

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

In the Matter of)

Implementation of Section 302 of)
the Telecommunications Act of 1996)

Open Video Systems)

CS Docket No. 96-46

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PETITION FOR RECONSIDERATION
OF RAINBOW PROGRAMMING HOLDINGS, INC.

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PETITION FOR RECONSIDERATION

Rainbow Programming Holdings, Inc. ("Rainbow"),^{1/} by its attorneys and pursuant to Section 1.429 of the Federal Communications Commission's Rules,^{2/} hereby respectfully requests reconsideration of certain aspects of the Commission's decision in the above-captioned proceeding.^{3/} Specifically, Rainbow requests that the Commission reconsider its decision to extend the program access provisions of the Cable Television Consumer

^{1/} Rainbow, a wholly-owned subsidiary of Cablevision Systems Corporation, is the managing partner of several partnerships that provide a unique mix of national and regional video programming to millions of subscribers across the country. Rainbow's programming services include American Movie Classics; Bravo; News 12 Long Island, News 12 Westchester, News 12 New Jersey, and News 12 Connecticut (regional news channels); MuchMusic; eight regional SportsChannel Services; NewSport; the national backdrop sports service of Prime Network; The Independent Film Channel; and PRISM, which is a premium sports and movie service serving the Philadelphia market

^{2/} 47 C.F.R. § 1.429

^{3/} In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order, FCC 96-249 (rel June 3, 1996) ("Order").

Protection and Competition Act of 1992,^{4/} and the Commission's rules thereunder,^{5/} to video programming providers ("VPPs") on open video systems ("OVS").

INTRODUCTION AND SUMMARY

In establishing the OVS framework, Congress intended to benefit consumers by fostering competition among video programmers on the OVS platform. With the Commission's decision to extend and expand the program access provisions of the 1992 Cable Act to programmers in the OVS environment, any incentive for programmers to use OVS platforms has been vitiated, as each programmer will be forced to compete against itself on OVS. If the Commission truly wishes to foster the development of OVS as a new mechanism for the distribution of diverse and innovative programming, it should specifically hold that VPPs may utilize OVS to offer their unique video programming fare without implicating the Program Access Rules.

Rainbow is uniquely positioned to develop new programming for open video systems, and as the managing partner of several partnerships that provide hundreds of millions of hours of programming to consumers, Rainbow eagerly seeks a strong and independent voice in the video marketplace. For over fifteen years, Rainbow has been at the forefront of niche programming development, delivering high quality sports, entertainment, and news to millions of U.S. television homes, over varied media including cable, SMATV, MMDS, and

^{4/} Pub. L. No. 102-385, 106 Stat. 1460 (codified at scattered sections of 47 U.S.C.) ("the 1992 Cable Act"). The program access provisions of the 1992 Act, contained in Section 19, were added to Section 628 of the Communications Act of 1934, codified at 47 U.S.C. § 548.

^{5/} 47 C.F.R. §§ 76.1000-76.1004 ("the Program Access Rules").

DBS. Rainbow pioneered innovative concepts like local cable news and regional sports. In addition, Rainbow is actively exploring the programming opportunities of new media, such as interactive and on-line services. As an innovative and experienced video programmer, Rainbow anticipated that OVS would expand distribution of its current offerings and create opportunities for new and exciting formats, including local and personalized programs.^{6/}

Open access is the bedrock tenet of the OVS construct.^{7/} OVS, unlike other video delivery mechanisms, was designed to allow video programming providers unfettered access to consumers. Because video programmers were to compete vigorously with each other, OVS was fashioned to unleash the distribution of diverse video programming, fostering the robust video marketplace that is one of the basic premises of the 1996 Act.^{8/} Thus, under the OVS framework, Rainbow and all other VPPs would stand or fall based upon the unique programming each offers -- not due to any regulatory handicapping or favored status. Consumers would be the ultimate winners as the programming pie expands.

^{6/} Open video systems hold the promise of the application of new technologies that would allow Rainbow to capitalize on its strengths and experience providing new and exciting program services to local communities. OVS should offer a programmer's dream: direct access to the consumer unimpeded by an intermediary.

