

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

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

REPLY COMMENTS OF A&E TELEVISION NETWORKS

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EXECUTIVE SUMMARY

The Notice of Proposed Rulemaking's ("NPRM") inquiry into alleged "problems" arising from "tying arrangements" has no factual or legal basis, and the comments submitted in support of new rules do not cure this deficiency. The focus of the NPRM in this regard seems to be mere misdirection for regulating the wholesale marketing of networks to multichannel distributors, in furtherance of the ultimate objective, held by some in government, of transforming the cable industry by mandating *à la carte* service to subscribers. There is no economic or marketplace basis for interfering with how non-vertically integrated programming providers sell their networks to video programming distributors. Moreover, any plan to "preclude" such bundled offerings by programming networks, as the NPRM suggests may be "appropriate," faces the insurmountable pitfalls of lack of statutory authority for such regulation and inability to withstand First Amendment review. The Commission should abandon any attempt to transform authority conferred by Section 628 of the 1992 Cable Act to regulate certain practices of vertically integrated programming vendors and cable operators, 47 U.S.C. § 548, into a pretext for restricting the ability of non-vertically integrated networks to sell their content to video programming distributors, especially that of non-vertically integrated, independent programming providers.

A&E Television Networks ("AETN") would have been unable to launch as many networks as it has – including, among others, The History Channel[®], The Biography Channel[®], The History Channel en Español[™], and various HD channels – without a strong brand, an ability to utilize its outlook and style of offering compelling content, and the right to package and market programming in the most effective manner. Rather than being vertically integrated, AETN built on the value of A&E Network[®] as a

cornerstone basic cable channel, to establish a family of networks as part of a video marketplace that has grown exponentially in both number of channels and diversity of programming and programmers since the Cable Act was adopted. AETN's ability to sell networks in bundles – which is a common tool used in many different markets to lower transaction costs, benefit from scale and scope economies, and enhance the attractiveness or convenience of products – is vital to its ability to obtain carriage by programming distributors. Doing so permits the use of innovation and the promise of diversity as bargaining tools, in an effort to offset advantages others have of obtaining carriage by regulatory fiat (*e.g.*, via must-carry or retransmission consent) or by virtue of vertical holdings.

The NPRM reflects an erroneous premise that the traditional marketing approach of bundling constitutes questionable use of market power that is in some way harmful. But this relies on input from interested parties about the use of retransmission consent, which is not the same as free market bargaining. The NPRM presumes the very facts it seeks to gather, by assuming “problems associated with [] tying arrangements” and purporting to “seek comment on whether it may be appropriate ... to preclude them.”

However, the FCC lacks statutory authority to ban “tying” by cable programmers, and, in particular, § 628(b) cannot be read as requiring them to offer networks on a stand-alone basis. Nothing in the Act, its legislative history, or previous rulemakings supports such regulation. Indeed, at the time § 628 and the rest of the Cable Act were adopted, neither Congress nor the Commission expressed concern about programmers' ability to negotiate carriage based on their networks' appeal and their desire to provide additional offerings. Rather, both acknowledged the legitimacy of such free market

transactions, which served the values the Act sought to promote. Over the years programming diversity flourished, thus undermining any justification for new regulations.

The Cable Act precludes imposing program “tying” restrictions on programmers not affiliated with cable operators, because Congress did not grant authority to adopt such rules. And, as judicial precedent makes clear, the FCC cannot leverage generalized grants of authority in order to regulate programming in ways the Act does not specify. The assertion of authority to regulate “tying” is not a permissible construction of the statute. Not only is any expansive reading of FCC authority over program networks unreasonable generally, it conflicts with the means Congress prescribed for implementing § 628. Virtually all the relevant legislative materials addressed vertical integration, while describing positively – as a remedy for the type of market power § 628 sought to control – the enhancement of programmers’ ability to negotiate based on the quality and diversity of their offerings. Congress eschewed fundamentally restructuring the cable industry, as would a ban on “program tying,” and sought to preserve programmers’ flexibility to negotiate prices, terms, and conditions for distribution, provided that competition flourished, as it has. Moreover, broadly interpreting FCC authority to regulate programming contracts unnecessarily raises substantial First Amendment problems that tenets of statutory construction require the Commission to avoid.

