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

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In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, submits these comments in response to the Notice of Proposed Rulemaking ("Notice") issued in the above-referenced proceeding. Cablevision is one of the largest operators of cable television systems in the United States, with more than 2.8 million subscribers in 19 states, and has ownership interests in companies that produce and distribute national and regional programming services and in Madison Square Garden, L.P. ("MSG"), a sports entertainment company.

Cablevision conducts its programming and entertainment activities through Rainbow Media Holdings, Inc. ("Rainbow"), its 75 percent owned subsidiary. Rainbow's businesses include seven regional sports networks, in partnership with Fox Corporation and Liberty Media Corporation, five national entertainment networks (American Movie Classics, Bravo, MuchMusic, Romance Classics, and the Independent Film Channel) and News 12 (regional news networks). MSG owns and operates the Madison Square Garden arena and adjoining theater, the New York Knickerbockers, the New York Rangers, and the Madison Square Garden Network. Cablevision is also providing facilities-based telephony services through its wholly-owned subsidiary Cablevision Lightpath, Inc. ("Lightpath"). Lightpath currently offers commercial telephony services to more than 800 customers in Long Island and Connecticut, and has begun its roll-out of facilities-based services to residential subscribers in Long Island, with plans to expand service offerings throughout its territories.

INTRODUCTION AND SUMMARY

Imitation may be the highest form of flattery, but it is innovation and investment in programming that have fostered the flourishing video programming services market that exists today. Cablevision has helped to lead the way over the years, investing hundreds of millions in new programming services. Through its programming affiliate, Rainbow, Cablevision has helped to develop over a dozen national and regional cable programming networks. These networks have succeeded because of Cablevision's willingness to risk substantial amounts of capital, energy, time, and resources – as well as its ability to endure the often-lengthy gestation period associated with the introduction of new programming services in a business environment in which channel capacity is limited.

The public has reaped substantial benefits – in the form of program choice and diversity – from the investments that Cablevision and other cable operators and programmers have made. Under the current program access rules, moreover, Cablevision's competitors already have access to the most popular programming made possible by this risk-taking.[1/] Expanding the

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1/ In addition to competition from DBS providers DirecTV, Primestar, and EchoStar, Cablevision today faces actual or potential competition in virtually all of the major markets program access regime will reduce consumer choice by reducing or removing economic incentives to invest in local and regional programming that poses greater risks for the producer because the potential audience is smaller.

Proponents of extending program access focus exclusively on price competition among video distributors. Consumers benefit most, however, when multichannel video distributors compete, not just on the basis of price and customer service, but also on the basis of the programming and service packages that they offer. By contrast, expanding the program access rules as cable's competitors propose would effectively transform programming services into commodities and cable operators into passive conduits. Turning programming into a commodity will reward the low-cost producer and eliminate any economic reward from developing a unique, innovative service. Consumers, deprived of the chance for exceptional programming, will be the losers in such an environment.

Cablevision always has viewed itself as a provider of information and entertainment services to subscribers, rather than as simply the owner of a conduit. In 1973, Cablevision's chairman, Charles F. Dolan, obtained and developed cable television systems in several suburban communities where over-the-air reception was already adequate. At that time, conventional wisdom cast cable television as a "community antenna" service that could do nothing more than improve signal reception of over-the-air broadcast programming. Dolan saw the opportunity to

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where it competes. Cablevision has begun to face competition from Ameritech in Ohio. SNET offers cable service in both of Cablevision's franchise areas in Connecticut. RCN/MFS provides competing multichannel service in Boston, and has been certified as an OVS provider in New York, where Cablevision already faces competition from Liberty Cable and its successors, as well as an LMDS provider, CellularVision. Attached as Exhibit 1 are channel line-ups from a number of Cablevision's current competitors, demonstrating their extensive programming offerings. Cablevision also anticipates that it will eventually face video competition from Bell Atlantic/NYNEX in New Jersey.

use cable's increased channel capacity to develop new programming content, and this vision sparked the creation of the first premium movie service, HBO, and the first regional sports programming service, SportsChannel.[2] Both of these staples of video programming would never have been developed had Dolan and other cable pioneers been forced into the "conduit" straitjacket now being promoted by cable's competitors.

In addition to the services described above, Rainbow has taken the lead in developing other local and regional programming, including News 12 Long Island and similar offerings in Connecticut and New Jersey. News 12 is a 24-hour news services that provides regional news programming that was unavailable from the broadcast outlets in the New York metropolitan area. Since its inception, News 12 has operated at a loss, but Cablevision has remained committed to providing its subscribers with news and information about their communities that they could not get anywhere else. Cablevision has recently begun an even more targeted news service – Neighborhood News – that, covers the neighborhoods, churches, schools and personalities that make up Long Island. Like News 12, Neighborhood News will require a long-term commitment of financial resources, time, and energy from Cablevision that would be impossible to justify if it were required to make this service available to other MVPDs.

