BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF TIME WARNER INC.

Steven N. Teplitz
Susan A. Mort
TIME WARNER INC.
800 Connecticut Ave., N.W.
Washington, DC 20006

Michael H. Hammer
Megan Anne Stull
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
Attorneys For Time Warner Inc.

April 16, 2007

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF TIME WARNER INC.

Time Warner Inc. ("Time Warner") hereby replies to the comments filed in the Notice of Proposed Rulemaking ("*Notice*") issued in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

Virtually every party that filed comments in this proceeding conceded that the marketplace has changed dramatically since the program access rules were adopted in 1992. In particular, DIRECTV and EchoStar, which had not begun service in 1992, are today the second and fourth largest MVPDs. DIRECTV has over 16 million subscribers and EchoStar has over 13 million subscribers. Together, the two companies serve over 30% of all multichannel video subscribers. Moreover, Verizon and AT&T, two of America's largest corporations, each with

---

[1] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd. 4252 (2007) ("*Notice*").

annual revenues that exceed those of the entire cable industry, have entered the marketplace and are aggressively competing for subscribers. Programming has flourished, as well. Today, there are over 500 national program networks and about 100 regional program networks. It is no wonder that the Commission has concluded that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[2]

These pro-competitive and pro-consumer developments are a critical backdrop to this proceeding and directly undermine the suggestion that the Commission should alter its program access procedural rules. The fact is, the growth in MVPD competition and the increase in the amount and diversity of programming available to consumers were all achieved under the current procedures, without expanded discovery, mandatory arbitration, or a standstill requirement.

From the outset, the Commission recognized that the appropriate way to resolve carriage disputes between programmers and MVPDs was for the parties to hash out their differences at the bargaining table, and it adopted policies and procedures to encourage such negotiations. The results have been exceedingly positive. In the 15 years since the rules were adopted, programmers and MVPDs have conducted thousands of carriage negotiations and only a handful have resulted in program access complaints. Of the complaints that have been filed, the vast majority have been settled prior to a Commission decision. MVPDs and programmers can and do reach carriage agreements without government intervention, and the fact that the Commission's rules encourage that result is a basis for congratulations, not criticism.

---

2 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 10th Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004).

The Commission's approach also is consistent with the normal principle that the marketplace should govern negotiations between private parties. The program access rules are a departure from that norm, based on a narrow concern articulated 15 years ago when the marketplace was fundamentally less competitive than today. As the Commission has recognized, "Congress believed it unlikely that *new market entrants* could compete effectively unless they could gain access to vertically integrated, satellite delivered programming. It was this programming that Congress believed incumbent providers had both the incentive and the ability to deny to *new competitors*."[3]

Today, however, EchoStar and DIRECTV are abusing the program access rules to increase their bargaining leverage with programmers. EchoStar and DIRECTV are by far the most prolific program access complainants. Of the 22 complaints that have been filed since 1998, almost 50% were filed by the two DBS operators. EchoStar and DIRECTV are no longer the type of new marketplace entrants Congress sought to protect when it adopted the program access provisions. They are large, powerful companies that have been in business nearly two decades and their ability to compete effectively is not in doubt.

To make matters worse, EchoStar is attempting in this proceeding to *expand* its regulatory advantage by using the program access rules in ways never intended by Congress or the Commission. EchoStar's proposal -- to require a programmer to submit *six* carriage contracts for comparison with the complainant's contract -- would allow MVPDs to engage in "fishing expeditions" for highly confidential and competitively sensitive information that would give

---

[3] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition,* Report & Order, 17 FCC Rcd. 12124 ¶ 7 (2002) ("*Sunset Order*") (emphasis added).

them substantially increased and unfair leverage in their negotiations with programmers. Indeed, under EchoStar's proposal, the temptation for an MVPD to file a program access complaint just to learn the details of its competitors' contracts with a programmer would be irresistible, particularly since there is no downside risk to such a strategy: once having gained access to the information, the MVPD can simply withdraw the complaint without penalty.

Moreover, there is no need for the Commission to adopt expanded discovery procedures. The current rules already permit discovery where warranted. By contrast, EchoStar's expanded discovery proposal would create a procedural quagmire. Programming contracts are extremely complex (as explained below, this is especially true in the case of contracts for carriage of premium networks) and comparing *one* contract to the complainant's contract is difficult enough. Comparing *six* would be virtually unworkable.

Likewise, the Commission should reject the proposal of some parties to impose mandatory arbitration in program access complaints. As described below, arbitration is generally a matter of contract, and federal law prohibits an agency from "requiring any person to consent to arbitration" in order to "ensure that the use of arbitration is *truly voluntary* on all sides." Thus, a mandatory arbitration requirement would be ultra vires and unlawful.