Additionally, a wholesale *à la carte* mandate could not survive constitutional review. At a minimum, the FCC has the burden of showing its rules satisfy intermediate First Amendment scrutiny, and the NPRM identifies no substantial governmental interest that would support the proposed rules. There is no discussion whatsoever in

the legislative history of § 628 regarding a need to restrict programmers' ability to bargain based on owning multiple channels, and the NPRM assumes harm from "tying" without any proof. A rule that would "preclude" tying arrangements also would restrict more speech than necessary by establishing a blanket regulation to cure adverse effects primarily felt by small cable operators and their customers. It would also effectively bar programmers from exercising editorial discretion regarding how to package their offerings. Finally, to the extent restrictions on tying are related to a content-based purpose – such as a desire to promote *à la carte* service to subscribers – any rules would face strict First Amendment scrutiny. This would present an all but insurmountable burden for the Commission.

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REPLY COMMENTS OF A&E TELEVISION NETWORKS

A&E Television Networks (“AETN”), by its attorneys, hereby replies to comments submitted in the captioned proceeding,¹ regarding alleged “problems associated with [] tying arrangements” of “undesired” channels when program networks package content for sale to multichannel video programming distributors (“MVPDs”), and “whether it may be appropriate ... to preclude such arrangements.” See *id.* ¶ 1 & Section IV.D. The comments confirm that expanding program access rules to networks not covered by Section 628 of the Communications Act,² *i.e.*, those not vertically integrated with a cable operator, would be statutorily unauthorized, constitutionally invalid, and unsound as a matter of policy and economics.

The comments of all parties that addressed this issue – both those opposing program tying rules like AETN, and those favoring such regulation – universally indicate one thing: that programming providers strive to obtain the widest dispersal of their

¹ *Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements*, 22 FCC Rcd. 17791 ¶¶ 114-137 (“*NPRM*”). See also *id.* ¶¶ 3-113 (“*R&O*”).

² 47 U.S.C. § 548.

networks in an extremely crowded and competitive market.³ Consequently, each market participant must take advantage of its copyrighted, constitutionally protected expression, and navigate the economic and regulatory currents coursing through the multichannel marketplace, in order to survive. Significantly, the comments are devoid of input from content providers such as AETN that do not, in seeking access to video platforms, benefit from retransmission consent, vertical integration, or other relationships or affiliations that assist in garnering carriage. Such programmers rely on the strength of their networks and their brand identity, and on what traction they gain thereby, to succeed in the competitive arena. From AETN's perspective, proposed rules to restrict program "tying" are utterly inexplicable. See *also* NCTA at 2 ("The Commission's continuing interest in additional regulation of the video programming marketplace is difficult to understand."); Comments at Time Warner, Inc. ("Time Warner") at 19 ("a rule that restricts a programmer's right to offer MVPDs discounts for carriage of multiple networks ... makes no sense").

As a threshold matter, as several commenters correctly note, the market conduct that the NPRM targets for regulation in this regard is not "tying" in the economic or

³ See Comments of Comcast Corporation at 2-3 (noting that one analyst "recently declared that cable is in 'an all-out war' in the marketplace"). See *also, e.g.*, Comments The Walt Disney Company ("Disney") at 37-43 & Exh. A at 23-47; Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. ("Fox") at 19-21, 26-31; Comments of NBC Universal, Inc. and NBC Telemundo License Co. ("NBCU") at 34-45; Comments of Viacom Inc. ("Viacom") at 2, 6; Comments of the National Cable & Telecommunications Association ("NCTA") at 3-7; Comments of DISH Network ("DISH") at 7-16; Comments of American Cable Association ("ACA") at 3-18; National Telecommunications Cooperative Association Initial Comments ("Nat'l Telecom Coop. Assn") at 16-19; Comments for the Organization for the Promotion and Advancement of Small Telecommunications Companies, *et al.* ("OPASTCO *et al.*") at 8-13; Comments of the Rural Iowa Independent Telephone Association ("RITTA") at 3; Comments of the Community Broadcasters Association ("CBA") at 3.

antitrust sense of that term. See, e.g., Viacom at 16 & nn.35-36; Disney, 21-26; Time Warner at 21. In any event, when the Cable Act provisions, including Section 628, were added to the Communications Act in 1992, neither Congress nor the Commission expressed concern about the ability of programmers to negotiate carriage agreements based on the broad appeal of their networks and their desire to provide additional diverse offerings. Quite to the contrary, both bodies acknowledged the legitimacy of such free market transactions, which served the very same values the government professed to promote with the Act. In the ensuing years, competition and programming diversity have flourished. The only thing that changed is the focus by some in government who want to transform the cable industry by requiring the provision of service on an *à la carte* basis, a point lost on few commenters here.⁴ However, “absent compelling evidence of market power sufficient to harm competition, the free market – not regulation – should be the driving factor in determining business outcomes.” Viacom at 20. *Accord*, Disney § IV.C. The proposals in the *NPRM*, which appear to be little more than a step in the direction of forced *à la carte*, are without support either in fact or law.

