

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

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

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**COMMENTS OF AT&T INC.**

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**I. INTRODUCTION AND SUMMARY.**

In its recent *Program Access Extension Order*, the Commission rightly concluded that incumbent cable operators retain the incentive and ability to deny their competitors access to (or otherwise discriminate in the provision of) must-have, affiliated programming that is vital for the growth and development of a competitive marketplace.<sup>2</sup> As Commissioner Copps observed, that incentive is particularly acute now that new entrants are beginning to gain a foothold in markets dominated by formerly monopoly cable incumbents.<sup>3</sup> The Commission also found that, absent a prohibition, cable-affiliated programmers will withhold such essential programming from competitive MVPDs,<sup>4</sup> and thus that the exclusive access prohibition continues to be necessary to

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<sup>1</sup> In addition to these comments, AT&T is a participant in the Coalition for Competitive Access to Content (CA2C), and is a joint signatory to the CA2C comments also filed today. AT&T is writing separately to emphasize the need for Commission action to close the so-called “terrestrial loophole” in the program access rules, as well as the Commission’s clear authority under multiple provisions of the Act to do so.

<sup>2</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, para. 29, 22 FCC Rcd 17791 (2007) (*Program Access Extension Order*). . The Commission observed, in this regard, that “cable programming – be it news, drama, sports, music, or children’s programming – is not akin to so many widgets,” and that numerous national programming networks, RSNs, premium programming networks and VOD networks that are affiliated with cable incumbents are demanded by MVPD subscribers and for which there are no adequate substitutes. *Id.* at para. 38.

<sup>3</sup> *Id.*, Statement of Commissioner Michael J. Copps, Approving in Part, and Concurring in Part.

<sup>4</sup> *Id.* at para. 51.

preserve and protect competition and diversity in the distribution of video programming.<sup>5</sup> And the Commission further recognized that access to such programming is necessary not only for viable competition in the video distribution market, but also to promote further investment in deployment of broadband and other advanced services.<sup>6</sup>

Each of these findings applies equally to terrestrially delivered programming. Indeed, the Commission relied heavily on evidence that cable operators have withheld such programming from competitive MVPDs to the detriment of video competition in concluding that it should extend the exclusive access prohibition for satellite-delivered programming. Specifically, the Commission found that, while it lacked empirical evidence of the effect on competition of withholding satellite-delivered programming, there was “factual evidence that cable operators have withheld” from competitors “vertically integrated programming that is delivered terrestrially,” and “empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market.”<sup>7</sup> The Commission observed in this regard that its findings regarding vertically integrated cable programmers’ incentives to withhold programming from competitors was buttressed by “specific factual evidence” that such programmers “have withheld and continue to withhold programming, including both sports and non-sports programming, from competitive MVPDs.”<sup>8</sup> And it noted that, “[w]hile many of these examples pertain to terrestrially delivered programming . . . , we find that these examples are

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<sup>5</sup> *Id.* at para. 29.

<sup>6</sup> *Id.* at para. 116 (noting the Commission’s prior conclusion that “the ability to offer a viable video service is ‘linked intrinsically’ to broadband deployment”) (citing *Local Franchising Report and Order*, 22 FCC Rcd at 5132-33, para. 62); *id.*, Statement of Commissioner Jonathan S. Adelstein (“These [program access] rules continue to be necessary to not only promote competition and diversity in the distribution of video programming, but to also encourage further investment in the deployment of broadband and other advanced services. Extending the program access rules truly promotes the twin goals of enhanced cable competition and accelerated broadband deployment.”).

<sup>7</sup> *Id.* at para. 39, citing instances in which regional sports networks vertically integrated with cable operators had denied such programming to competitors, which suffered significantly decreased market shares as a result.

