketplace by guaranteeing that they had access to a critical mass of programming, which was largely owned by cable operators.³⁴

The competition Congress was trying to foster through Section 628 has flourished and it is irreversible. To the extent that disparate treatment of MVPDs ever was warranted, there is no basis whatsoever for it to be preserved going forward now that the two large DBS companies are fully competitive, ubiquitously available alternatives to cable. As Chairman Martin has stated, it

three years, these two companies now serve over 100 million wireline customers and 129 million wireless customers, well over a majority of customers in both markets. Those wireline customers are highly clustered, as AT&T and Verizon both provide nearly ubiquitous service throughout large multi-state regions. In contrast, even after decades of mergers and acquisitions, no cable operator has a service area that is as large or as clustered as AT&T or Verizon. And in the wireless context, the Commission just recently eased its merger review standards to enable AT&T to control an even larger block of spectrum than previously permitted in a number of markets. *Applications of AT&T, Inc. and Dobson Communications Corp. for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion and Order, FCC 07-196 (rel. Nov. 19, 2007).

³³ NCTA Program Access Reply Comments at 4.

³⁴ Although Congress was concerned about the possibility that a cable operator might withhold programming, there was no evidence that cable operators actually had done so.

is important to “achieve regulatory parity by applying a consistent regulatory framework across platforms.”³⁵

Where competition has taken hold in a marketplace, the benefits of competition are almost always best achieved by encouraging regulatory parity through deregulation rather than by imposing existing regulations on additional competitors. This type of deregulatory approach is particularly warranted where First Amendment considerations exist, as they do here. By their very nature, program access requirements implicate the constitutional rights of programmers because they dictate to whom programming must be sold and/or the terms and conditions under which it must be sold. Although the courts rejected a facial challenge to Section 628 on the ground that Congress appropriately balanced the cost of such restrictions with the benefits from “fairer competition” when it adopted Section 628 in 1992,³⁶ any new rules adopted by the Commission would be subject to renewed scrutiny in light of the substantial competition that currently exists in the marketplace.

To move to greater regulatory parity between cable and DBS, the Commission should consider loosening the program access rules applicable to cable operators. The Commission’s decision to extend the exclusivity prohibition for another five years was a step in the wrong direction. To ameliorate the harm from this decision, MVPDs should be able to make a showing, as proposed in the *Order and NPRM*, that a local market is sufficiently competitive to warrant

³⁵ *Telecommunications Services Inside Wiring*, CS Docket No. 95-184, Report and Order and Declaratory Ruling, Statement of Chairman Kevin J. Martin (rel. June 8, 2007). Other commissioners have expressed similar positions. See, e.g., *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, Statement of Commissioner Deborah Taylor Tate (“I hope that we will continue to implement policies that promote parity across platforms. As new services and providers emerge, the FCC should seek to apply a light but equitable regulatory touch to ensure fair competition for all participants.”); *Id.*, Statement of Commissioner Robert M. McDowell (“No governmental entities, including those of us at the FCC, should have any thumb on the scale to give a regulatory advantage to any competitor.”).

³⁶ *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996).

elimination of the exclusivity prohibition.³⁷ On average, competitors to traditional cable operators have captured 33 percent of the marketplace. And the figure is much higher in some local markets. Just as the Commission allows incumbent LECs to petition for forbearance from wholesale obligations, cable operators should be given the same opportunity with respect to their obligations under Section 628.

B. The Commission Should Not Adopt Any of the Section 628 Rules Proposed In the *Order and NPRM*

Because DBS providers are not subject to Section 628, it is clear that the goal of regulatory parity would be undermined by adopting any of the additional rules under Section 628 that the Commission proposed in the *Order and NPRM*. Broad rules covering the manner in which cable program networks are packaged and sold to MVPDs, including rules that would address “tying” of programming, likely would be challenged as being beyond the Commission’s limited authority under Section 628(b) or any other provision of the Act. The same legal concerns apply to many of the other proposals in the *Order and NPRM*, as we explain below.

Terrestrial Programming. In the *Order and NPRM*, the Commission solicits comment on whether it should extend the program access rules to terrestrial programming and it identifies a number of statutory provisions upon which it might rely.³⁸ Because none of these provisions provide the Commission with the necessary statutory authority, the Commission has no legal basis on which to extend the rules as proposed.

As an initial matter, there is no basis in Section 628(b) for expanding the rules to cover terrestrial programming. As the Commission notes in the *Order and NPRM*, “the plain language of Section 628(b), like Section 628(c)(2)(B)” makes clear that it is limited to satellite delivered

³⁷ *Order and NPRM* at ¶ 114.