I. AETN PROVIDES HIGH-QUALITY PROGRAMMING THAT DEPENDS ON ITS OPERATION AS A FAMILY OF NETWORKS

AETN was among the original programmers that populated early basic cable when it launched Arts & Entertainment Network, now known as A&E Network[®] (“A&E”), in 1984. Since then A&E has earned carriage on the basic and/or expanded basic tier and seen subscribership grow to over 96 million households. In fact, 2007 was A&E’s

⁴ See, e.g., NBCU at 51 (“the Commission’s puzzling concern with wholesale marketing practices must be related to its belief that wholesale packaging (if it existed in the form described ... by the *NPRM*) is the cause of retail bundling or tiering, with which the Commission also has expressed concern”) (citation omitted); Disney at 74-75; Viacom at 20-32; OPASTCO at 11; ACA at viii; SCSOC at 5.

most successful year in its history, based on significant growth in all key viewer demographics. A&E offers a diverse mix of high-quality programming ranging from the network's signature Real-Life series franchise, including the hit series "Intervention," "Gene Simmons Family Jewels," "The First 48," and "Criss Angel Mindfreak," to critically acclaimed original movies, dramatic series, and some of the most successful justice shows on cable. A&E is also the official basic cable home to the high-profile series "The Sopranos" and "CSI: Miami." In 2007 alone, A&E announced it had twelve new scripted dramas in development, ten new unscripted series, four unscripted pilots, and several new web projects. A&E features a prime-time lineup in which at least 50 percent of the programming is original to the U.S. market.

AETN is not owned by any cable operator or other MVPD, but is a joint venture of The Hearst Corporation, ABC, Inc. and NBC Universal.⁵ AETN operates independently from the participants in the joint venture, and contrary to the suggestions made by those favoring new regulations, *see, e.g., ACA* at 15-16, AETN does not – and cannot – rely on affiliation with its joint venturers to secure carriage by cable, direct broadcast satellite ("DBS") and other video distributors. In this regard, AETN is in no different position from members of the Community Broadcasters Association who state that in seeking carriage they face "burdens" that are "significantly increased by the scarcity of cable channel capacity" due to preferences given to "the most popular broadcast and cable programming." CBA at 2. But the answer is not, as CBA apparently would have it, re-jiggering the regulatory landscape so that some programmers have easier access to

⁵ The Commission noted this ownership structure in *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503, Table C-5 (2006) ("*Twelfth Annual Video Competition Report*").

video platforms by government fiat – regardless of the demand for their content – while others face further impediments to gaining carriage. Instead, the answer is that every programming provider should rise or fall on the value of its content to subscribers, and the negotiating power earned in the marketplace by generating such demand.

Rather than benefiting from any vertical integration, AETN was able to build on the value of A&E as a cornerstone basic cable channel, to establish a family of networks that feature distinctive programming that evolved from A&E's signature content, and that focus on documentaries and nonfiction series that give viewers historical and international context on a variety of subjects. Earlier this year, AETN announced it was poised to invest more than \$600 million in new programming, media, and technology. It truly can be said that AETN has succeeded in “express[ing] a message by packaging together certain content.” *NPRM* ¶ 128. See also *Disney* at 74 (“cable programmers often do promote the content as a whole to contribute to a theme”).

Given its evolution from offering a single A&E channel to its current pallet of channels and programs, AETN has a wealth of experience launching new networks and hopes to continue doing so. There is no doubt it would be adversely affected by any restrictions on how it is allowed to bundle its networks in the market for video programming, and it accordingly is not the case, as some argue, that the “sole beneficiaries of [the current] system are a handful of ... conglomerates” consisting of “the largest video providers” and “the largest broadcast networks.” *DISH* at 2. Indeed, notwithstanding the presence of some AETN networks among the “Top 50 Channels,” it is hardly a “conglomerate” that “control[s] ... news and entertainment channels,” as some allege. See *ACA* at 16.