^{7/} See 1996 Act, Sec. 302(a), codified at 47 U.S.C. § 573(b)(1) (outlining regulatory construct relying on open access and non-discrimination). See also Order at ¶ 3 (noting that the OVS model depends on diverse programming choices), ¶ 40 (noting that independent programmers must be allowed to distribute on the OVS platform) and ¶ 51 (noting that the Act generally prohibits discrimination).

^{8/} See, e.g., H. Rep. No. 458, 104th Cong., 2d Sess. 178 (1996) ("Conference Report").

The Order turns this scheme upside down by extending the Program Access Rules to OVS video programming providers. The Order does not encourage Rainbow and other VPPs^{9/} to develop and distribute video programming widely through OVS. Indeed, by extending the Program Access Rules to the OVS sphere -- where they are clearly inapplicable given the regulatory framework Congress established for OVS -- the Order risks impeding the development of diversity and competition among OVS programmers, and threatens the successful deployment of OVS. Such a result is fundamentally contrary to the plain language of the Telecommunications Act of 1996^{10/} and the critical policy bases upon which it rests.

While Congress has spoken as to the areas in which it believes the program access provisions have some role in promoting policy goals, it has also limited those areas by virtue of its directives regarding OVS. Thus, Congress expressly provided that the program access provisions of Section 628 should be applied to operators of open video systems as they apply to cable operators.^{11/} Rather than apply these Rules to OVS operators in the same manner as they apply to cable operators, however, the Commission decided, with no rational policy

^{9/} Specifically, video programming providers that are not affiliated with the incumbent local exchange carrier ("LEC").

^{10/} Pub. L. No. 104-102, 110 Stat. 56, approved Feb. 8, 1996 (codified at scattered sections of 47 U.S.C.) ("1996 Act" or the "Act").

^{11/} 1996 Act, Sec. 302(a), codified at 47 U.S.C. § 573(c)(1) (applying the Program Access Rules "to any operator of an open video system" as they apply "to a cable operator").

basis or genuine record evidence, to extend the Rules to video programmers utilizing OVS.^{12/}

The Commission has failed to explain why or how its new rules can be squared with the OVS open access framework. Nowhere does the Order explain how the new rules are consistent with the bedrock premise of open access, nor how the new rules will further inter-programmer competition. The Commission may have wedged the OVS "peg" into the Program Access Rules "hole," but Congress intended a different result. The Commission's latitude in implementing the statutory mandate does not extend to fashioning rules that undermine the statute itself.

The Commission's role is not to ensure that OVS is deployed at all costs; rather, it is to implement the mandate of the 1996 Act. Rainbow remains extremely interested in exploring the potential of OVS and other new video delivery mechanisms so as to provide consumers with the benefits of its vast experience in the programming marketplace and the unique and exciting products it has developed. Congress intended for the Commission to

^{12/} Order at ¶ 195. See also id. at ¶ 182. As Congress intended, the Order applies the program access provisions to OVS operators and their affiliates in the same manner as they are currently applied to cable operators. Id. at ¶ 175. However, the Commission then extends the Program Access Rules to OVS programming providers, in a complicated and essentially arbitrary manner, by concluding that VPPs on open video systems are multichannel video programming distributors ("MVPDs") under Section 602(13) of the Communications Act. Id. at ¶¶ 167, 182, 195-96. Under these rules, a vertically integrated satellite programmer that proposes to provide its own programming directly to subscribers by purchasing channel capacity on an OVS platform will violate the rules unless it sells the same programming to its competitors on the same platform. Id. at ¶¶ 183, 194. Relying on nothing more than its own DBS decision, under entirely different regulatory parameters, the Commission devises a complicated array of cross-vertical proscriptions and exceptions. See Implementation of Cable Television Consumer Protection and Competition Act of 1992, 10 FCC Rcd 3105 (1994) ("DBS Order"). See also Order at ¶ 187 (the adventures of "Red Provider" and "Yellow Channel").

adopt rules encouraging programmer participation consistent with the OVS framework.