The Commission should also reject the standstill requirement advocated by some parties. It appears that the standstill requirement being proposed would prohibit a network from deauthorizing carriage by an MVPD, but would allow the MVPD to drop the network. This would create an extraordinarily unfair bargaining situation. Moreover, any standstill requirement would *increase* the likelihood of program access complaints (because the MVPD will have a strong incentive to file a complaint just to protect the status quo) and *decrease* the chances that parties will resolve their disputes (because, depending on who likes the status quo, the incentive of either party to negotiate could be reduced once the status quo is protected).

Time Warner agrees with NCTA's comments and reply comments which describe the reasons why the Commission should not expand the program access procedures, as well as the reasons why the exclusivity restriction should be allowed to sunset. In particular, Time Warner believes an extension of the restriction would raise serious constitutional issues. No party has submitted evidence that the restriction is necessary to "further an important or substantial governmental interest" -- here, preserving and protecting competition -- and, therefore, the First Amendment requires that the restriction must be allowed to sunset.

Finally, the Commission should approach with caution any suggestion to expand the program access rules, not only because the rules are inconsistent with the norm of relying on the marketplace to govern contracts between private parties, but because they apply to only a very small number of program networks. These networks face a burdensome regulatory regime that skews their negotiations with MVPDs and is not faced by the vast majority of their program network competitors. Such a dichotomy -- like the program access rules themselves -- is increasingly unfair and unjustified given the competitive state of the marketplace.

II. THE COMMISSION'S MANAGEMENT OF PROGRAM ACCESS COMPLAINTS HAS BEEN FAIR AND APPROPRIATE, AND THERE IS NO REASON TO REVISE ITS CURRENT PROCEDURAL RULES.

A number of parties criticized the Commission's handling of program access complaints. For example, parties complained that the Commission takes too long to decide complaints[4] and

---

[4] *See, e.g.*, EchoStar Comments at 14 (claiming that "the Commission has failed to resolve program access complaints on their merits in an expedited manner"); Broadband Serv. Providers Ass'n ("BSPA") Comments at 7

(footnote continued…)

has adopted inadequate discovery procedures.[5] Parties suggested that the Commission adopt shorter self-imposed deadlines,[6] or that complaints be farmed out to third-party arbitrators.[7] The implication is that the Commission is incapable of processing complaints in an efficient and equitable manner.

Time Warner disagrees. The Commission typically has resolved program access complaints in a reasonable time frame given the significant complexity the complaints present. More important, the Commission's policies and procedures have encouraged parties to settle their disputes at the bargaining table, and the vast majority of complaints have been resolved in that manner. In Time Warner's view, the Commission deserves credit, not criticism, for its handling of program access complaints.

(…footnote continued)

(claiming that "the Commission's program access complaint rules and procedures are inadequate and lack the teeth necessary to ensure a timely, efficient resolution"); Coalition for Competitive Access to Content ("CA2C") Comments at 21 (stating that the timeframe for resolving program access complaints is "uncertain, with complaints often taking years to resolve," but not providing any specific instances where the Commission took "years"); Office of Advocacy, U.S. Small Bus. Admin. ("SBA Advocacy") Comments at 8; Organization for the Promotion & Advancement of Small Telecomm. Cos. ("OPASTCO") Comments at 8; RCN Comments at 18; United States Telcom Ass'n ("USTA") Comments at 25-27; AT&T Comments at 27; Verizon Comments at 15-16.

[5] *See, e.g.*, EchoStar Comments at 17; USTA Comments at 21-24; CA2C Comments at 22-24.

[6] *See, e.g.,* AT&T Comments at 29-30; CA2C Comments at 21-22; OPASTCO Comments at 8; USTA Comments at 25; Verizon Comments at 16.

[7] *See, e.g.*, BSPA Comments at 7-13; RCN Comments at 18-20; EchoStar Comments at 18-24; OPASTCO Comments at 8; SBA Advocacy Comments at 8.

A. Expanded Discovery Rules Are Unnecessary, Inconsistent With The Commission's Goals And Policies, And Would Create A Procedural Quagmire That Would Delay Resolution Of Program Access Complaints.

A number of parties urge the Commission to expand discovery in program access proceedings.[8] EchoStar, for example, suggests that the Commission require programmers to produce "at least six carriage contracts" in response to any program access complaint.[9] According to EchoStar, "[t]hese agreements should offer a broad representation of carriage terms across platforms, and different sized providers."[10] EchoStar further suggests that programmers should be required to respond to fifteen written interrogatories submitted by the complainant.[11]

Expanded discovery is unnecessary and potentially pernicious. The current rules already permit discovery where appropriate. The fact that EchoStar and other complainants have rarely been able to convince the Commission to allow discovery demonstrates that, as the Commission originally envisioned, the complaint, answer, and reply provide a sufficient basis for resolving complaints.