A. The AETN Family of Networks

The success of its flagship A&E Network allowed AETN to launch The History Channel® on January 1, 1995, as a unique programming service that features documentaries, movies and miniseries placed in historical perspective. Its quality and range of programming have made the network, which like A&E appears on the expanded basic tier, one of the quickest growing and most watched in cable, with over 95 million U.S. subscribers and 235 million subscribers worldwide in over 135 countries.⁶ Over 75 percent of The History Channel's primetime lineup is original programming, and research data available to AETN (discussed in greater detail *infra* at 10) shows that The History Channel® is perceived by cable subscribers to be among the most important networks contributing to their enjoyment of cable service. In 2007, The History Channel® offered six new major specials including *A Global Warning* on the history of climate change; *Stalking Jihad*, about the recovery of Americans captured by terrorists in the Philippines; and *1968 With Tom Brokaw*, which explored the significance of that year and its impact on America today. In 2008, the network will offer an array of specials including *King*, a Tom Brokaw special produced 40 years after the death of Dr. Martin Luther King., Jr., exploring his life, times and legacy; *China's First Emperor*, the saga of Chin Shihuang; and *Sputnik*, exploring the start of the space age and the U.S.-U.S.S.R. space race.

⁶ The History Channel® has received four Peabody Awards, three Primetime Emmy® Awards, and ten News & Documentary Emmy® Awards. It also has received the prestigious Governor's Award from the Academy of Television Arts & Sciences for the network's Save Our History® campaign dedicated to historic preservation and history education, and in 2007, it launched its "Take a Vet to School Day" with cable partners linking veterans with young people in schools.

The brand-recognition and success of A&E and The History Channel® have enabled AETN to be a pioneer on the digital tier as well, launching in 1998 both The Biography Channel® (re-branded in the fourth quarter of 2007 as BIO™), as an outgrowth of the BIOGRAPHY® series on A&E Network, and History International® as an outgrowth from The History Channel®. BIO™ is about real people and their lives: up close and personal, gritty and provocative, and unfiltered. In addition to being the exclusive home to the Emmy-Award winning *Biography*® series, BIO's dynamic blend of original and acquired series includes *The Final 24*, *Psychic Investigators* and the upcoming William Shatner-hosted talk show, *Shatner's Raw Nerve*. BIO™ currently reaches more than 47 million subscribers and remains one of cable's fastest growing networks. History International® offers viewers an enriching mix of historical documentaries with a global focus, original short features, interviews with historians, and exclusive programs produced or acquired in conjunction with international partners. It currently reaches more than 41 million households and in 2006 was the fastest growing cable network in primetime among the 18-49 year-old demographic.

Building on the success of The History Channel® and History International®, AETN launched The History Channel en Español™ in 2004, which offers a wide range of primarily non-fiction Spanish-language programming, and Military History Channel™ in 2005. Already available on the Hispanic tier in the nation's top cable systems representing nearly 30 million subscribers in key Hispanic markets (*i.e.*, the network is available to viewers in 18 of the top 20 Latino U.S. markets), The History Channel en Español™ focuses on history's dramatic moments and events, highlights both world and Latin American history, and provides enriching entertainment about Hispanic roots and

culture. The Military History Channel™ evolved from AETN's successful introduction of a military programming block on History International™ into a new full-scale network dedicated exclusively to the array of worldwide military history.

AETN recently launched the Crime & Investigation Network™ as a new premier destination for crime, investigatory, and mystery programming. Crime & Investigation Network™ allows viewers to witness first-hand law enforcement agencies' use of detective work and forensic investigation to solve cases – including insights into crime labs, police archives, and the justice system – and probes unexplained mysteries. In addition, AETN has been at the leading edge of cable's marquee networks as they expand into high-definition programming, with the launch of A&E HD™, THC HD™ and BIO HD™.