Because the scheme adopted in the Order is wholly antithetical to the policy objectives and market structure that Congress sought to create, the Commission must reconsider and reverse its extension and expansion of the Program Access Rules

ARGUMENT

I. EXTENSION OF THE PROGRAM ACCESS RULES TO VIDEO PROGRAMMING PROVIDERS ON OPEN VIDEO SYSTEMS IS CONTRARY TO THE TELECOMMUNICATIONS ACT OF 1996 AND THE EXPRESS INTENT OF CONGRESS

The Commission's decision to apply the Program Access Rules to video programming providers on an open video system could not be more inconsistent with the 1996 Act.^{13/}

The plain language of the 1996 Act extends the Program Access Rules solely to OVS

operators: "Any provision that applies to a cable operator under [Section 628] shall apply

. . . to any operator of an open video system" ¹⁴ Because the plain language of the

^{13/} Cf. 47 U.S.C. § 154(i) (the Commission may "make such rules and regulations . . . not inconsistent with this Act, as may be necessary in the execution of its functions").

^{14/} 1996 Act, Sec. 302(a), codified at 47 U.S.C. § 573(c)(1) (emphasis added). No other provision of the Act, or its legislative history, purports to create a new right of access to programming for VPPs.

Act is clear and unambiguous, the Commission must implement it directly and without expansion.^{15/}

The Commission cannot expand the provisions of the 1996 Act to apply to unnamed classes of persons where the statute specifically names the entities to which a particular provision applies.^{16/} In Railway Labor Executives Ass'n, the D.C. Circuit held en banc that the National Mediation Board was without power to initiate proceedings for investigating representation disputes even if the federal Railway Labor Act extended that right to a "carrier's employees."^{17/} Likewise, the Commission must recognize its own lack of statutory authority to extend the applicability of rules from one specified group to

^{15/} As the Commission noted in the Order, [w]here Congress 'has directly spoken to the precise question at issue . . . that is the end of the matter,' and the Commission must give effect to Congress' express intent." Order at ¶ 13 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). See also Demarest v. Manspeaker, 111 S. Ct. 599, 604 (1991) (no need to inquire beyond statute's clear terms). The Commission cannot just ignore the fact that the statute specifies OVS "operators." See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (in construing a statute, court must "give effect, if possible, to every word Congress used").

^{16/} See Railway Labor Executives Ass'n v. National Mediation Bd., 29 F.3d 655 (D.C. Cir. 1994) (en banc), cert. denied, 115 S.Ct. 1392 (1995). Nor does the Commission possess the power to expand the statute merely because the statute fails to forbid expressly the Commission from applying the Program Access Rules beyond OVS operators. See id. at 666, 670-71 (citing cases).

^{17/} Railway Labor Executives Ass'n, 29 F.3d at 665.

another.^{18/} Where, as here, the extension of the rules affirmatively undermines, rather than promotes, the statutory scheme, there is absolutely no basis to so act.

Because the language of the Act is clear, there is no need or basis for the Commission to look elsewhere to interpret its meaning.^{19/} Yet, even considering the legislative history of the 1996 Act, however, it is clear that the Program Access Rules should not be extended to apply beyond the "operator" of the open video system. The Conference Report notes that "[n]ew section 653(c)(1)(A) states that the following provisions that apply to cable operators also apply to certified operators of open video systems."^{20/} Applying the Program Access Rules to VPPs makes as little sense as applying the certification requirements of Section 653(a)(1) to VPPs.

Indeed, if Congress had intended to apply the Program Access Rules to OVS programmers, it would have and could have expressly done so in the text of the 1996 Act itself. Congress did in fact provide that a video programming provider on an OVS platform

^{18/} The 1996 Act's provisions establishing open video systems did not give the Commission discretion to achieve general objectives or purposes found elsewhere in the statutory scheme. Compare Mobile Communications Corp. of America v. FCC, 77 F.3d 1399, 1404-06 (D.C. Cir. 1996) (holding the Commission had authority to require all licensees to pay for their licenses, but remanding for failure to engage in reasoned decision-making). Here, the specific language of the 1996 Act controls, see Green v. Bock Laundry Machine Co., 490 U.S. 504, 524-25 (1989), and that language expressly applies the Program Access Rules solely to OVS operators.

^{19/} There is no reason or basis to look beyond the language of the 1996 Act to the "purposes of the program access statute in the open video context." Order at ¶ 182. Where the text is clear and unambiguous it is determinative. See American Hospital Ass'n v. NLRB, 499 U.S. 606, 616 (1991) (noting that "the Constitution is quite explicit about the procedure that Congress must follow in legislating."); Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (criticizing reliance on legislative history).