The overwhelmingly positive subscriber response to the community-based and regional programming has prompted Rainbow to begin developing other local services. For instance, Rainbow is making plans this year to launch a package of up to five terrestrially-delivered, local programming services designed to serve as the electronic equivalent of a local newspaper. This new programming service will combine neighborhood-based information and entertainment

[2] See http://cablevision.com/cvhome/frame/fabout.htm (describing Charles Dolan's pioneering development of HBO and the SportsChannel concept).

content with the interactive capabilities made possible by advanced cable network infrastructures. Rainbow aims to provide viewers with a new level of in-depth and interactive community-based video programming. Based on its experience in developing News 12, Rainbow estimates it will spend tens of millions developing this programming.

Cablevision's plans to fund the development of local services reflect its long-held belief that remaining competitive requires continuous investments in programming. The proposals set forth in the Notice, by contrast, represent a continuing effort by some of the nation's wealthiest companies to reduce the costs and risks associated with their entry into the video programming marketplace. Ameritech, Bell Atlantic, SBC/SNET, General Motors' DirecTV and others all have substantial financial resources to draw upon to develop new video programming services and offerings. They have refused to use those resources to invest in new programming, however, preferring instead to sit on the sidelines while their competitors incur all the risks associated with developing new services. For any new programming services that prove successful, these companies expect government-mandated access at the same price, terms and conditions made available to those who incurred the risks associated with developing such programming.

Although it is perhaps unsurprising that the local phone monopolies and General Motors would pursue such risk-averse business strategies, both competition and consumers would be harmed substantially by the adoption of the broader program access policies that they advocate. Expanding the program access regime to force Cablevision to immediately surrender to its competitors any terrestrial programming services it develops, will simply preclude development of such programming.

Rainbow's plans to develop its new local programming services require both terrestrial delivery and the flexibility to offer distributors exclusivity. Terrestrial delivery is often the most economic means of distributing local and regional cable programming services. The terrestrial exception to the program access rules gives local cable programmers the option of offering distributors exclusive carriage of such services. This flexibility is critical because distributors often hesitate to devote channel capacity and marketing resources to local and regional programming due to the inherent geographic limits on their potential subscriber base.

The language of section 628 unequivocally precludes the Commission from expanding the reach of the program access rules to encompass terrestrially-delivered local and regional programming services, and the Commission should reject calls to apply section 628(b) to putative "evasions" of the Commission's program access rules. Although clearly aware of the existence of terrestrially-delivered local programming services when section 628 was enacted, Congress nonetheless declined to apply the program access rules to such services. It cannot be an "evasion" of section 628 for programmers to utilize a delivery mechanism that Congress opted to exclude from the program access regime. Even apart from this statutory limitation, attempts to adjudicate complaints about the repositioning of satellite programming would embroil the Commission in protracted, fact-intensive disputes requiring it to analyze the motives and business judgment of programmers who decide to switch delivery mechanisms. The result will be to discourage use of terrestrial delivery altogether, even in instances where the use of terrestrial technology is economic, pro-competitive, and pro-consumer.

Even if the Commission could apply the program access rules to terrestrial programming, it would contravene the public interest to do so because it would undermine the distribution and development of new local programming services. New, terrestrially-delivered local programming services – such as the package of neighborhood-based services Rainbow plans to develop – must be able to offer exclusivity as a means of countering distributor concerns over the heightened risks associated with devoting channel space and marketing resources to services with a limited geographic base. Barring Rainbow from offering exclusivity for terrestrially-delivered local services would prevent it from recovering the substantial sums it expects to spend in developing this new "electronic" local newspaper. Bluntly stated, if Rainbow cannot offer exclusivity for its new terrestrially-delivered local programming services, it will not develop these services and consumers will lose access to new, valuable, and diverse programming options.

Finally, the proposed revisions to the Commission's current rules concerning the procedural schedule for program access complaints, discovery, and damages are likewise unnecessary and counterproductive. Allowing a program access complainant discovery as of right would turn program access disputes into full-blown litigation, deter negotiations to settle program access disputes, and delay resolution of complaints. Moreover, authorizing damages awards effectively vitiates Congress's explicit decision to permit programmers to impose rate differentials based on variances in the costs and benefits associated with furnishing programming to particular distributors. The Commission's rules already permit price discrimination complainants to establish a *prima facie* case based upon nothing more than the mere existence of a rate differential,[3/] notwithstanding Congress's express authorization of such differentials.[4/] Thus, programmers risk the substantial costs and burdens associated with having to prove their innocence in a program access case whenever they engage in differential pricing. The prospect

[3/] 47 C.F.R. § 76.1003(c)(ix); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd 3359, 3416 ¶ 125 (1993) ("Program Access Order").