Likewise, the fact that so few program access complaints have been brought over the years does not, as some parties suggest, demonstrate that the Commission is doing something wrong. To the contrary, it reflects the Commission's proper judgment that carriage contracts should be negotiated in the marketplace between the parties, not in the halls of government. It reflects, as well, the lack of any evidence that discrimination is a problem in today's

---

8 *See, e.g.*, EchoStar Comments at 17; USTA Comments at 21-24; CA2C Comments at 22-24.

9 EchoStar Comments at 27.

10 *Id*.

11 *See id.* (arguing that complainants be permitted to "file and serve up to ten written interrogatories at the same time as the complaint, and up to five more interrogatories after the defendant's answer.").

marketplace. The implication that the settlement of a program access complaint by the parties is somehow a "failure" on the part of the Commission turns logic on its head. To the extent the Commission's procedural rules encourage parties to resolve disputes at the bargaining table, that is a *success*.

Expanded discovery would turn the program access rules into a procedural quagmire. Program carriage agreements are extremely complex, involving dozens of issues, such as license fees, marketing, signal security, performance incentives, packaging conditions, audit rights, and copy protection. It typically takes the parties months to reach agreement on terms. As the Commission knows, comparing the complainant's contract with *one* other contract is difficult and time-consuming. If it were required to compare the complainant's contract with six other contracts, the complaint process would become virtually unworkable.

This issue is exacerbated with respect to premium networks, such as HBO, because their carriage contracts are particularly complex. Premium networks are sold to consumers on an individual basis, not in a tier. Premium networks, therefore, must build subscribership one customer at a time. In addition, premium networks have a high "churn" rate -- they typically lose 5-6% of their customers each month -- so they need to replace half of their customers each year just to stay even.[12] As a result, marketing and promotional efforts are critical to the survival and growth of premium networks.

Marketing and promotion of premium networks also requires extensive and ongoing cooperation between premium networks and MVPDs, since the MVPDs have the direct relationship with the end-user customer. For example, premium networks and MVPDs share

---

12 *See* John M. Higgins, *Premium Networks Take A Hit*, Broad. & Cable, Feb. 9, 2004.

resources and work closely on a series of tactics designed to stimulate consumer demand, including, for example, advertising campaigns, direct mail, free previews, payment center promotions, cash marketing support, telemarketing, training MVPDs' customer service representatives, and performance discounts and other incentives to encourage MVPDs to favorably price, package, and promote the premium network. In sum, contracts between premium networks and MVPDs are exceedingly complex, and analyzing them would require significant resources and time for both the programmer and the Commission under an expanded discovery regime.[13]

Moreover, the Commission has long recognized that the program access rules only make sense if the terms a programmer offers an MVPD are compared to the terms it offers another *similarly situated* MVPD.[14] By requiring a "broad representation of carriage terms across platforms, and different sized providers," EchoStar's proposal would render the similarly situated requirement meaningless. The agreements of such different MVPDs would provide no insight whatsoever into whether an MVPD is facing discriminatory treatment.

---

13 The particular marketing strategies a premium network and an MVPD employ are dependent on their individual circumstances, so the contracts contain highly specialized and unique marketing provisions, as are clearly contemplated under the program access rules. *See* 47 U.S.C. § 548(c)(2)(B)(i); S. Rep. No. 102-92, at 28 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 ("The Committee recognizes that distributors may undertake different levels of promotion, marketing, billing, and collection, and other efforts that are of value to video programmers, and that these are legitimate business considerations in establishing rates, terms, and conditions in contracts with multichannel video distributors. The Committee intends that video programmers have flexibility in negotiating price, terms, and conditions for distribution, so long as the price, terms, and conditions allow competition to flourish."). The program access rules, however, have a tendency to push networks to homogenize their program contracts because it is "safe" to do so. That is, to the extent that a network's distributors have the same (or very similar) contract provisions, the program access risk is low. For the reasons described above, this dynamic does not work for premium networks. The program access rules thus place a unique burden on premium networks and ultimately harm those networks as well as consumers.

14 *See* 47 C.F.R. § 76.1003(e)(3)(iii).