<sup>8</sup> *Id.* at para. 51.

nonetheless significant because they demonstrate that, absent a prohibition, cable-affiliated programmers will engage in withholding of programming from competitive MVPDs.”<sup>9</sup>

Based on the Commission’s own findings in the *Program Access Extension Order*, there can be no doubt that cable operators have the incentive and ability to withhold vertically integrated programming that is delivered terrestrially (they already have done so), and that withholding such programming will have (and indeed already has had) a material adverse impact on competition in the video distribution market. Likewise, the Commission’s findings in that order establish that extending the exclusive access prohibition to terrestrially delivered programming is “necessary to preserve and protect competition and diversity in the distribution of video programming,”<sup>10</sup> as well as to facilitate and promote deployment of broadband and other advanced services as required by section 706.<sup>11</sup> Consequently, the answer to the Commission’s query in the Notice of Proposed Rulemaking (NPRM) whether extending the exclusive access prohibition to terrestrially delivered programming would promote the goals of sections 628 and 706<sup>12</sup> is unequivocally yes.

The only issue in this proceeding, then, is whether the Commission has authority to so extend that prohibition. Here again, the answer is yes. While the Commission previously has held (including in the *Program Access Extension Order*) that the exclusive access prohibition in section 628(c)(2)(D) pertains only to vertically integrated “satellite cable programming” and

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<sup>9</sup> *Id.* See also, *id.*, at para. 116 (“As demonstrated by the examples of withholding of RSNs in San Diego and Philadelphia, we believe that withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market.”).

<sup>10</sup> 47 U.S.C. § 628(c)(5).

<sup>11</sup> *Program Access Extension Order* at para. 116, noting the intrinsic link between a provider’s ability to offer video services and broadband deployment.

<sup>12</sup> *Id.*

“satellite broadcast programming,”<sup>13</sup> as discussed herein, the Commission plainly has authority under other provisions – including section 628(b) and other provisions of the Communications Act – to close the “terrestrial loophole,” and should promptly exercise that authority to do so.

## **II. THE COMMISSION HAS AUTHORITY TO EXTEND THE PROGRAM ACCESS RULES TO TERRESTRIALLY DELIVERED PROGRAMMING.**

In the *Program Access Extension Order*, the Commission declined to extend the exclusive contract prohibition to terrestrially delivered programming because it found that such programming is “‘outside of the direct coverage’ of the exclusive contract prohibition in Section 628(c)(2)(D)” and it wanted to consider whether it had authority under any other provision of the Act to apply the program access rules to terrestrially delivered programming.<sup>14</sup> The Commission stated, “We continue to believe that the plain language of [Section 628(c)(2)(D)]... as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D),” citing its *2002 Extension Order* (extending the exclusive contract prohibition for five years) and its decision in *DIRECTV, Inc. v. Comcast Corp. et al.*<sup>15</sup> In the former order, the Commission found that the legislative history of section 628 supported its conclusion that terrestrially delivered programming is outside the scope of *section 628(c)(2)(D)* on the ground that the Senate version of the bill that became section 628 would have applied the program access provisions to all cable programmers affiliated with cable operators, while section 628(c)(2)(D) as ultimately adopted applied the exclusive contract

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<sup>13</sup> *Id.* at para. 78 (noting that the Commission declined to apply the exclusive contract prohibition and other program access rules to terrestrially delivered programming “at this time,” and that in the *NPRM* it sought comment on whether provisions of the Act other than section 628(c)(2)(D) provide the Commission authority to so extend the program access rules).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, citing *DIRECTV, Inc. v. Comcast Corp. et al.*, CSR 5112-P, CSR 5244-P, Memorandum Opinion and Order, 15 FCC Rcd 22802, 22807, ¶ 12 (2000) (*DIRECTV*); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 et al.*, CS Docket No. 01-290, Report and Order, 17 FCC Rcd 12124, 12158, ¶73 (2002) (*2002 Extension Order*).

provision only to satellite cable or broadcast programming vendors affiliated with cable operators.<sup>16</sup>