[4/] 47 U.S.C. § 548(c)(2)(B)(i)-(iii).

of damage awards would make the risks of differential pricing untenable and thereby nullify conduct expressly permitted by Congress.

I. THE PROPOSALS RAISED IN THE NOTICE WOULD EXACERBATE THE ALREADY SUBSTANTIAL MARKET DISTORTIONS FOSTERED BY THE PROGRAM ACCESS RULES

The Notice seeks comment on a set of proposals designed to facilitate and expand actions brought against vertically-integrated cable programmers under the Commission's program access rules.[5] These proposals – which include extending program access to cover terrestrially-delivered programming, providing complainants with an automatic right to discovery, and imposing damages on programmers found in violation of the program access rules – are unnecessary and counterproductive. The program access rules already significantly distort the cable programming marketplace, and the revisions set forth in the Notice only would exacerbate such distortions to the detriment of both programmers and cable subscribers.

In most businesses, the developer of a product, whether it is an automobile or the latest fashion accessory, is generally free to market and sell its valuable product to whomever it wants in whatever manner it wants.[6] For example, the developer of a new widget can choose whether it will sell its product through large national distributors, specialty shops, or mail order catalogs. Subject to the antitrust laws, which generally recognize a producer's right to choose the means of

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[5] See generally Notice at ¶¶ 37-51.

[6] See United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967) ("[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods."), overruled on other grounds by Continental T.V., Inc. v. GTE Sylvania, Inc. 433, U.S. 36 (1977); United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal[.]").

distributing its product,[7] the owner of a product can use its business judgment to choose how best to further its business goals.

Copyright and patent law also recognize the rights of inventors and creators to control the commercial distribution and use of their works.[8] Thus, owners of movies and television programming choose their means of distribution. Original episodes of ER are shown only on NBC, heightening the value of the programming to both network distributors and advertisers.[9] Movies may be distributed only through a particular studio and exhibited only in particular theaters.[10]

The current program access rules severely constrain the ability of vertically-integrated cable programmers, such as Rainbow, to take pursue elemental strategies used by other

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7/ See Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1226 (10th Cir. 1986) ("Sound economic theory supports the cases that have allowed suppliers wide latitude in selecting their distributors."); Inter-City Tire & Auto Ctr., Inc. v. Uniroyal, Inc., 701 F. Supp. 1120, 1124 (D.N.J. 1988) ("The unilateral decision of a single manufacturer to rearrange its distribution structure by limiting or increasing the number of its dealers or transferring its business to different dealers does not violate the Sherman Act."), aff'd, 888 F.2d 1382 (3d Cir. 1989).

8/ See Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994) ("an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers"); Lucasarts Entertainment Co. v. Humongous Entertainment Co., 870 F. Supp. 285, 290 (N.D. Cal. 1993) (noting that the laws of intellectual property are *in pari materia* with the antitrust laws and modify them *pro tanto*); Edwin K. Williams & Co. v. Edwin K. Williams & Co.-E., 542 F.2d 1053, 1061-62 (9th Cir. 1976) (upholding distribution restraints that were ancillary to patent, trademark, and know-how licenses).

9/ See Michael Schneider, "Networks Raise the Stakes: NBC To Pay $13 Million a Week for 'ER,'" ELECTRONIC MEDIA, Jan. 19, 1998, at 1A (noting that without "ER" it would have been difficult for NBC to maintain first-place in ratings, especially in the critical 18-to-49 demographics group); Keith Marder, "NBC-'ER' Deal Sets TV Record," DAILY NEWS OF LOS ANGELES, Jan. 15, 1998, at N1 ("The renewal of the show, which attracts an average of 32 million viewers a week, was critical to NBC").

10/ See, e.g., Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358 (3d Cir. 1996) (upholding film distributor's grant of exclusive license for certain first-run films to film exhibitor); Three Movies v. Pacific Theaters, 828 F.2d 1395 (9th Cir. 1987) (upholding summary judgment where defendant allowed only one of two competitors first-run movie rights).

businesses to maximize growth, investment, and innovation. Rainbow must generally sell its satellite cable programming to any distributor that wants to buy it, regardless of whether distribution by that entity advances the marketing and development plans for such programming.[11] It is limited in its ability to vary its licensing terms and conditions, depending upon a distributor's commitment, ability and performance with respect to furthering Rainbow's objectives for the programming services it licenses. Rainbow and other vertically-integrated cable programmers are also forbidden from entering into business arrangements, including exclusive agreements, that are common methods used by entrepreneurs to ensure the best possible distribution channels and superior marketing support for their products. The changes to the program access rules demanded by the supporters of the Notice proposals would exacerbate the current regulatory distortions in the cable programming business, further reducing the incentives of companies like Cablevision to develop new programming and depriving consumers of the benefits of diversity and choice.