^{20/} Conference Report at 178 (emphasis added) (listing, inter alia, Section 628).

may be treated as a cable system operator for certain purposes unrelated to program access.^{21/} The Commission must infer from the express absence of the term "programmer" that Congress purposely did not intend the program access provisions to apply to OVS programmers.^{22/} In this manner, the 1996 Act delineates clearly and expressly those aspects of the cable regulation regime, including the Program Access Rules, that apply to OVS operators, and those aspects that are to be extended to VPPs that provide programming through an OVS. Unlike other statutory schemes, in the 1996 Act, the "class of persons" subject to the Program Access Rules in the OVS context is clearly not an issue on which "Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'"^{23/}

Thus, the Commission's extension of the Program Access Rules contravenes a deliberate and specific statutory scheme setting forth both the reach of the Program Access Rules in the OVS context and the circumstances under which VPPs will be treated as cable operators. The Commission's extension of the Program Access Rules is inconsistent with the specific provisions and overall scheme of the 1996 Act, and should be reversed.

^{21/} Compare 1996 Act, Sec. 302(a), codified at 47 U.S.C. § 573(c)(4) (VPP making use of an OVS may be treated as an operator of a cable system for purposes of 17 U.S.C. § 111) with § 573(c)(1)(OVS operators subject to cable Program Access Rules).

^{22/} See Gozlon-Peretz v. U.S., 498 US 395, 404 (1991) (noting that where a term is used in one place and not in another, its exclusion should be presumed intentional). See also Russello v. U.S., 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

^{23/} Railway Labor Executives Ass'n, 29 F 3d at 671 (quoting Chevron, 467 U.S. at 843-44).

II. EXTENSION OF THE PROGRAM ACCESS RULES TO OVS VIDEO PROGRAMMING PROVIDERS IS INCONSISTENT WITH THE OVS POLICY FRAMEWORK AND WILL STIFLE VIDEO COMPETITION

The Commission's interpretation of the 1996 Act also runs clearly contrary to the bedrock policy underlying open video systems. Congress intended that the OVS platform would provide a field for diverse and robust competition between VPPs that choose to obtain capacity on the platform.^{24/} Congress provided for the "reduced regulatory burdens imposed on open video systems" contained in Section 653(c) in the hopes of stimulating vigorous competition among programmers.^{25/} The Commission has also placed a premium on vigorous competition among VPPs on an OVS platform.^{26/} Despite this clear understanding of Congressional intent and the nature of the statutory scheme, the Commission's rules will create the directly opposite result.

Congress intended for consumers to have access to diverse programming on open video systems by subscribing to the offerings of one or more programmers utilizing the open platform. Rainbow and all other potential OVS programmers must therefore be allowed to compete with each other on the platform on an equal basis. Market forces must be given

^{24/} Conference Report at 178.

^{25/} Id. (noting the expectation that OVS would "introduce vigorous competition in entertainment and information markets").

^{26/} See, e.g., Order at ¶¶ 2, 3; Separate Statement of Chairman Hundt at p. 1 ("As envisioned by Congress, open video systems will provide a vehicle for . . . intrasystem competition between the open video system operator's affiliated programming and unaffiliated programmers carried on the system"); Separate Statement of Commissioner Quello at p. 1 (the Order "is intended to bring new competition to the video programming distribution market"); Separate Statement of Commissioner Ness at p. 1 (Commission's rules "seek to ensure Congress' vision of an open platform, allowing programming providers, both affiliated and unaffiliated with the OVS operator, to gain access to the platform and provide significant new competition in the video programming market" (emphasis in original)).

reign to promote diversity and determine the success of each programmer's offerings.^{27/}

Giving competing VPPs the right forcibly to gain access to each other's programming fundamentally undermines the very competition OVS is intended to promote. A VPP whose programming is made available to any competitor cannot distinguish itself on the basis of its unique blend of programming. Rather, the Commission's rules mean that VPPs will be asked to compete against themselves. This regime means that there will be virtually no incentives for VPPs to develop new programming, and no incentives to offer such programs through OVS.