B. Among AETN's Most Important Assets are the Strength of its Brand and the Uniqueness of its Vision

AETN would not have been able to launch as many networks as it has, as quickly as it has, without the strength of its brand, the ability to build upon its unique outlook and style of presenting compelling content, and the right to package and market its programming in a manner it feels is most effective for its overall business strategy. Such bundling of goods is commonplace in many different markets,⁷ where potentially dis-

⁷ See Wholesale Packaging of Video Programming, Bruce M. Owen, January 4, 2008 ("Owen Report"), filed as Fox Appendix B, NBCU Exhibit B, & Viacom Appendix 2, at 62 ("Almost every product and service purchased by consumers is bundled by sellers from various components that could each ... be sold or priced separately. Bundling presents no presumptive threat to consumer welfare."). See also Disney at 27 ("As the [FCC's] Chief Economist, Gregory S. Crawford has observed [elsewhere], 'Bundling is a customary feature of contemporary product markets' and 'nearly all goods embody a bundle of attributes or characteristics.'") (citing Gregory S. Crawford, *The Discriminatory Incentives to Bundle in the Cable Television Industry*, July 19, 2005, at 2).

tinct products are combined to lower transaction costs, benefit from scale and scope economies,⁸ and enhance the attractiveness or convenience of products to consumers. Basic economic analysis confirms that the cost of service will necessarily increase if individual channels are sold in separate units.⁹ Nor is bundling harmful, either in the wholesale market, or in the retail market.¹⁰ Indeed, the comments reflect that even the largest “programmers do not have the market power needed to impose an anticompetitive tie.” Disney at 37. See *also* NBCU at 34.

The advantages of bundling cable network offerings include enhancing the value of the service for consumers,¹¹ providing synergies associated with selling advertising and promoting services, reducing costs that otherwise would be incurred in distributing unique combinations of the individual components of a bundled offering and/or selling multiple products to the same customer rather than a bundled product,¹² and enabling the launch of new and unique programming services. In particular, “bundling enables

⁸ See Disney at 32-33 & Exh. A at 11; Fox at 22; NBCU at 50; Viacom at 10.

⁹ See *generally* Bruce Owen and Stephen Wildman, VIDEO ECONOMICS 219-20 (1992) (“Owen & Wildman”).

¹⁰ See, *e.g.*, NBCU at 51 & Owen Report at 33. See *also* Disney Exh. A at 9 (noting that DOJ and FTC endorse, in the specific context of intellectual property such as video programming, the concept that “for the vast majority of cases where bundling is observed, the reason why separate goods are sold as a package is easily explained by economies of scope in production or by reductions in transactions and information costs, with an obvious benefit to the seller, the buyer, or both”).

¹¹ See, *e.g.*, Fox at 21-22; Disney at 32. See *also* NBCU at 52; Owen Report at 33; Disney at 27 (all explaining that bundling allows consumers to gain more from purchasing the bundle than they would from purchasing the goods individually).

¹² Disney at 28; NBCU at 54. Bundling also can help producers reduce the cost of capital and obtain new investment, and provide stability necessary to ensure consistent production and enable future planning. See Viacom at 10.

the launch of new and previously unsampled services” that “benefit greatly from their association on the bundled tier with established networks,” as it gives “new services ... the greatest opportunity to be sampled and ... find an audience.”¹³ In this regard, it is notable that The History Channel® enjoys the third-highest score in percentage of total respondents mentioning it as a favorite channel, and A&E was not far behind.¹⁴ With aided awareness of the channels, however, The History Channel® is the most recognized network as an available programming choice (99 percent recall) tied with 12 other basic networks, and A&E tied for the number three spot. This data supports the conclusion that the ability to use brand recognition to launch and support other channels in the AETN family of networks is crucial to marketing and brand awareness. See Owen Report at 63 (“Whether, and how, to bundle components is an important aspect of ... competitive strateg[y].”). The History Channel® ranks first in average satisfaction among all viewers (tied with 2 other basic networks) and A&E was close behind. See *Beta Study*, *supra* note 14.

AETN’s ability to bundle its networks for sale in the marketplace is an important tool for obtaining carriage by MVPDs. Unlike programmers that hold a marketplace advantage by regulatory fiat (*e.g.*, through must-carry or retransmission consent rules), AETN must rely on the strength of its brand and the quality of its programming.

¹³ See *How Bundling Cable Networks Benefits Consumers*, Economists Incorporated, July 23, 1998, filed with Comments of ABC, Inc., CS Docket No. 98-102, July 31, 1998 at 4. See also Disney at 30, 33 & Exh. A. Disney’s expert also correctly notes the important threshold point that “mixed bundling,” which gives buyers discounts compared with the prices of goods purchased separately – and which is what the record reflects is the case with video network bundling – has a very different impact from the kind of “tying” on which it appears the Commission has mistakenly focused. *Id.* Exh. A. at 8.