Cablevision is in the business of providing information and entertainment content. It wins and retains subscribers by investing in and developing programming content that viewers want to see. Just as computer buyers make their purchasing decisions based on the software and applications they seek to run, cable subscribers make their purchasing decision based on the programming content they seek to view. As Cablevision's News 12 service demonstrates, the proximity of cable operators to their subscribers often renders them best-suited to develop new programming services and concepts. Developing a cable programming service is expensive,

[11] 47 C.F.R. § 76.1002(b).

resource-intensive, and replete with risk, however. Cable operators are less likely to undertake those substantial risks if they cannot use these services to attract and keep subscribers.

Cable programming that must be provided to all video distributors will become a commodity rather than a means for enabling distributors to distinguish themselves in the marketplace. Turning programming into a commodity will reward the low-cost producer and eliminate the possibility of economic rewards in exchange for taking the risks necessary to develop a unique, innovative service. Consumers, deprived of the chance for exceptional programming, will be the losers in such an environment.[12/]

[12/] Turning programming into a commodity and cable operators into passive carriers, as cable's competitors advocate, fundamentally conflicts with the First Amendment protection afforded cable operators. See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) ("[C]able operators exercise ' a significant amount of editorial discretion regarding what their programming will include.' Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." (citation omitted)); Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

The Commission's program access rules must be applied consistently with the First Amendment. See id. If the Commission expands the program access regime by subjecting more programming to its constraints and aggravating existing disincentives imposed upon the development of new programming services by vertically-integrated cable programmers, it heightens the risk that those rules would run afoul of the First Amendment. Indeed, while the D.C. Circuit rejected a facial challenge to the program access provisions set forth in the 1992 Cable Act, Time Warner Entertainment Co., L.P. v. Federal Communications Commission, 93 F.3d 957, 977-79 (D.C. Cir. 1996), it remains open for a programmer to demonstrate in an as-applied challenge that the rules "burden 'substantially more speech'" than is necessary to accomplish their putative purposes:

> To be sure, because the ability to enter into exclusive contracts could create economic incentives to invest in the development of new programming, prohibiting such contracts might result in reduced programming – that is, less speech. . . . . [A]ny impact on Time Warner's speech is simply too conjectural for us to conclude in a facial challenge that the provisions burden substantially more speech than necessary to achieve the government's goal."

Id. at 979 (emphasis added). While the Supreme Court in Turner mandated that cable operators make their conduit available to broadcasters, it did not address the extent to which the government could require programmers to provide content to third parties.

If Cablevision is reduced to a mere provider of conduit – as would occur if the program access rules were expanded to deprive vertically-integrated cable operators of any vestige of control over the content they produce – the resulting price "competition" would not last long. In a battle of conduit providers furnishing commodity programming, the telephone companies with their ubiquitous presence, substantial local telephone revenues, and captive subscribers will be able to survive on the thinnest of margins. Their substantial financial resources enable them to outlast their competitors in any price war, to the detriment of both competition and innovation in the cable television business.

Telephone companies and DBS operators argue that expanding the program access rules is somehow necessary to bolster their entry into the video marketplace.[13/] The facts, however, demonstrate that the program access rules have accomplished the congressional objective of jump-starting competition by giving multichannel technologies access to all of the cable programming services they need to compete.[14/] When Congress passed the program access rules

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13/ See Testimony of William F. Reddersen, Group President - Long Distance and Video Services of Bell South Enterprises, before the Subcommittee on Telecommunications, Trade, and Consumer Protection, United States House of Representatives at 1-3 (July 29, 1997); Testimony of Deborah L. Lenart, President of Ameritech New Media, Inc., before the Subcommittee on Telecommunications, Trade, and Consumer Protection, United States House of Representatives at 3-4 (July 29, 1997); Testimony of Eddy Hartenstein, President of DirecTV, Inc., before the Subcommittee on Antitrust, Business Rights and Competition, United States Senate at 5 (Oct. 8, 1997) ("Hartenstein Testimony").

14/ See supra n. 1 and Exhibit 1. See also In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Second Annual Report, 11 FCC Rcd 2060, 2136 ¶ 160 (1995) ("The Commission's enforcement of the program access provisions appears to be meeting one of the goals of the 1992 Cable Act – ensuring access by competing MVPDs to satellite cable programming from vertically-integrated programming services."); Testimony of Decker Anstrom, President and CEO of the National Cable Television Association, before the Committee on the Judiciary, United House of Representatives at 12 (Sept. 24, 1997) ("The 1992 Cable Act program access provisions have accomplished exactly the result that Congress intended: alternative providers of video programming have access to all of the most widely distributed national cable program networks."). The absurdity of the telephone companies position is illustrated by Ameritech's claim that it needs mandated access to TV Land in order to compete effectively, even though Ameritech could easily draw upon its own vast store in 1992, cable operators served over 95 percent of the nation's multichannel households.[15] Since then, the market share attained by cable's competitors has nearly tripled.[16]

Well-financed telephone companies such as Ameritech, Bell Atlantic, and SBC's new affiliate SNET should be encouraged to develop their own programming, rather than remaining dependent on government assistance to obtain guaranteed access to programming that exists through the efforts of their competitors.[17] Further expansion of the program access rules to subsidize the likes of General Motors and SBC is not necessary to jump start competition among video distributors – but it will substantially harm consumer welfare by stifling the development of new programming services.