However, nothing in section 628, its legislative history, or its purpose supports any restriction on these broad sources of authority to address terrestrially delivered programming. As the Commission recently observed in the *MDU Exclusivity Order*, section 628(b) of the Act broadly proscribes any practice by “a cable operator” (or a satellite cable or broadcast programming vendor in which a cable operator has an attributable interest) that unfairly denies a competitive MVPD the ability to provide satellite cable or satellite broadcast programming to consumers.<sup>17</sup> And section 628(c), in turn, directs the Commission to promulgate rules specifying the conduct prohibited by section 628(b), and requires that such rules – “at a minimum” – must encompass a prohibition against, *inter alia*, exclusive contracts for satellite delivered programming and unreasonable discrimination in the provision of such programming to competing MVPDs.<sup>18</sup> While the terms of section 628 thus *require* the Commission to address the problem in the context of “satellite cable or broadcast programming,” they do not *foreclose* it from addressing the same problem in the terrestrial context.<sup>19</sup> The language used in Section 628 thus simply reflects Congress’s understanding about the nature of the delivery mechanism typically used by cable programmers at the time of its enactment, in the cases of abuse that had

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<sup>16</sup> 2002 *Extension Order* at ¶ 73.

<sup>17</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 at ¶44 (rel. Nov. 17, 2007) (*MDU Exclusivity Order*).

<sup>18</sup> 47 U.S.C. § 548(c).

<sup>19</sup> See, e.g., *Martini v. Federal Nat’l Mortgage Ass’n*, 178 F.3d 1336, 1342 (D.C. Cir. 1999) (“the statute nowhere says that complainants may sue *only if* one of these conditions occurs”) (emphasis in original).

been brought to its attention.<sup>20</sup> In other words, Congress focused on satellite-delivered programming because this was the conduct of which it was aware, and as to which it identified a need for reform.

Since “there was no reason to consider” terrestrial delivery in 1992, “its omission [in Section 628] would mean nothing at all.”<sup>21</sup> As the Supreme Court has recognized, it is not “a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected.”<sup>22</sup> Indeed, the absence of such foresight by Congress “is precisely one of the reasons why regulatory agencies ... are created;” in order to make use of “the expert’s familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.”<sup>23</sup>

Moreover, where legislation addresses the power of administrative agencies, the courts have repeatedly held that despite the maxim of *expressio unius*<sup>24</sup> that may apply in other statutory interpretation contexts, “a congressional decision to prohibit certain activities does *not* imply an intent to disable the relevant administrative body from taking similar action with

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<sup>20</sup> Hearing testimony referring to the availability of regional sports programming, for example, assumed it was, at the time, delivered by satellite. *Competitive Problems in the Cable Television Industry: Hearing Before the Subcomm. On Antitrust, Monopolies and Business Rights of the Senate Judiciary Comm.*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 10, 450 (1990) (local wireless cable operator unable to obtain “satellite programming” exhibiting Cleveland Cavaliers games). Even four years *after* the 1992 Cable Act’s passage, the Commission suggested that terrestrial delivery was only then becoming economically viable. See Third Annual Report, *Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd. 4358, 4435 (1997) (“improved technology and lower costs are improving the efficiency of terrestrial distribution,” such that it “*may become possible* for a vertically integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading Commission’s rules concerning access to programming.”) (emphasis added).

<sup>21</sup> *Union Dominion Industries, Inc. v. United States*, 532 U.S. 822, 836 (2001).

<sup>22</sup> *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372 (1973).

<sup>23</sup> *Id.* at 372-73.

<sup>24</sup> *Expressio unius est exclusio alterius, i.e.*, “mention of one thing implies exclusion of another.” See, e.g., *Martini*, 178 F.3d at 1342 (citing Black’s Law Dictionary 581 (6<sup>th</sup> ed. 1990)).

respect to activities that pose a similar danger.”<sup>25</sup> This view is essentially a corollary of *Chevron*. For example, the D.C. Circuit has upheld the Commission’s assertion of authority under Section 4(i) of the Act<sup>26</sup> to require the holder of a pioneer preference to pay for its license, notwithstanding a more specific grant of authority to charge for licenses that is limited to mutually exclusive auction bidders. In doing so, the court reaffirmed its prior determination that application of the *expressio unius* maxim “has little force in the administrative setting,” where “we defer to an agency’s interpretation of a statute unless Congress has ‘directly spoken to the precise question at issue.’”<sup>27</sup> Congress’s requirement that an agency police or proscribe certain conduct is *not* deemed, in and of itself, to constitute a limitation on its authority to police or proscribe other conduct. Indeed, “a congressional prohibition of particular conduct may actually *support* the view that [an] administrative entity can exercise its authority to eliminate a similar danger”<sup>28</sup> pursuant to its more general statutory authority.