¹⁴ Beta Research Corp., *The Beta Research Cable Subscriber Study – Evaluation of Basic Cable Networks*, 2007 (“*Beta Study*”).

Accordingly, AETN's success depends on its ability to create and carefully manage its portfolio of compelling content and unique characteristics that the Commission acknowledges can foster demand and help earn carriage. See R&O ¶ 38 (noting the significance of "programming and personalities packaged by" a given channel).

AETN makes such efforts to ensure that its networks are carried by as many video platforms as possible to make them available to the maximum number of viewers. The inability to attain such carriage, and as a consequence, to reach, first, a critical mass of viewers, and then, to expand the audience, is fatal to the ability to launch and sustain any network, especially those seeking to offer the quantity – and quality – of original programming that AETN's channels feature. Indeed, the Commission recognizes the inherent danger in reducing the number of platforms that distribute a cable programming network, and thus the total number of subscribers to it, which "results in a reduction in potential advertising or subscription revenues that would otherwise be available to the network." *Id.* ¶ 44.

In this regard, programmers like AETN invest hundreds of millions of dollars annually developing content, marketing it, and negotiating for carriage under business plans based on bundling service on expanded basic or other programming tiers.¹⁵ Any requirement for these programmers to change midstream and unbundle their networks would scuttle the economic premise on which they rely. *Accord* Owen Report at 32 ("[A]ny rule constraining bundling is, in effect, a rule defending the economic legitimacy of [] product definitions. Unfortunately, once a product is defined by government

¹⁵ See Disney at 35-36 ("Programming expenditures for cable networks rose by 422 percent from 1993 to 2004. In just the last five years, spending on original programming, for cable increased 66 percent to a record-setting \$5 billion in 2006, and it is expected to increase another 43 percent over the next three years.") (citation omitted).

decree, rather than by a competitive market outcome, it ceases to have any economic legitimacy – *i.e.*, no longer is it presumptively efficient.”). In fact, most contracts between video distributors and programmers – including each of the AETN networks – specify the tier on which programming must appear. Moreover, all key economic terms in such carriage contracts, including licensing fees, marketing support and other provisions, reflect and are conditioned on the totality of the content the distributor acquires from the programmer, which of course seeks maximum reach for as many of its networks as possible. Consequently, any regulatory change dictating modification of contracts to comply with newly imposed anti-tying “access” requirements would frustrate programmers’ business expectations, and could not be implemented through simple amendments to existing agreements. Any such rule would require renegotiating important economic terms in existing agreements.¹⁶

All of the AETN networks benefit from being sold in a bundle, for the cross-promotional and brand-awareness-building reasons set forth above. Each time AETN has launched a new network, it has been invaluable to enable viewers to discover the channel and to sample its programming alongside familiar AETN offerings. A multichannel network must be able to show it reaches at least forty million subscribers before it can reasonably expect to attract significant advertising revenue. It also must

¹⁶ Such a regulatory mandate would have other far-ranging business effects as well. For example, since AETN’s valuation is calculated based on several factors, including both subscriber base and cash flow (which is in significant part driven by advertising), a non-tying mandate could significantly reduce the company’s asset value. In addition, if programmers are unable to reliably predict how many homes receive their network(s), because regulatory mandates give control over that factor to distributors and/or their subscribers, it becomes virtually impossible for the programmer to base advertising sales on the reach of its channel(s).

reach tens of millions of subscribers before it attains a level where it can pay for unique programming, which helps increase the viewership, which in turn leads to advertising dollars that allow the network to bring something new to the market.

II. THE MEDIA ENVIRONMENT HAS CHANGED SUBSTANTIALLY SINCE THE ADOPTION OF PROGRAM ACCESS PROVISIONS IN THE 1992 CABLE ACT

As the Commission is aware, and as the comments confirm, major changes have occurred in the multichannel video programming market that strongly indicate that *new* regulations – including “program tying” rules – are wholly unjustified. The current media landscape differs vastly from what prevailed at the time Congress enacted the program access provisions in the 1992 Cable Act. By the end of the decade that followed,¹⁷ the Commission took the opportunity presented by its tenth annual report on the growth of competition in the market for video programming services to note that “Americans enjoy more choice, more programming and more services than any time in history.”¹⁸ Just prior to that, it found “the modern media marketplace is far different than just a decade ago,” as traditional media “have greatly evolved,” while “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.”¹⁹ Consumers can select from multiple distribution

¹⁷ Ten years after their adoption, Congress required the FCC to determine whether the program access rules should be retained. See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution*, 17 FCC Rcd. 12124, 12127 (2002) (“2002 Extension Order”) (citing and implementing 47 U.S.C. § 548(c)(5)).