II. THE PROGRAM ACCESS RULES SHOULD NOT BE EXTENDED TO THE TERRESTRIAL DELIVERY OF REGIONAL AND LOCAL PROGRAMMING

A. Section 628 Of The Communications Act Is Limited To Satellite-Delivered Cable Programming

The program access provisions of section 628 of the Communications Act impose restrictions only on the sale of "satellite cable programming" by vertically-integrated cable

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of financial resources to put together a network featuring syndicated television shows from the '60s and '70s.

15/ H.R. Rep. No. 102-628, at 30 (1992) ("cable's competitors serve, in the aggregate, fewer than 5 percent of American households").

16/ In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, CS Docket No. 97-141 (rel. Jan. 13, 1998) ("Fourth Annual Video Competition Report"), Appendix E, Table E-1 (estimating cable industry's share of multichannel households to be 87 percent).

17/ Clearly these companies are not lacking the financial resources necessary to invest in new programming. In the last year, Bell Atlantic purchased NYNEX for $ 25.6 billion, see "Bell Atlantic's profit rises 6.8%," THE TIMES UNION (ALBANY, N.Y.), Jan. 22, 1998, at E1, and SBC has offered $ 4.4 billion for SNET, see "Telco-Cable," WARREN'S CABLE REGULATION MONITOR, Jan. 12, 1998.

programmers.[18] Drawing on the definition of "satellite cable programming" set forth in section 705 of the Act (which addresses piracy of satellite delivered programming),[19] Congress expressly limited the ambit of section 628 only to "video programming which is transmitted via satellite[.]"[20] The suggestion in the Notice that there might be a basis for the Commission to extend the reach of the program access rules to encompass terrestrially-delivered programming is refuted by the language of the statute itself, which is explicitly confined to "satellite cable programming." When the language of a statute specifically designates the categories of covered entities, all other entities are presumptively excluded from such provision.[21] Because only satellite programming is covered by the section 628, the Commission is without authority to extend its program access jurisdiction to terrestrially-delivered programming services.[22] Indeed,

18/ 47 U.S.C. § 548(b)-(c).

19/ 47 U.S.C. § 548(i).

20/ 47 U.S.C. § 548(i), referring to 47 U.S.C. § 605(d) (emphasis added).

21/ See SUTHERLAND STAT. CONST. § 47.23 ("[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.").

22/ See Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 916 n.3 (3d Cir. 1981) ("[A]n administrative agency is a creature of statute, and can only act within the jurisdiction conferred by its enabling act Although the courts will respect authorized agency action, an assumption of jurisdiction or action that is ultra vires and beyond the scope of the delegated authority will be set aside."); Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it" to act); FCC v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979) (concluding that the "authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress"). See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) ("if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Mississippi Power & Light Co. v. Moore, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) ("[I]n defining agency jurisdiction Congress sometimes speaks in plain terms, in which case the agency has no discretion."); Hi-Craft Clothing Co., 660 F.2d at 918 (an agency's "power came to an end when its lack of jurisdiction became a matter of record"); cf. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 795 (8th Cir. 1997) ("Moreover, the absence of any reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices confirms to us that Congress did not envision the FCC's participation in determining the prices that the incumbent LECs will be able to charge for one federal court already has expressly rejected the argument that the term "satellite cable programming" could be interpreted to encompass terrestrially-delivered programming signals.[23]

The legislative history of section 628 reinforces the view that Congress expressly chose to exclude terrestrial programming from the program access requirements. The program access provisions of the Senate version of the 1992 Cable Act applied to "a video programmer in which a cable operator has an attributable interest who licenses video programming for national or regional distribution . . . ."[24] The Senate bill defined video programmer as "a person engaged in the production, creation, or wholesale distribution of a video programming service for sale,"[25] and considered a programmer who distributed a programming service to more than one "cable

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opening their networks to new entrants."), cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd. 66 U.S.L.W. 3484 (U.S. Jan. 27, 1998) (No. 97-826). See also DirecTV, Inc. v. Comcast Corp., File No. CSR 5112-P, Answer To and Request for Dismissal of Program Access Complaint at 7-9, 12-13 (filed Oct. 24, 1997).