³⁸ *Id.* at ¶ 116.

programming.³⁹ Had Congress intended for the Commission to have authority to impose these requirements on terrestrial programming, it would have included such authority in Section 628(b).⁴⁰

Nor do any of the other statutory provisions identified by the Commission provide the necessary authority. The exercise of authority under Section 4(i), for example, must be ancillary to “the Commission’s effective performance of its statutorily mandated responsibilities.”⁴¹ Given that Congress expressly limited the scope of Section 628 to satellite-delivered programming, there is no basis on which the Commission could find that the performance of its statutory responsibilities requires regulation of terrestrial programming.

Courts have reached a similar conclusion with respect to Section 303(r), finding that it provides the Commission authority to carry out other provisions of the Act, but no independent authority beyond that.⁴² The same is true for Section 706, which the Commission long has recognized “does not constitute an independent grant of forbearance authority or of authority to employ other regulatory methods.”⁴³ Similarly, while the Supreme Court has recognized that Section 201(b) gives the Commission authority to “carry out the provisions of this Act,” the Court made clear that this provision does not allow the Commission to regulate in areas over

³⁹ *Id.*

⁴⁰ To the extent the Commission is concerned that companies are attempting to use terrestrial programming to evade the rules covering satellite programming, it already has stated that Section 628(b) provides it with authority to address this situation. *Order and NPRM* at ¶ 117, n.520.

⁴¹ *American Library Association v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005); *see also Motion Picture Association of America v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

⁴² *MPAA v. FCC*, 309 F.3d at 806; *California v. FCC*, 124 F.3d 934, 941 (8th Cir. 1997).

⁴³ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, 13 FCC Rcd 24011, 26044 (1998). Moreover, any authority the Commission may possess to act pursuant to Section 706(b) is conditioned on a finding that broadband deployment is not taking place in a reasonable and timely fashion. The Commission has concluded just the opposite in each of its Section 706 reports.

which it has not explicitly been given authority to do so.⁴⁴ In sum, where Congress has expressly constrained the Commission's authority, none of these provisions empower the Commission to ignore this congressional constraint.

Finally, the Commission asks whether Sections 612(g) or 616(a) might provide the necessary authority to expand the program access rules beyond their current limits.⁴⁵ While Section 612(g) does give the Commission authority to adopt "additional rules necessary to provide diversity of information sources," that provision is triggered only if cable systems are "subscribed to by 70 percent of the households to which such systems are available."⁴⁶ As the Commission has apparently – and correctly – concluded, there is no reliable data that would support such a finding.⁴⁷ Moreover, even if there is a change in marketplace trends that would enable it to make such a finding in the future, Section 612(g) only gives the Commission additional authority with respect to leased access.

Section 616(a), the program carriage section of the Act, addresses issues of how programmers obtain carriage on a cable system.⁴⁸ In other words, its focus is on the rights of programmers, not competitive distributors. So it involves a completely different question than what is at issue in the *Order and NPRM*, which is how a competitive MVPD obtains carriage of a particular type of programming. In sum, none of the provisions identified by the Commission provide it with authority to regulate terrestrial programming.

⁴⁴ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 381 n.7 (1999); see also *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986).

⁴⁵ *Order and NPRM* at ¶ 116.

⁴⁶ 47 U.S.C. § 612(g).

⁴⁷ See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 06-189, Statement of Commissioner Deborah Taylor Tate ("I am now able to approve this item concluding that the 70/70 test has not been met for the 2006 Report.").

⁴⁸ 47 U.S.C. § 616(a).

Complaint Procedures. In the *Order and NPRM*, the Commission conducted a detailed review of the rules governing program access complaints and adopted a number of changes to those rules.⁴⁹ Notwithstanding this extensive treatment of program access complaint procedures, the Commission solicits comment on the need for additional changes to these procedural rules. In particular, it asks whether the Commission should adopt a mandatory arbitration requirement or standstill provisions to govern parties while a complaint is pending.⁵⁰

Neither proposal should be adopted. With respect to a mandatory arbitration requirement, there is no basis in the Act for the Commission to import this concept into the program access regulations. Nothing in Section 628 or any other section of the Act suggests the Commission may outsource its responsibilities for program access complaint resolution or fact-gathering to a third party arbitrator. In the absence of any express authority, the Commission has no power to delegate its responsibilities to third parties.⁵¹ Moreover, given the extremely limited number of program access complaints that have been filed, there is no Commission workload issue that could possibly justify offloading these cases to a private arbitrator.

Even a more limited form of arbitration, where the arbitrator would consider “final offers” from the parties regarding the appropriate remedy after a Commission finding of discrimination,⁵² raises concerns. In theory, the informal nature of arbitration is intended to reduce costs for the parties and provide a more expeditious resolution of a dispute. But none of those benefits would result in a case where the parties and the Commission already have devoted significant resources to the litigation of an MVPD’s discrimination claim. In addition, limiting

⁴⁹ *Order and NPRM* at ¶ 83.