Rainbow's experiences with video dialtone are instructive. As the Commission is well aware, Rainbow sought participation in virtually every proposed or authorized video dialtone system. Those efforts were stymied by the telephone companies at every turn.^{28/} Then, having thwarted Rainbow's efforts to obtain its own capacity on their video dialtone platforms, SNET, US West, and Bell Atlantic -- through their respective proxies CCT, Interface, and FutureVision -- all sought to use the Program Access Rules to demand

^{27/} See Separate Statement of Commissioner Chong at p. 7 ("Competition always ought to trump regulation, and where it does arise, the Commission ought to get out of the way, let the marketplace work, and only intercede where necessary").

^{28/} For example, in Dover Township, New Jersey, Bell Atlantic withheld from Rainbow the fact that proprietary software would be necessary to access end-user subscribers, software that was developed by Bell Atlantic and owned by its favored programmer, FutureVision. Moreover, it appears that Bell Atlantic offered FutureVision favored terms to provide consumers with digital converter units, discounting the price of the service and giving FutureVision a tremendous marketplace advantage. Finally, without resolving these issues, Bell Atlantic went ahead with its trial and left Rainbow and other VPPs without access. Unless the Commission's rules promote fairness and affords each VPP an honest chance to compete on OVS, OVS will likely be a re-play of video dialtone.

Rainbow's programming for their own use.^{29/} If the Commission persists in expanding and extending these rules to OVS, Rainbow will be forced to provide its programming directly to its potential competitors and will have no incentive to utilize OVS itself. Rainbow was virtually the only truly independent programmer on video dialtone. By now acting to extend the Program Access Rules to OVS programmers the Commission is in effect blessing a regime where the telephone companies and their favored programmers will have de facto exclusive access to OVS video channel capacity. Such is not the vigorous competition envisioned by Congress, but rather a duplication of the cable television regime without the full responsibilities and burdens of Title VI.^{30/} Enabling any competing programmer to obtain forcibly Rainbow's programming will fundamentally undermine the very competition Congress and the Commission supposedly intend to promote.

An analysis of the tortuously complicated set of rules that the FCC promulgated to govern programmer-affiliate relationships underscores the fact that they have no relationship to the OVS framework. Thus, under the rules, a vertically-integrated satellite programmer that proposes to provide its own programming directly to subscribers by purchasing channel capacity on an OVS platform is subject to the provisions of Section 628(c).^{31/} In addition,

^{29/} See CAI v. Cablevision Systems, Inc. [sic], File No. CSR ___ (dismissed without prejudice after SNET withdrew its video dialtone applications, Order, DA 96-283, rel. March 12, 1996); Interface Communications Group, Inc. v. American Movie Classics Company and Rainbow Programming Holdings, Inc., File No. CSR ___, filed Jan. 16, 1996; Digital Video Services [formerly FutureVision] v. Cablevision Systems Corp. and Rainbow Programming Holdings, Inc., File No. CSR ___, filed March 12, 1996.

^{30/} See Title VI of the Communications Act of 1934, codified at 47 U.S.C. §§ 521 et seq.

^{31/} Order at ¶ 194.

subject to the general prohibitions of Section 628(b). OVS operators may enter into exclusive contracts with satellite programmers in which a cable operator has an attributable interest and cable operators may enter into exclusive contracts with satellite programmers in which an OVS operator has an attributable interest.^{32/} A vertically-integrated satellite programmer is not "per se" prohibited from entering into an exclusive contract with one MVPD on an open video system, so long as that MVPD is not affiliated with "the same type of operator" as the vertically-integrated satellite programmer.^{33/} Exclusive contracts between vertically-integrated satellite programmers and unaffiliated OVS programming providers are still subject to challenge under Section 628(c)(2)(B).^{34/} Exclusive agreements between cable-affiliated satellite programmers and cable-affiliated OVS programmers will be prohibited unless the contract pertains to an area served by a cable operator at the time the 1992 Cable Act was enacted and the Commission first determines that they are in the public interest.^{35/}

While certainly detailed and lengthy, none of these pages and pages of rules contemplate the Congressional OVS framework -- that video programmers are supposed to compete on equal terms. Significantly, nor does the Commission in formulating the rules make more than passing reference to the OVS statutory language. Simply put, the Commission has wholly failed to justify its detailed rules in light of the unique OVS framework. As such, the Commission should reverse this essentially arbitrary result.

^{32/} Id. at ¶ 177.

^{33/} Id. at ¶ 184.