[23] United States v. Norris, 833 F. Supp. 1392, 1398-99 (N.D. Ind. 1993), aff'd, 34 F.3d 530, 532 (7th Cir, 1994). In Norris, the court was presented with the question whether equipment that facilitates the descrambling of a transmission over a coaxial cable rather than a satellite transmission violates section 705 of the Communications Act. The government argued that the phrase "satellite cable programming" includes signals retransmitted by cable operators over coaxial cable, and that section 705 thereby reaches a device that accomplishes the unauthorized descrambling of the cable operator's coaxial wire transmission. The court flatly rejected this argument, noting that the "definition of 'satellite cable programming' covers 'video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators.'" 833 F. Supp. at 1398. The court further explained:

> That the signals are to be retransmitted does not mean that Congress sought to protect the satellite signal ad infinitum without regard to whether it remains a satellite signal or is translated into some other form; Congress merely described in greater detail the type of signal it sought to protect. . . . The converter boxes in the instant case were not designed to decrypt satellite signals "primarily intended for the direct receipt by cable operators"; rather, they allegedly were designed to decrypt signals transmitted over coaxial wire.

Id. at 1398-99. In other words, Congress's decision to use the phrase "satellite cable programming" excluded the application of section 705(e)(4) to terrestrially-delivered programming signals.

[24] See 138 CONG. REC. S763 (Jan. 31, 1992) (text of section 6 of S. 12 as passed by Senate).

[25] Id. at S762.

community" to be a "regional" cable programmer covered by the program access provisions.[26] The House version of the program access rules, however, applied only to satellite programming and made no reference to regional distribution, and it was that version that was enacted into law.[27] Thus, Congress clearly contemplated, but rejected, applying the program access provisions to non-satellite delivered programming distributed on a regional basis.[28] The Commission should not revisit Congress's resolution of this issue.

Notwithstanding suggestions to the contrary,[29] the language of section 628(b) clearly precludes the Commission from applying the program access rules to vertically-integrated programmers who decide, for whatever reason, to switch from satellite delivery of their programming services to terrestrial means.[30] Section 628(b) only applies to instances in which a cable operator or vertically-integrated satellite cable programmer (1) "engage[s] in unfair methods of competition or unfair or deceptive acts or practices" which has (2) "the purpose or effect . . . to hinder significantly or prevent" MVPDs from "providing satellite cable

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[26] Id. at S763. The term "cable community" meant the "geographic area in which a cable system provides cable service." Id. at S761.

[27] H.R. Conf. Rep. No. 102-862, at 92-93 (1992).

[28] The Supreme Court has noted that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." INS v. Cardoza-Fonseca, 480 U.S. 421, 441-43 (1987) (finding enactment of House bill rather than Senate bill demonstrates that Congress rejected Senate's stricter language); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-200 (1974) (finding deletion of language in Conference Committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

[29] Notice at ¶ 51. See also In Re Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems, Second Report and Order 11 FCC Rcd 18223, 18325 n.451 (1996).

[30] The Notice itself correctly recognizes that "[o]n its face, Section 628 does not preclude a programmer from altering its distribution method from satellite-distribution to terrestrial distribution. Notice at ¶ 51.

programming . . . ."[31] Because Congress expressly opted to exclude terrestrial programming from the reach of section 628, a programmer's decision to utilize terrestrial delivery cannot constitute an "unfair method of competition" or an "unfair or deceptive act or practice."

Moreover, an otherwise lawful practice – terrestrial delivery of programming – undertaken by a vertically-integrated cable programmer does not become unlawful simply because it removes a programming service from the ambit of section 628. Such a construction unhinges section 628(b) from its moorings, and potentially could be used to support the application of the program access rules not only to programming moved to terrestrial distribution, but also to vertically-integrated programming subsequently sold to an "independent" or non-cable affiliated entity. Section 628 cannot be construed in this manner, since it would vitiate Congress's decision to exclude both terrestrial and non-vertically integrated programming from the ambit of the program access rules.

B. As A Matter Of Policy, The Commission Should Not Apply Section 628 To Terrestrially-Delivered Cable Programming

Even if the Commission had some statutory authority to subject terrestrially-delivered programming to the program access rules, which it does not, it would contravene the public interest to apply section 628 to instances in which "a vertically-integrated programmer moves from satellite-delivered programming to terrestrial-delivered programming for the purpose of evading the program access requirements."[32] As a threshold matter, applying the strictures of section 628(b) to a programmer's decision to switch from satellite to terrestrial delivery would enmesh the Commission in lengthy and burdensome fact-intensive disputes concerning the

[31] 47 U.S.C. § 548(b).