¹⁸ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd. 1606, 1608 (2004) (“Tenth Annual Video Competition Report”).

¹⁹ *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, ¶¶ 86-87 (2003).

platforms, including over-the-air broadcasting (which includes multicast offerings²⁰), cable systems (and in some areas multiple systems) offering basic, expanded, premium, and on-demand services, similar choices delivered via satellite (including two DBS providers), and various home-video options (DVD, digital video recorders),²¹ as well as newer options noted below. The comments in this proceeding attest to how highly competitive the video programming market has become. See Comments cited *supra* note 3. See also NCTA at 5-7.

This trend toward greater competition and, consequently, decreased power for each participant in the market for video programming services, has continued and is ongoing. This trend is documented in the R&O, the *Twelfth Annual Video Competition Report* on which it heavily relies, and in the Commission's announcement it has adopted and will release a *Thirteenth Annual Video Competition Report*.²² For example, as the R&O notes, relying on the *Twelfth Annual Video Competition Report*, the number of national programming networks has increased by almost 400 percent since 1994 when the rule implementing the exclusive contract prohibition took effect,²³ and by 80 percent

²⁰ See, e.g., *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2509 ("Hundreds of local stations are using their digital channels to provide multicast programming, including news, weather, sports, religious material, music videos and coverage of local musicians and concerts, as well as foreign language programming.").

²¹ See *Tenth Annual Video Competition Report*, 19 FCC Rcd. at 1608-10, 1624-25 & App. C; *2002 Biennial Regulatory Review*, 18 FCC Rcd. at 13648.

²² *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for The 14th Annual Report*, News Release, November 27, 2007 ("*Thirteenth Annual Report Public Notice*").

²³ R&O ¶ 64 (comparing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, 7589-92 (1994) ("*First Annual Video Competition Report*"), with *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2575).

since 2002 when the Commission last examined the exclusive contract prohibition.²⁴ Even in the last year, the number of satellite-delivered national programming networks increased from 531 to 565, or by nearly 6.5 percent. *Thirteenth Annual Report Public Notice* at 4. In this environment, the competition for “shelf space” on cable (and other MVPD) lineups is extremely robust.²⁵ In every case, AETN enters this highly competitive fray and engages in arms-length negotiation for carriage of its networks.

Meanwhile, in the last year the percentage of multichannel subscribers receiving their video programming from a cable operator has declined from 78 percent to 67 percent.²⁶ The *Thirteenth Annual Report Public Notice* re-affirms that “competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation.” *Id.* at 1. Perhaps most notable in this evolution has been the advent of video programming outlets that were in their infancy – or even not yet on the scene – just five years ago, let alone when Congress adopted program access provisions as part of the 1992 Cable Act.

In this regard, in 1992 cable operators faced no competition from DBS providers, but by the middle of last year “DBS subscribers comprise[d] the second largest group of MVPD households, representing 29 percent of total MVPD subscribers.” *Thirteenth Annual Report Public Notice* at 3. Among the significant developments since 2002

²⁴ *Id.* (comparing 2002 *Extension Order*, 17 FCC Rcd. at 12131-32 with *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2575).

²⁵ This is especially so with the wide variety of programmers seeking to bolster their HD offerings, each of which occupies more bandwidth than a traditional channel.