Ironically, the same parties that argue for expanded discovery also complain that the Commission is too slow in resolving complaints.[15] Expanded discovery would *increase* the duration of program access proceedings. A much longer time would be needed to analyze and compare the complainant's contract to multiple different MVPD contracts, plus respond to interrogatories. It would be unreasonable to expect a programmer to do so in the current 20-day response period, let alone the 10-day period proposed by EchoStar.[16]

Expanded discovery also would increase the burdens on the Commission staff. For example, the Commission would have to analyze the complaint, the programmer's answer and supporting affidavits, multiple different carriage contracts, the programmer's answers to fifteen interrogatories, the complainant's reply, and any surreplies filed by the parties, as well as to write an order disposing of the case. According to EchoStar, the Commission should be required to complete all this within 45 days. This compressed time frame is as unrealistic as it is unnecessary.

Expanded discovery would allow MVPDs to engage in "fishing expeditions" designed to give them increased leverage in their negotiations with programmers. For example, if an MVPD knew the terms of a programmer's carriage agreements with multiple other MVPDs, it would have an extraordinary advantage over the programmer when negotiating its own carriage agreement.[17] The harm to programmers would be increased six-fold under EchoStar's proposal.

---

15 *See, e.g.*, EchoStar Comments at 13-15; USTA Comments at 25; CA2C Comments at 21-22; AT&T Comments at 29-30.

16 EchoStar Comments at 25.

17 Program carriage agreements also involve third parties that would not be involved in the complaint proceeding. If the terms and conditions of those contracts were inadvertently revealed, they could be used by the complainant to the significant disadvantage of those third parties. For example, if a complainant were to learn the

(footnote continued…)

In fact, if all MVPDs were able to use the program access rules to obtain six of their competitors' contracts in every program access complaint, the confidential nature of the negotiations between these programmers and MVPDs -- which the Commission has always recognized and assiduously attempted to protect -- would quickly break down completely. Everyone would know the terms of everyone else's contracts. Not only are the implications for competition profoundly negative, but this is a virtual recipe for price fixing.

Expanded discovery is particularly unwarranted because DIRECTV and EchoStar are by far the most frequent program access complainants, today accounting for nearly half of all complaints. As noted, Congress established the program access rules to protect nascent and fledgling MVPDs, which in 1992, the DBS providers unquestionably were. However, by no means are DIRECTV and EchoStar nascent or fledgling competitors today. With 16 million and 13 million subscribers respectively, they are the second and fourth largest MVPDs in the country. They plainly do not need the government to help them negotiate carriage contracts with programmers. In fact, there are adequate bases for the Commission to conclude that DIRECTV and Echostar should no longer have standing to bring program access complaints, but there certainly is no policy or legal basis to *expand* the regulatory advantage these two companies already enjoy by adopting new and far-reaching discovery rules that permit them to root around in programmers' confidential and competitively-sensitive distribution contracts.

(…footnote continued)

cost and pricing structure of a competing distributor's contract with HBO, it could act strategically to price and market its own services in a way that could cause significant harm to the other distributor. The risk of such an outcome is significantly higher when six contracts, rather than one, are disclosed in response to every program access complaint.

The anti-competitive risks associated with expanded discovery are all the more significant because carriage agreements are a programmer's most sensitive documents. These agreements contain information at the very heart of how the programmer conducts its business, and thus are highly proprietary and maintained in the strictest confidence. Even inadvertent disclosure of such contracts would harm the programmer and place it at a significant competitive disadvantage. As the Commission has consistently recognized, "disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider."[18] For this reason, the Commission has often affirmed that programming contracts are highly confidential and deserve the highest levels of protection.[19]

Contrary to USTA's arguments, protective orders do not eliminate the potential for harm.[20] Disclosures of confidential information, even when covered by a protective order, are

---

18 *See In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816 ¶ 61 (1998) ("*Confidential Information Order*").

19 For instance, programming contracts qualify as automatically exempt from public examination under Section 0.457(d)(1)(iv) of the Commission's rules. *See* 47 C.F.R. § 0.457(d)(1)(iv) (providing an automatic exemption for "[p]rogramming contracts between programmers and multichannel video programming distributors"); *see also id.* § 0.457(d) (citing 5 U.S.C. § 552(b)(4) and 18 U.S.C. § 1905); *Confidential Information Order* ¶ 61 (amending Section 0.457 of the Commission's rules to "state that programming contracts between programmers and multichannel video programming distributors will not be routinely available for public inspection"). The Commission also has granted *enhanced* confidentiality protection in program access and merger proceedings to prevent inadvertent disclosures of programming contracts. *See EchoStar Satellite L.L.C. v. Home Box Office, Inc., Request for Enhanced Confidential Treatment*, Order, 21 FCC Rcd. 14197 ¶ 9 (2006) (finding that enhanced confidential treatment was necessary to protect the "highly sensitive material" contained in HBO's programming contracts); *In re Applications for the Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al. - Order Adopting Second Protective Order*, Order, 20 FCC Rcd. 20073 ¶ 7 (2005) (granting enhanced confidential treatment for programming contracts to certain RSN contracts at the heart of the proceeding); *In re News Corp., General Motors Corp., and Hughes Electronics Corp. - Order Concerning Second Protective Order,* Order, 18 FCC Rcd. 15198 ¶¶ 2-3 (2003) (granting "enhanced protection" for "highly sensitive material" contained in certain documents related to News Corp.'s programming contracts).