[32] Cf. Notice at ¶ 51.

motives underlying that decision. Competitors undoubtedly would challenge any decision to move existing satellite programming to terrestrial facilities, thereby exacerbating the risks associated with switching delivery mechanisms and forcing the Commission to second-guess the business judgment exercised by programmers.

Indeed, there are sound business and policy reasons for preserving the terrestrial exception to section 628, even in instances when programming services are moved from satellite to terrestrial delivery. In some instances, particularly with local and regional programming, terrestrial delivery is simply more cost-effective, because the nationwide footprint provided by satellite delivery is unnecessary. Moreover, to the extent that an operator seeks to offer interactive, two-way components to any local services being provided, terrestrial delivery may be the most technologically feasible means of doing so.

Of equal importance, the flexibility to offer exclusivity for terrestrially-delivered programming services promotes competition and encourages the development of new programming. The exception strengthens incentives for cable operators to invest in the development of local and regional cable programming, because it permits them to utilize the full range of programmer distribution strategies, including exclusivity. This flexibility is critical to local and regional programmers, whose potential audience base and revenue streams are inherently more limited than for national programmers. If the program access rules are extended to terrestrially-delivered local and regional programming, it would not make economic sense for Cablevision to invest the substantial sums and undertake the considerable risks associated with the development of such programming. Consequently, these service will not be developed and the public will be denied <u>any</u> access to this diverse and innovative programming, undermining Congress's goal to expand the diversity of programming available to the public.

Rainbow anticipates that the bulk of the new local and regional terrestrial services it develops will consist of new programming content geared toward the local communities to which these services are being distributed. Even if some programming content shown on these new services is shifted from existing satellite cable programming services, there can be no "evasion" where an existing satellite service remains available to all MVPDs. More fundamentally, however, retaining section 628's exclusive focus on satellite-delivered programming will serve the public interest in program diversity by encouraging the development of terrestrially-delivered local and regional programming services.

1. The Development Of Local And Regional Cable Programming Services Entails Substantial And Unique Risks

Cablevision pioneered the development of local and regional cable programming services. In the 1970s, Cablevision developed the first regional sports programming network, SportsChannel. In December 1986, Rainbow launched News 12 as the world's first 24-hour regional, cable news channel. News 12 is now an integral part of the local community, providing local news, traffic, weather, and sports coverage on Long Island that was routinely neglected by the New York City broadcast stations. Today, News 12 reaches more than 2.5 million households in the greater New York market. It is one of Rainbow's most popular programming services and the quality of its programming has been widely recognized.

Rainbow delivers News 12 via terrestrial means and is in the process of expanding its regional news services to reach markets in Connecticut and New Jersey. In addition, Rainbow envisions offering to consumers an integrated collection of local terrestrial programming services that will provide access to a new level of interactive television. This package would blend superior community and neighborhood-based editorial and entertainment content with advanced broadband technology to deliver the first true electronic equivalent of a local daily newspaper. Eventually, Rainbow expects the package to contain as many as five local channels, each dedicated to a single, divergent interest, such as local weather, traffic, sports, music, arts and leisure, and self-help.[33/] These new local programming services aim to marry our subscribers' strong interest in local, community-based information and entertainment content with the two-way, interactive capabilities of advanced cable network infrastructures. Rainbow intends to put a new twist on the concept of the "global village" by using advanced technology to provide subscribers with comprehensive content pertaining to their village.

As with News 12, Rainbow plans to deliver this service terrestrially, because that is a more economically and technically efficient means of reaching specific communities of interest than using a satellite with a national footprint. In addition, permanently-linked landlines will enable Rainbow to offer interactive and innovative services as part of the mix of programming, such as multiple camera angles during sporting events and the ability to deliver a version of these services to personal computers. Landline distribution also provides the level of reliability needed for the mix-and-match programming and the inter-network coordination Rainbow envisions for these channels.

Notwithstanding the quality and popularity demonstrated by News 12, and anticipated for the new local programming services being developed by Rainbow, the risks associated with such programming are unique and substantial. By definition, local and regional programming appeals to a much smaller subscriber base (a subscriber in Boston has no interest in Long Island restaurant reviews) than does national programming, thereby limiting its potential revenues. The

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33/ Rainbow also anticipates offering some live programming, which will include community interaction via phone, fax, and the Internet.

Commission itself has previously recognized that regional and local programming has limited distribution potential, which constrains the revenue potential of such programming.[34/] Based on Rainbow's past experience, the combination of costs and limited audience and revenues means that a cable programmer interested in developing local or regional programming can expect to incur years of losses. Since the launch of News 12, for example, Rainbow has spent more than $10 million on the service but to date it has not turned a profit or broken even. Without the ability to offer distributors exclusivity, Rainbow's future ability to undertake these risks will be placed in jeopardy.