To be sure, in some contexts the legislative history and purpose of the specific statute might provide “affirmative and significant evidence” that Congress intended to foreclose agency authority to regulate outside that specific context.<sup>29</sup> But quite the opposite is the case here. In proposing Section 628, Rep. Tauzin never indicated any intent to *limit* the FCC’s authority, or to

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<sup>25</sup> *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (emphasis in original).

<sup>26</sup> 47 U.S.C. § 154(i). The D.C. Circuit has described this provision as the “necessary and proper” clause of the Communications Act. *See, e.g., New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987).

<sup>27</sup> *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (internal quotation omitted). *See also id.* at 1406 n.1 (subsequent decision by Congress to require rather than permit auctions did not change the analysis).

<sup>28</sup> *See, e.g. Texas Rural Legal Aid*, 940 F.2d at 694 (emphasis in original) (citing *Mourning*, 411 U.S. at 372-73); *Mobile Communications Corp.*, 77 F.3d at 1405.

<sup>29</sup> *Cheney R.R. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (“[i]n the absence of affirmative and significant evidence that Congress intended the omission to be read as a mandate ... we find Congress not to have precluded or required any particular [agency] solution ....”).

constrain it to the listed categories of service. When introducing his amendment, he did not confine his description of the problem to any particular mode of delivery. He explained that those few companies “that control the program now have refused to sell that program to anybody else who would compete with cable.”<sup>30</sup> And while, as the Commission has noted, the Senate’s version of the 1992 Cable Act did not contain the term “satellite cable programming,” the record shows that *neither side of the debate* found this difference in language to be of any substantive significance at the time.<sup>31</sup> Indeed, Rep. Tauzin described the Senate bill as “similar” to his own.<sup>32</sup> Perhaps most tellingly, the substitute proposal offered by Rep. Manton – described as being “drafted by the cable companies for the cable companies” – applied generally to “video programming” without *any* reference to its mode of delivery.<sup>33</sup>

Thus, the legislative history supports no intention to limit the Commission’s authority to address program access problems arising from vertical integration in the contexts of other forms of program delivery than that most common in 1992. Indeed, the premise of the 1992 Act supports broad Commission authority to address other abuses of vertical integration by dominant cable incumbents. A critical premise of that Act was the finding by Congress that vertically integrated programmers “have the incentive and ability to favor their affiliated cable operators

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<sup>30</sup> 138 Cong. Rec. 19,149 (1992) (statement of Rep. Tauzin); *see also id.* at 19,152 (statement of Rep. Harris that “cable companies which also own programming cannot refuse to sell their programming to other distribution systems in order to choke off any competition”).

<sup>31</sup> *See 2002 Order* ¶ 73. As noted above, there is nothing to suggest that the phrase “satellite cable programming” was anything other than a statement of the nature of the specific problem to be addressed at that time. The conference report explaining the differences between the bills does not address the question one way or the other. *See H.R. Conf. Rep. 102-862*, at 91-93 (1992). Even a deletion of more expansive language in a prior version of the very same bill that became law has not been read as the kind of “affirmative and significant evidence” of congressional intent needed to support an *expressio unius* challenge to agency authority. *See Cheney R.R., supra*, 902 F.2d at 69.

<sup>32</sup> 138 Cong. Rec. 19,181 (1992).