^{34/} Id. at ¶ 185.

^{35/} Id. at ¶¶ 187-93.

The OVS platform is designed to enable multiple program providers to bring their offerings directly to consumers in competition with each other and the system operator.^{36/} Market forces must be given full play under such a scheme.^{37/} Inter-programmer competition must be encouraged lest OVS platforms become nothing more than vehicles for a well-financed takeover of the video programming market

Critically, in extending the rules to OVS, the Commission misinterprets the Program Access Rules themselves. The Rules were never intended to eliminate distinctions among competing VPPs; rather, they were intended "to preclude practices that restrict the availability of programming to subscribers or favor a particular distribution technology to the exclusion of other competing distributors."^{38/} The Commission has failed to explain how extending the Program Access Rules to competing OVS video programming providers will serve either of these goals. In fact, record evidence indicates that just the opposite is likely - that it will effectively thwart the goal of "competition and diversity in the multichannel video programming market."^{39/}

To allow VPPs to use the Program Access Rules to cherry-pick their competitors' most desirable programming will dramatically reduce the number and diversity of voices

^{36/} See, e.g., Separate Statement of Chairman Hundt at p. 1 (noting the benefits of inter-programmer competition).

^{37/} The Commission should not ignore its longstanding commitment to competition in the introduction of these new services. See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.53 - 63.58, 7 FCC Rcd 5781, 5787 ("Free market forces, rather than governmental regulation, determine the success or failure of new services.")

^{38/} Separate Statement of Commissioner Quello. p. 2

^{39/} 47 U.S.C. § 548(a) (purpose of Program Access Rules).

available through open video systems, dampen competition, and harm consumers. Rainbow and other potential video programmers will have no incentives to roll out new offerings on OVS, because they will be forced to relinquish their programs to competitors. It will be easy, moreover, for a dominant VPP to thwart competition by demanding access to channels owned or controlled by non-affiliated, competing VPPs that have fewer channels. It was for this reason that Commissioner Quello expressed concern that the short timeframe for the Commission to complete OVS proceedings "could lead to the adoption of rules that would yield unintended consequences."^{40/} Competition will not be served by the Order as it applies the Program Access Rules. Accordingly, the Commission should reconsider its rules to comport with the Congressional intent and policy of OVS.

III. THE COMMISSION HAS FAILED TO EXPLAIN HOW ITS DECISION IS RATIONALLY RELATED TO PROMOTING OVS GOALS

The Commission must also reconsider its determination with respect to applying the Program Access Rules to VPPs because it adopted without justification rules not rationally related to the framework and goals of the 1996 Act with respect to open video systems.^{41/} Specifically, the Commission failed to demonstrate "that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency was charged with solving."^{42/}

^{40/} Separate Statement of Commissioner Quello, p. 1

^{41/} See 5 U.S.C. § 706(2)(A).

^{42/} Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992) (Posner, J.) (citing Bowen v. American Hosp. Ass'n, 476 U.S. 610, 626-27 (1986) (plurality opinion)).

First, the Commission has erred by failing to show how its decision is consistent with the language and purpose of the 1996 Act. As demonstrated above, Congress did not authorize the Commission to apply the Rules except with respect to OVS operators. Congress precisely spoke to the issue of applying the Program Access Rules in the OVS context, and the Commission proceeded nonetheless to apply the Rules more expansively. Moreover, in applying and extending the Rules, the Commission referred solely to its own DBS Order and referenced only vaguely "the purposes of the program access statute in the open video context."^{43/} The Commission never explained how its proposed rules were rationally related to the unique OVS framework, with its promise of inter-programmer competition, or how they are otherwise tailored to the 1996 Act's OVS framework. While the Commission's discussion is full of references to the purposes of Section 19 of the 1992 Cable Act, such references fail to address in the specific OVS regime how the rules are necessary or desirable. General statements applicable in other contexts are insufficient.

Furthermore, the Commission erred when it failed to address Rainbow's arguments that the Program Access Rules should not be applied to OVS in a manner that would make some programmers more equal than others.^{44/} Rainbow specifically addressed the importance of inter-programmer competition and the need to stay within the parameters of

^{43/} Order at ¶ 182.