2. The Flexibility To Offer Exclusivity Is Necessary To Ensure Adequate Distribution For Terrestrially-Delivered Local And Regional Programming

To recover its costs, a regional programmer needs distributors willing to place the service on a channel that will be viewed by a substantial number of subscribers and to market the service aggressively to promote the highest possible penetration. Distributors frequently are reluctant to commit their limited channel capacity to a service that interests a smaller audience, especially in a marketplace where numerous new programmers – mostly national services with greater audience potential – are vying for their attention. The traditional carriage and promotional incentives offered to distributors such as marketing support, direct payments, and local ad avails also may be less effective for regional programmers due to their limited base of potential subscribers. Thus, maintaining the terrestrial exception to the program access rules is of critical importance to Rainbow's plans to develop additional local and regional programming services.

[34/] New England Cable News, 9 FCC Rcd 3231, 3238 ¶ 36 (1994); NewsChannel, a Division of Lenfest Programming Servs., Inc., 10 FCC Rcd 691, 695 n.47 (1994).

For instance, exclusivity helps to countervail the enhanced risks associated with distributing a service with a small subscriber base.[35/] It is particularly important in connection with the launch of a new local service. Rainbow's experience with News 12 demonstrates that new, local services cannot survive without distributors willing to place these services on highly-penetrated tiers and devote substantial resources and energy to market them to their subscribers. Absent a sufficient subscriber base to recoup its advertising or promotional expenses, however, a distributor will either decline to carry the product or it will limit its promotion and distribution.[36/] Without the flexibility to offer exclusivity, new local programming services face untenably high risks of failing to attain sufficient distribution and viewer awareness necessary to ensure their success, thereby making it uneconomic to develop these new services. Under these circumstances, it is a perfectly rational – and even necessary – business decision for a programmer whose product has a limited audience to offer exclusivity as a carrot to encourage a distributor to use all of its efforts to attract as many members of that limited audience to

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[35/] See STANLEY M. BESEN ET AL. EXCLUSIVITY AND DIFFERENTIAL PRICING FOR CABLE PROGRAM SERVICES 33-34 (Jan. 25, 1993) ("While uncertainty is always present, it is increased when the same program service is carried by a competing distributor. Increased substitutability between the offerings of the two distributors adds an additional source of variation in the value to a distributor of carrying a program service. If the distributors cannot be insulated form this increased risk, and if they are risk averse, the increased uncertainty will reduce the amount they are willing to pay for a license to a program service."). Of course, if the potential subscriber base is small, the risk increases, raising the likelihood that the distributor will completely forego carrying the service.

[36/] See 8 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1617a1, at 227 (1989) ("If prospective pioneering dealers for a new product foresee that such post-development prices would not compensate for their earlier costs, they will refuse to embark upon distribution of that product unless they believe the manufacturer will shield them from intrabrand competition long enough for them to recover their pioneering costs. Unless the manufacturer is allowed to do so, the market will fail to bring forth the new product.").

subscribe.[37] In these instances, exclusivity promotes consumer welfare by increasing the store of programming services and bringing forth a new product valued by consumers.[38]

Exclusivity for regional or local programming service also prevents competitors from "free riding" on the distributor's promotional and marketing efforts.[39] Free riding reduces the return a distributor receives from its promotional efforts and therefore reduces the incentives the distributor has to undertake such efforts at all. If a distributor concludes that competitors will free ride off of its promotions for a new local or regional service, it will decline to invest substantial resources to advertise, or even carry, such a service.

Program exclusivity also allows a distributor to differentiate its programming packages from other distributors in the crowded video distribution marketplace. Product differentiation "represents a useful and desirable part of the competitive process" that "includes such clear public benefits as product diversity, genuine innovation, responsiveness to consumers, attention [and] service[.]"[40] Exclusivity thus enables distributors to compete not only the basis of price, but also on the basis of service offerings, and thereby encourages distributors to carry new or risky programming services.

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[37] See, e.g., Three Movies v. Pacific Theaters, Inc., 828 F.2d 1395, 1399-400 (9th Cir. 1987) (finding a legitimate business reason to limit exhibition of first-run movies to one theater to recoup investment, avoid free riding, and to reach the largest number of viewers with the smallest number of movie prints).

[38] See 8 AREEDA ¶ 1617a1, at 227-28; Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 35, 51-57; Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1227 (10th Cir. 1986) ("[R]efusals to deal may facilitate the entry of new manufacturers into the market. The prospect of limited intrabrand competition that results from restricted distribution may encourage distributors to make the investment necessary to carry the new manufacturer's product.").

[39] See 8 AREEDA ¶ 1611c2, at 153 ("By limiting intrabrand competition, a manufacturer may prevent the free riding that impairs the provision of dealer services desired by all consumers[.]"); Three Movies, 828 F.2d at 1399 (preventing free riding off of theater's advertising).

[40] 8 AREEDA ¶ 1612c2, at 170.