20 *See* USTA Comments at 24-25.

common, having occurred in several previous Commission proceedings.[21] The risks would increase dramatically if multiple carriage contracts were in play, rather than just one. And, post-breach punishment of offenders does not cure the irreparable damage caused by a leak of the terms of a programming contract. Whether intentional or not, leaked confidential information can be used by the disclosing party (and other parties) to craft negotiation strategies that are extremely harmful both to the programmer and the competing MVPDs whose contract terms have been disclosed.

The current rules permit discovery when a complainant demonstrates that it is necessary to resolve the complaint, and the Commission has fairly balanced the complainant's interest in obtaining information vital to its complaint with the programmer's need to protect the sensitive information contained in its carriage agreements. The Commission has repeatedly rejected attempts to game the discovery process in program access and other contexts,[22] and it should do so here as well.[23]

---

[21] *See, e.g., In re Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, Order, 15 FCC Rcd 19668 (2000) (describing the breach of a merger protective order by the Walt Disney Company); *see also EchoStar Satellite Corp. v. Young Broad. Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070, ¶ 7 (2001) (describing EchoStar's disclosure of allegedly confidential information on its "Charlie Chat" program).

[22] *See, e.g., Family Stations, Inc. v. EchoStar Satellite Corp.; Request for Mandatory Carriage of Television Station KFTL-TV, Stockton, CA*, Memorandum Opinion and Order, 17 FCC Rcd. 982 ¶ 1 & n.4 (2002) ("We reject EchoStar's supplemental filing since it failed to articulate the extraordinary circumstances required to support its consideration under 47 C.F.R. § 76.7(d)."); *Family Stations, Inc. v. EchoStar Satellite Corp.; Request for Mandatory Carriage of Television Station WFME-TV, West Milford, NJ*, Memorandum Opinion and Order, 17 FCC Rcd. 987 ¶ 1 & n.4 (2002) (same); *EchoStar Communications Corp. v. Comcast Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 2089 ¶ 31 (1999) (concluding that "EchoStar has not persuaded us that discovery is necessary or that the record compiled herein is insufficient").

[23] Expanded procedural rules are not justified as necessary to ensure MVPDs' access to "must have" program networks. The Commission's recent characterization of certain networks, including HBO, as "must have" does not withstand legal or factual scrutiny. While Time Warner is proud of HBO's service, in today's 500+ channel world, it is difficult to characterize any single network as essential to an MVPD's survival, the *sine qua non* of a "must have" network. Moreover, the Commission has never solicited public comment on which networks qualify as "must have," has never adopted criteria for determining if a network is "must have," and has produced no reports, studies,

(footnote continued…)

B. The Commission Lacks Legal Authority Or A Policy Basis To Adopt Mandatory Arbitration.

Some parties have urged the Commission to adopt mandatory arbitration for program access complaints. Time Warner opposes mandatory arbitration because it is unnecessary and would be inconsistent with the Commission's goal to facilitate a rapid resolution of program access complaints. It would also violate federal law.

Under federal law, "arbitration is a matter of contract."[24] A party "cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[25] Thus, a rule imposing mandatory arbitration without any agreement between the parties would violate federal law.[26] Moreover, the Alternative Dispute Resolution Act ("ADRA") "prohibits a federal agency from requiring any person to consent to arbitration" in order to "ensure that the use of arbitration is *truly voluntary* on all sides."[27] Notably, the Commission's own rules incorporate ADRA.[28] Thus, the Commission has an obligation to follow the statute.[29]

(…footnote continued)

consumer surveys, or other evidence that would explain or justify its conclusion. Surely, on an issue with such clear First Amendment implications, the commenting parties must do more than simply assert that a network is "must have."

24 *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986).

25 *Id.* (quoting *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582 (1960)); *see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942 (1995) ("[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute."); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869, 876 (1998) (holding that employees "need not submit fee disputes to arbitration when they have never agreed to do so"); 5 U.S.C. § 575(a)(1) (2006) (only allowing arbitration "whenever all parties consent"); *id*. § 572(c) (reaffirming that agency arbitration mechanisms "are *voluntary* procedures") (emphasis added).