⁵⁰ *Id.* at ¶ 134-37.

⁵¹ *See, e.g., USTA v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

⁵² *Order and NPRM* at ¶ 134.

the decisionmaker to a choice between only two options would seem much more likely to produce an end result that includes unreasonable terms and conditions than would be case under a normal regulatory process. The risk of an unreasonable end result will be even higher if the Commission does not provide detailed guidance as to exactly how the arbitrator is supposed to decide which offer to accept.

The Commission also should not impose standstill requirements to preserve the status quo while a dispute is pending. As cable operators have explained previously, there is no legal or policy reason for the Commission to interfere with commercial agreements in this way.⁵³ Where warranted, there is well established Commission precedent for granting injunctive relief and nothing about the program access context suggests that a different approach is warranted.

Shared Headends. The *Order and NPRM* recounts a number of allegations made by rural telephone companies regarding alleged problems they have encountered in negotiating with programmers.⁵⁴ Given the lengths to which many of these same companies have gone to avoid negotiating with potential competitors in the voice market,⁵⁵ these allegations should be viewed by the Commission with a healthy dose of skepticism.

The main concern identified by the Commission is the claim that programmers are unreasonably denying rural phone companies the ability to receive programming through a shared headend.⁵⁶ From a programmer perspective, the use of shared headends raises concerns about the unauthorized reception and redistribution of programming that are best addressed

⁵³ *Id.* at ¶ 136.

⁵⁴ *Id.* at ¶ 133.

⁵⁵ See, e.g., *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, WC Docket No. 06-55, 22 FCC Rcd 3513 (2007).

⁵⁶ *Order and NPRM* at ¶ 133.

through commercial negotiations, rather than regulation. As both Congress and the Commission have recognized, programmers have a bona fide interest in preventing the unauthorized reception and distribution of their services.⁵⁷ A programmer not only needs to ensure that its content is distributed pursuant to valid affiliation agreements, but also has a strong and valid interest in knowing the precise communities and geographical areas where its content is being distributed. This knowledge helps to ensure that territorial blackout and other restrictions imposed by content owners are honored and that commitments to advertisers are being met.

Moreover, programmers are entitled to negotiate contractual assurances that will protect against degradation of the technical quality of their services and ensure that such services are delivered with appropriate security and encryption. For example, if two or more telephone companies were to share a headend for their video services, it is critical that secure paths, including appropriate encryption and copy protection, are established for the transport of the programming to the various systems served off the headend. Another concern that must be addressed is the allocation of rights and responsibilities among the programmer, the shared headend owner (which may be a reseller, rather than a MVPD), and the various cable systems served by the shared headend. Issues that would be relatively straightforward in a bilateral agreement, e.g., the consequences of delinquent payments, could be quite complicated in the multilateral agreement that might be needed to implement this type of arrangement.

In light of the ongoing private negotiations to address these issues,⁵⁸ the Commission should avoid imposition of unnecessary regulatory restrictions that could undermine marketplace

⁵⁷ See, e.g., *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, ¶ 41 (1998) (recognizing that unauthorized reception of video signals is a serious matter); *CellularVision of New York, LP v. SportsChannel Associates, Program Access Complaint Pursuant to 47 C.F.R. § 76.1003*, Memorandum Opinion and Order, 10 FCC Rcd 9273, ¶ 28 (1995) (recognizing, in program access context, that it is not unreasonable for programmer to demand adequate signal security assurances from MVPD).

⁵⁸ See *Order and NPRM* at ¶ 133.

efforts to develop terms and conditions that will facilitate shared headend deployment while protecting programmers' legitimate interests. Allowing the marketplace to operate makes particular sense in this case because Section 628 provides the Commission no authority to compel the sale of programming to third parties that resell or redistribute the programming to MVPDs. Rather, the program access rules are limited to contractual relationships between covered programmers and MVPDs that intend to provide such programming directly to subscribers.⁵⁹

CONCLUSION

For all the reasons explained above, the Commission should not expand the program access rules as proposed in the *Order and NPRM*. Rather, the Commission should promote regulatory parity by establishing a process by which cable operators can seek relief from these rules.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Michael S. Schooler
Steven F. Morris
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431

January 4, 2008

⁵⁹ *Wizard Programming, Inc. v. Superstar/Netlink Group, LLC et al.*, 12 FCC Rcd 22102 (CSB, 1997) (standing under Section 628 limited to entities seeking to purchase programming for sale directly to consumers).