<sup>33</sup> *See id.* at 19,149, 19,179-80.

over nonaffiliated cable operators and programming distributors using other technologies.”<sup>34</sup> Section 2(b)(5) of the Act also expressed the “policy of the Congress” to “ensure that cable television operators do not have undue market power vis-à-vis . . . consumers.”<sup>35</sup> And the conference report directed the Commission to “address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies,” and to “encourage arrangements which promote the development of new technologies providing facilities-based competition to cable.”<sup>36</sup> There is no suggestion that Congress intended to foreclose the Commission from implementing these policy objectives and concerns other than in the context of satellite-delivered programming. Instead, the concerns clearly address the hold the cable incumbents had over video programming generally, and demonstrate a congressional intent to authorize the Commission to police that hold as necessary to advance the public interest in diverse programming and delivery systems. In short, there is nothing in Section 628, its legislative history, or the purpose of that provision or the 1992 Act that serves to prohibit the Commission from exercising its broad statutory authority under other provisions of the Act to address the significant problems it has identified with the terrestrial loophole.

In any event, the Commission itself recently held that section 628(b) broadly prohibits any “unfair methods of competition with the purpose or effect of hindering significantly or preventing MVPDs from providing satellite cable and broadcast programming to consumers.”<sup>37</sup>

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<sup>34</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(5).

<sup>35</sup> *Id.* § 2(b)(5).

<sup>36</sup> H.R. Conf. Rep. 102-862, at 93 (1992).

<sup>37</sup> *MDU Exclusivity Order* at ¶ 43 n.132.

Insofar as cable-affiliated terrestrial programming, such as RSN and other programming, is vital to the growth and development of a competitive marketplace for video and other broadband services, as the Commission already has held,<sup>38</sup> denial of access to such programming on reasonable terms plainly limits the ability of competitive MVPDs to compete effectively in the marketplace (again, as the Commission already has so held<sup>39</sup>), and thus has the “effect of hindering significantly . . . any [MVPD] from providing [other] satellite cable programming or satellite broadcast programming to subscribers or consumers” contrary to section 628(b).<sup>40</sup> As such, the Commission plainly has authority to extend the program access rules to terrestrially delivered programming under section 628.<sup>41</sup>

Even if the Commission were to conclude (wrongly) that it lacks authority under section 628 to close the “terrestrial loophole,” the Commission certainly has authority under other provisions of the Act to do so. As the Supreme Court has long recognized, the Commission has expansive authority under sections 1, 2(a), 4(i), 201(b) and 303(r) to regulate video services and competition, and “issue such orders, not inconsistent with this Act, as may be necessary in the

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<sup>38</sup> *Program Access Extension Order*, FCC 07-169 at ¶¶ 29, 38 (noting that there are no adequate substitutes for numerous national programming networks, RSNs, premium programming networks and VOD networks that are affiliated with cable incumbents and demanded by MVPD subscribers).

<sup>39</sup> *Id.* at ¶ 9.

<sup>40</sup> 47 U.S.C. § 548(b).

<sup>41</sup> Indeed, the Commission already has recognized as much. Specifically, in *DIRECTV*, the Commission acknowledged that “there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming.” *DIRECTV*, 15 FCC Rcd at 22807. The Commission thus already has determined that section 628(b) extends to terrestrially delivered programming, at least in certain circumstances. The only question then is in what circumstances – only where programming has been moved from satellite to terrestrial delivery (a limitation that appears no where in the Act)? In AT&T’s view, the Commission should read that provision to prohibit all exclusive (and unreasonably discriminatory) program distribution agreements between cable operators and vertically affiliated programmers, regardless of whether such programming is delivered terrestrially, and thereby fulfill the Commission’s obligation to promote competition and diversity in the delivery of video programming, as well as to promote broadband deployment.

execution of its functions.”<sup>42</sup> The Commission too has acknowledged as much: “Congress delegated to the Commission the task of administering the Communications Act,” and granted the Commission both “broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility.”<sup>43</sup>

The courts have routinely upheld the Commission’s authority to promulgate rules to promote video competition and deployment pursuant to section 303(r) and other provisions of the Act, even prior to enactment of the Cable Act, which explicitly granted the Commission jurisdiction over cable services. As the D.C. Circuit explained, “[t]he Commission’s power under Section 303(r)” extends to all “rules that the Commission has found necessary to carry out its mandate under the Communications Act” that are “reasonably adopted in furtherance of a valid communications policy goal.”<sup>44</sup> Section 201(b) likewise grants the Commission broad authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”<sup>45</sup> And the Supreme Court has emphasized that section 201(b) “means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’”<sup>46</sup>