26 It would also run afoul of state laws that uniformly prohibit arbitration where "there is no agreement to arbitrate." *See*, *e.g.*, Mass. Gen. Laws. Ann. ch. 251, § 2(b) (West 2007); 42 Pa. Cons. Stat. § 7304(b) (2006); D.C. Code Ann. § 16-4302(b) (LexisNexis 2007); *accord* Fla. Stat. Ann. § 682.03(4) (West 2007); N.Y. Civ. Prac. Law & Rules § 7503(b) (2007); Del. Code Ann. tit. 10, § 5703(b) (2007).

27 S. Rep. No. 101-543, at 13, *as reprinted in* 1990 U.S.C.C.A.N. 3931, 3943 (emphasis added)*; accord id.* at 3932 ("Participation in the ADR techniques authorized by the Act is predicated on the voluntary, informed

(footnote continued…)

ADRA also prohibits an agency from considering arbitration if the matter: 1) involves significant government policy questions; 2) requires consistent policies that should not be subject to individual decisions; 3) may significantly affect third parties; or 4) is important enough to require a full public record.[30] Program access complaints have almost uniformly focused on legal interpretations of the scope of the program access provision;[31] therefore, the cases involve significant policy questions and require a consistent approach. Likewise, carriage decisions inevitably affect third parties, including consumers and other programmers. And, given the important implications of program access complaints, including potential First Amendment implications, a full record of the proceedings is critical. The Commission is uniquely qualified

(…footnote continued)

agreement of all parties to a dispute."); *id.* at 3933 (explaining that Congress passed ADRA "to promote more efficient, effective administrative procedures through the use of voluntary, informal procedures"); *id.* at 3936 (explaining that ADRA is only constitutional if the "decision to arbitrate" is truly "voluntary on the part of all parties and is subject to the [ADRA's] guidelines"); *id.* at 3937 (explaining that "[v]oluntary binding arbitration" is only "authorized when all parties consent, subject to safeguards of judicial review and agency review of the appropriateness of arbitral awards"); *id.* at 3939 (explaining that ADRA only allows arbitration "when all the parties to the dispute voluntarily agree to its use").

28 *See* 47 C.F.R. § 1.18(b) (2006).

29 *Accord Review of Car Hire Regulation*, Ex Parte No. 334 (Sub-No. 6), Ex Parte No. 334 (Sub-No. 8), Ex Parte No. 334 (Sub-No. 8A), 1992 ICC LEXIS 34, *18 (I.C.C. Feb. 18, 1992) ("[T]he Administrative Dispute Resolution Act (ADRA) . . . *permits an agency to allow, but prohibits it from requiring arbitration*.") (emphasis added); *S. Pac. Transp. Co. v. I.C.C.*, 69 F.3d 583, 599 (D.C. Cir. 1995) (Rogers, J., dissenting on other grounds) (rejecting mandatory arbitration requirement under 5 U.S.C. § 575(a)(3)).

30 *See* 5 U.S.C. § 572(b) (2006).

31 *See* NCTA Comments at 12-13 & n.32 (citing, *e.g.*, *World Satellite Network, Inc. v. TCI*, 14 FCC Rcd. 13242 (1999) (denying complaint because of lack of standing); *Dakota Telecom, Inc. v. CBS Broad., Inc*., 14 FCC Rcd. 10500 (1999) (denying program access complaint brought against exclusive contract between cable operator and non-vertically-integrated program network); *RCN Telecom Servs. of N.Y. v. Cablevision Sys. Corp*., 14 FCC Rcd. 17093 (1999) (denying program access complaint brought against non-satellite delivered service); *Everest Midwest Licensee v. Kansas City Cable Partners*, 18 FCC Rcd. 26679 (2003) (denying complaint filed against terrestrially delivered and unaffiliated program network)).

to make program access determinations, and ADRA recognizes that in such circumstances mandatory arbitration is inappropriate.

Before mandating arbitration, ADRA requires the head of each agency to consult with the Attorney General and issue guidance on the appropriate use of binding arbitration and when the agency has authority to settle an issue in controversy through binding arbitration.[32] Several years ago, the Commission issued an initial policy statement and order establishing a pilot program for the use of private arbitration.[33] Based on that pilot program and public comments, the Commission stated that it would issue a final order establishing guidance on the use of private arbitration, as required by ADRA. However, it does not appear that the Commission issued a final order.[34] Absent these guidelines, the Commission has no authority to mandate arbitration.

The Communications Act provides no rationale for the Commission to require mandatory arbitration for program access regulations. Section 628 instructs *the Commission* to establish procedures and remedies for program access complaints.[35] It does not permit the Commission to subdelegate its responsibilities to third parties. The D.C. Circuit has consistently affirmed that

---

32 5 U.S.C. § 575(c).