^{44/} See International Fabricare Institute v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992) (agency required to give "reasoned responses to all significant comments in rulemaking proceeding").

the OVS framework as envisioned by Congress.^{45/} Rather than responding with a rational explanation as to why these arguments were inapplicable the Commission merely brushed them aside.^{46/} It is grossly insufficient for the Commission merely to refer to the "purposes of the program access statute"^{47/} and note its disagreement with Rainbow's position.^{48/} Courts will not hesitate to require the Commission to reconsider in cases such as the instant one, where arguments presented in the record are merely given "back-of-the-hand treatment."^{49/}

Moreover, the Commission's conclusion that OVS programmers are MVPDs is unsupported by the Act and prior Commission policy.^{50/} Just as Congress declined to

^{45/} See, e.g., Comments of Rainbow Programming Holdings, Inc., CS Docket No. 96-46, filed April 1, 1996 at pp. 28-30. See also Comments of Cablevision Systems Corporation and the California Cable Television Association, CS Docket No. 96-46, filed April 1, 1996 at 23-24.

^{46/} See Order at ¶ 195 ("Although Rainbow argues that it will not be able to compete with other programmers on an open video system platform if [it] is forced to sell its programming to other MVPDs, we believe that the statute and the program access rules should not be interpreted as Rainbow urges.") (emphasis supplied) (internal citation omitted). The Commission seems to have assigned itself the task of interpreting its own rules simultaneously with the 1996 Act, disguising its treatment of the Act's OVS provisions.

^{47/} Id. at ¶ 182.

^{48/} Id. at ¶¶ 182, 195.

^{49/} Mobile, 77 F.3d at 1403 (remanding case for reconsideration of petitioner's arguments). See also Schurz, 982 F.2d at 1049-51 (same). See also Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 586 (D.C. Cir. 1970) (agency's independent determination absent a basis in the record cannot be sustained).

^{50/} Contrary to the Commission's characterization, Order at ¶ 196, the Order expands the Program Access Rules beyond their current application. See Separate Statement of Commissioner Quello, at p. 2 ("I am also concerned by the decision to expand the application of program access rules in the context of programming services, video

(continued...)

extend the program access requirements to VPPs in Section 302, it also declined to add OVS video programming providers to the list of representative entities under its definition of MVPDs.^{51/} In fact, the statutory examples of MVPDs all differ from VPPs in at least one material respect: The listed MVPDs all operate the vehicle for distribution (cable, MMDS, DBS, etc.) of their programming, whereas OVS video programmers distribute their product on a common platform in direct competition with other VPPs. Where "prior policies and standards are being deliberately changed,"^{52/} the Commission has an extra burden to explain rationally and justify its decision, and cannot "casually ignore" precedent and the record before it.^{53/} Accordingly, the Commission must reconsider the extension of the Program Access Rules in this respect.

^{50/}(...continued)

programming packagers, and OVS operators rather than follow past precedent in applying these rules.")

^{51/} See 47 U.S.C. § 522(13). Under the statute, MVPD "means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." Id.

^{52/} Mobile, 77 F.3d at 1407 n.2; People of the State of California v. FCC, 4 F.3d 1505, 1511 (9th Cir. 1993); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

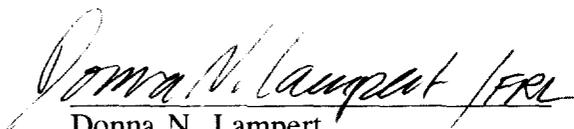
^{53/} Cross Sound Ferry Service, Inc. v. ICC, 873 F.2d 395, 398 (D.C. Cir. 1989). See also Greater Boston Television Corp., 444 F.2d at 852

CONCLUSION

For the foregoing reasons, the Commission should grant Rainbow's Petition for Reconsideration in the above-captioned proceeding.

Respectfully Submitted,

RAINBOW PROGRAMMING HOLDINGS, INC.



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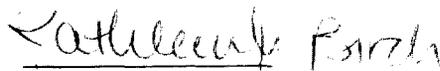
Its Attorneys

July 3, 1996

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CERTIFICATE OF SERVICE

I, Kathleen M. Birch, hereby certify that on this 3rd day of July 1996, I caused copies of the foregoing "Petition for Reconsideration of Rainbow Programming Holdings, Inc." to be sent by first-class mail, postage prepaid, or to be delivered by messenger(*) to the following:


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