In the Cable Act, the Commission granted the Commission explicit jurisdiction and authority over “cable services,”<sup>47</sup> and enacted the substantive requirements in Title VI of the

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<sup>42</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 700 (1984) (holding that the Commission’s authority to regulate cable services extends “to all regulatory actions necessary to ensure achievement of the Commission’s statutory responsibilities”).

<sup>43</sup> *Franchising Reform Order* at ¶ 54 (quoting *Southwestern Cable*, 392 U.S. at 167-68).

<sup>44</sup> *United Video v. FCC*, 890 F.2d 1173, 1183 & n. 4 (D.C. Cir. 1989).

<sup>45</sup> 47 U.S.C. § 201(b).

<sup>46</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

<sup>47</sup> 47 U.S.C. § 152(a).

Communications Act. Since then, courts repeatedly have affirmed that both sections 201(b) and 303(r), as well as section 4(i), grant the Commission rulemaking authority over services and matters governed by the Cable Act, as well as “broad authority to take actions that are not specifically encompassed within any statutory provisions but that are reasonably necessary to advance the purposes of the Act.”<sup>48</sup>

A principal purpose of the Cable Act is to promote competition in video services. Specifically, Congress adopted that legislation to: “establish a *national* policy concerning cable communications,” and “promote competition in cable communications.”<sup>49</sup> As discussed above, and as the Commission recognized in the *Program Access Extension Order*, rules prohibiting

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<sup>48</sup> *Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, ET Docket No. 05-247, Memorandum Opinion and Order, 21 FCC Rcd 13201 at n. 112 (2006), citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (upholding Commission's exercise of ancillary jurisdiction pursuant to Section 201(b); *United States v. Southwestern Cable*, 392 U.S. 157 (1968) (*Southwestern Cable*) (upholding the Commission's authority to regulate cable television); *National Broadcasting Comm'n v. United States*, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1281, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen even if [] that means straying a little way beyond the apparent boundaries of the Act--to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) ("The instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing... The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service"). See also *City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) ("§ 303 of the Communications Act continues to give the Commission broad rulemaking power 'as may be necessary to carry out the provisions of this chapter,' 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters."); *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) ("[w]e are not convinced that for some reason the FCC has well-accepted [rulemaking] authority under [section 201(b)] but lacks authority to interpret [section 621 of the Cable Act] and to determine what systems are exempt from franchising requirements").

<sup>49</sup> 47 U.S.C. §§ 521(1), (6).

exclusive program distribution contracts – irrespective of whether programming is delivered terrestrially or via satellite – directly promote those pro-competitive objectives and thus are well within the Commission’s broad rulemaking authority to ensure that the objectives of the Act are met.

Moreover, the Commission is independently required under section 706 of the Act to take action to encourage deployment of broadband and other advanced telecommunications services by “utilizing measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment.”<sup>50</sup> That mandate is particularly relevant here, insofar as the Commission has already acknowledged that “the ability to offer a viable video service is ‘linked intrinsically’ to broadband deployment,”<sup>51</sup> and that the withholding of cable-affiliated, terrestrially delivered programming “has had a material adverse impact on competition in the video distribution market.”<sup>52</sup>

The Commission thus plainly has authority to extend the program access rules, including the prohibition on exclusive program access arrangements, to terrestrially delivered programming, and should do so without delay.

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<sup>50</sup> 47 U.S.C. § 157 nt.

<sup>51</sup> *Program Access Extension Order* at ¶ 116 (citations omitted).

<sup>52</sup> *Id.* at ¶ 39.

**III. CONCLUSION.**

For the foregoing reasons, the Commission should adopt rules extending the program access rules, including the prohibition against exclusive access arrangements, to terrestrially delivered programming.

Respectfully submitted,

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