33 *See In re Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in Which the Commission Is a Party,* Initial Policy Statement and Order, 6 FCC Rcd. 5669 ¶ 2 n. 6 (1991) (setting forth the Commission's preliminary policies concerning the use of ADRA and expressly contemplating that a final policy statement would be developed, reviewed with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service, and issued).

34 *See In re Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission Is a Party*, Memorandum Opinion and Order, 7 FCC Rcd. 4679 ¶¶ 5-6 (1992) (explaining only that ADRA applies to proceedings "in which the Commission is the deciding body but not itself a party" and to "situations where the FCC may not be aware that parties have hired a private neutral," but providing no further clarifications or procedures); *In re Termination of Stale or Mooted Proceedings*, Order, 17 FCC Rcd. 4543, Appendix (2002) (terminating the docket entitled "Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party" before the issuance of a final policy statement).

35 *See* 47 U.S.C. § 548(e)-(f).

"the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of Congressional authorization."[36] No such Congressional authorization exists here.

In its comments, EchoStar erroneously argues that the Commission can impose a mandatory arbitration condition because "Congress specifically provided in Section 628(e)(2) that enforcement of the program access rules through administrative adjudication is 'in addition to and not in lieu of the remedies available' in a forfeiture proceeding or under 'any other provision' of the Communications Act."[37] EchoStar misstates Section 628(e)(2). That section addresses remedies after the Commission finds a violation of the program access rules, and does not address "administrative adjudication" or other procedures.[38] Sections 628(d) and (f) govern the program access "Adjudicatory Proceeding" and "Procedures," and leave no doubt that the Commission is responsible for implementation and enforcement of the program access provision of the statute.[39] No other provision in the Communications Act gives the Commission the authority to order mandatory arbitration against a party's consent, and federal law prevents the Commission from doing so here.

---

36 *USTA v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (citations omitted); *see also Mich. Bell Tel. Co. v. Lark*, 373 F. Supp. 2d 694 (E.D. Mich. 2005).

37 EchoStar Comments at 21.

38 *See* 47 U.S.C. § 548 (e)(1)-(2) ("Remedies Authorized.--Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved [MVPD] . . . . The remedies provided [above] are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.")

39 *See id.* § 548(d) (noting that any MVPD "aggrieved by conduct that it alleges constitutes a violation of [the program access rules] *may commence an adjudicatory proceeding at the Commission*") (emphasis added); *id.* § 548(f) (charging the Commission with prescribing regulations that "provide for an expedited review of any complaints," establish procedures *for the Commission to collect* such data . . . alleged to violate this section," and "provide for penalties to be assessed against any person filing a frivolous complaint") (emphasis added).

EchoStar also erroneously argues that ADRA does not prevent mandatory arbitration so long as the Commission retains final decision-making authority.[40] ADRA broadly applies to any "alternative means of dispute resolution," which includes "any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombuds, or any combination thereof."[41] De novo review does not change the fact that parties would be compelled to submit to an arbitration process without their consent. The Commission cannot make an otherwise unlawful arbitration requirement lawful simply by retaining the authority to review the arbitrator's decision.

Finally, mandatory arbitration is unnecessary. As described above, very few program access complaints have been brought over the years and the vast majority of those have been settled by the parties prior to a Commission decision. Settling carriage disputes between the parties at the bargaining table is the appropriate result. There is no evidence to suggest the need to bring a third party in to resolve these disputes, particularly when both parties do not agree to arbitration and the Commission plainly lacks authority to compel the parties to arbitrate.

---

40 EchoStar Comments at 22.

41 5 U.S.C. § 571(3) (2006); *see also id.* § 571(6) (defining "dispute resolution proceeding" as "any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate"); *id.* § 572(a); *id.* § 572(b) (limiting authority of agency to use a "dispute resolution proceeding"). In addition, the Commissioners have made clear that the arbitration procedures in the *News Corp.* and *Adelphia Orders* are in fact "binding." *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corp. to Time Warner Cable Inc. and Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd. 8203 (2006) (Statement of Chairman Kevin J. Martin) ("As a result, we conditioned approval of the News Corp./DirecTV transaction on the requirement that News Corp. make its affiliated RSNs available to other MVPDs and, if the parties were not able to reach an agreement on the terms and conditions, the MVPD could request binding arbitration. We adopt the same condition here . . ."); *In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority To Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, 699 (2004) (Dissenting Statement of Commissioner Jonathan Adelstein, dissenting on other grounds) ("[T]he Order appropriately adopts a fair and neutral mechanism to resolve disputes, requiring News Corp. to agree to undertake binding arbitration with its distribution rivals.").

C. The Commission Should Not Adopt A Standstill Provision.

Some commenters ask the Commission to adopt a standstill requirement that would prohibit an affiliated program network from deauthorizing distribution of its programming during a program access dispute. Such a requirement would undermine rather than promote the goals of the program access rules.

As an initial matter, this one-sided standstill proposal reveals a disingenuous intent to increase the MVPD's leverage in negotiations with programmers. If the Commission were to remove the ability of only one side of the negotiations to walk away (*i.e.*, the programmer *could not* say it would deauthorize the MVPD if the parties cannot come to terms, but the MVPD *could* say it would stop carrying the programming if the parties cannot come to terms), it would be shifting the bargaining power toward the party that can still walk away. The threat of deauthorization gives the programmer negotiating leverage, and the threat of dropping the service gives the MVPD negotiating leverage. If the FCC removed the former, the MVPD's relative leverage would increase significantly.

Moreover, any standstill requirement -- even one applied to both sides in a negotiation -- would *increase* the likelihood of program access complaints and *reduce* the chances that parties will be able to negotiate a resolution of their carriage disputes. A standstill requirement would increase the likelihood of program access complaints because MVPDs would have an incentive to routinely file complaints to protect their status quo. It would reduce the incentives of both parties to negotiate resolution of their disputes because the risk of losing valuable programming helps keep an MVPD at the bargaining table, and the risk of losing carriage helps keep the program network at the bargaining table. Depending on the circumstances (*i.e.*, who likes the status quo), a standstill agreement could reduce either party's incentive to negotiate an agreement.

III. EXTENDING THE RESTRICTION ON EXCLUSIVE AGREEMENTS IS INCONSISTENT WITH THE FIRST AMENDMENT.

Time Warner believes an extension of the restriction would raise serious constitutional issues. Program-access rules significantly encroach on constitutionally protected speech, thereby triggering at least intermediate scrutiny.[42] To survive intermediate scrutiny, a regulation must "furthe[r] an important or substantial governmental interest" and may not impose a burden that is "greater than is essential to the furtherance of that interest."[43] The statute frames the government's interest here as "preserv[ing] and protect[ing] competition.[44]

It is significant that no commenter has submitted evidence demonstrating that, in the absence of the restriction, the amount of withholding will be so substantial that competition will be harmed.[45] Indeed, the fact that one-third of programmers' revenues today are derived from non-cable MVPDs makes withholding much less likely. Moreover, cable operators have no incentive to withhold programming in locations where they have no cable systems,[46] and the vast majority of video-programming services today are not affiliated with any cable operator at all.

---

42 *See Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996).

43 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (internal quotation marks omitted). The Commission may not "simply posit the existence of the disease sought to be cured." *Id.* at 664 (plurality) (internal quotation marks omitted). Rather, it "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

44 47 U.S.C. § 548(c)(5).

45 For there to be harm to competition, it is not enough that there is harm to competitors. *See*, *e.g.*, *Brooke Group Ltd. v. Brown & Williamson Corp.*, 509 U.S. 209, 224 (1993) ("It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.") (internal quotation marks omitted).

46 The Commission may not assume that cable operators will withhold affiliated programming with a view to assisting other cable operators. *See Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) ("the FCC has put forth no evidence at all that indicates the prospects for collusion").

Likewise, no commenter submitted or could submit any evidence demonstrating that the expected level of withholding will harm consumers. Plainly, allowing the exclusivity restriction to sunset will not cause DBS operators and ILECs to abandon their massive sunk investment in video distribution facilities or otherwise compete less vigorously. The more plausible prediction is that, if these firms -- some of which dwarf even the largest cable operators in size and revenue -- are denied access to a few cable-affiliated programming channels, they will invest in programming of their own. That would not harm consumers, it would benefit them.

The First Amendment requires the Commission to build "a record that convincingly shows a problem to exist,"[47] based on "empirical proof."[48] There is no such proof in this record. Accordingly, the exclusivity restriction must be allowed to sunset.

---

47 *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam); *see Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-55 (D.C. Cir. 1985).

48 *Quincy*, 768 F.2d at 1457-58.

IV. CONCLUSION

The comments filed in response to the *Notice* have presented no evidence to support expansion of the Commission's program access discovery rules or to adopt new procedural rules, such as mandatory arbitration and a standstill provision. Time Warner respectfully requests that the Commission reject all such proposals.

Respectfully submitted,

<u>/s/ Michael H. Hammer</u>
Michael H. Hammer
Megan Anne Stull
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238

Steven N. Teplitz
Susan A. Mort
TIME WARNER INC.
800 Connecticut Ave., N.W.
Washington, D.C. 20006

April 16, 2007