²⁶ See R&O ¶ 23 (citing *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2617, Table B-1). See also *id.* ¶ 50 (“recogniz[ing] the pro-competitive developments in the MVPD market since [] 2002”).

noted by the R&O were the emergence of video services offered by telephone companies, and the Government Accountability Office's release of a report in 2004 concluding that such video entry provides more price discipline to cable. See R&O ¶ 24. Taking just one such example, by "the end of 2006, Verizon reported that it offered video programming via FiOS TV to more than 2.4 million households in 200 cities in 10 states and served 207,000 subscribers." *Thirteenth Annual Report Public Notice* at 3. Recently, Verizon announced that it had reached its 1 millionth FiOS TV customer. In addition, Broadband Service Providers served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households. *Id.*

The R&O also notes other potential sources of competition in the form of providers of video content on the Internet (such as YouTube, Google, and Akimbo), and providers of mobile video services. R&O ¶ 25. The *Thirteenth Annual Report Public Notice* reports that the "amount of web-based video provided over the Internet continues to increase significantly each year, such that, by July 2006, 107 million Americans, three out of every five Internet users, viewed video online. About 60 percent of U.S. Internet users downloaded videos, and more than 7 billion videos were downloaded that month." Moreover, "[i]n recent years, major commercial mobile radio service and other wireless providers have begun offering services that allow subscribers to access video programming through handheld devices, such as mobile telephones." *Thirteenth Annual Report Public Notice* at 4.

III. THE COMMENTS CONFIRM THAT THE COMMISSION LACKS BOTH STATUTORY AND CONSTITUTIONAL AUTHORITY TO REGULATE THE NETWORK MARKETING PRACTICES OF PROGRAMMERS SUCH AS AETN

As explained thus far, the ability of programmers like AETN to market their networks as part of a package is essential to its ability to negotiate carriage with cable systems and satellite distributors. Doing so enables programmers to use innovation and the promise of diversity as bargaining tools in an effort to offset the advantages of others who obtain carriage via regulatory fiat or by virtue of their vertical holdings. The net result has been to encourage the development of new programming services that otherwise might not have had an opportunity to find an audience.

The *NPRM*, however, begins with the erroneous premise that such traditional marketing arrangements constitute a questionable use of market power that is in some way harmful to program distributors and possibly consumers. *NPRM* ¶ 120 (referring to “these disparities in bargaining power”). Relying primarily on comments submitted by interested parties about the use of retransmission consent – not free market bargaining arrangements – the Commission asserts that MVPDs and their subscribers “are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis,” either by incurring costs for programming subscribers “do not demand and may not want,” or by “forcing [operators] to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer.” *Id.* The *NPRM* thus assumes the very facts it seeks to gather, stating that “[g]iven the problems associated with such tying arrangements, we seek comment on whether it may be appropriate for the Commission to preclude them.” *Id.* *Accord*, Disney at 21-22 (the *NPRM*’s “circular

statement” in this regard “simply assumes that these practices exist and that they harm MVPDs and their subscribers without explaining how”).

The Commission’s concern in this respect is ironic given its tendency to adopt rules that have precisely the impact that it decries in the *NPRM*. See, e.g., *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, 22 FCC Rcd. 21064 (2007) (adopting must-carry rules granting preference to broadcast channels regardless of consumer demand and requiring system capacity for duplicative analog and digital channels). The difference between must-carry and retransmission consent rules, however, and the “tying” restrictions proposed in the *NPRM*, is that the latter were neither contemplated by Congress nor enacted into law. In addition, any attempt by the Commission to expand its authority to regulate the wholesale marketing of programming networks would raise significant First Amendment problems.

A. Statutory Considerations

The *NPRM* seeks comment on whether the FCC has jurisdiction “to preclude tying arrangements by satellite cable programmers under Section 628(b) [of the 1992 Cable Act] or any other statutory authority.” *NPRM* ¶ 131. In particular, it asks “whether Section 628(b) requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions.” *Id.* However, nothing in the Act, its legislative history, or the FCC’s previous rulemaking proceedings supports the Commission’s current assertion of authority. See *Disney* at 2 (there is “no express jurisdiction, no ancillary jurisdiction, and no other legal basis” for anti-tying regulations by the FCC). This lack of statutory authority does not deter certain advocates of new rules, such as the National Telecommunications Cooperative Association, which suggests the Commission’s power to act “should not hinge

on the fact that Congress did not specifically provide” for such authority. Nat’l Telecom Coop. Assn. at 9. Contrary to such statements, that is precisely what the law requires.

The FCC, like other federal agencies, "literally has no power to act ... unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Administrative agencies are “creature[s] of statute” and have “no constitutional or common law existence or authority, but only those authorities conferred upon [them] by Congress.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Hence, the FCC’s power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it. See *id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)). As NBCU notes, “precluding wholesale packaging of non-broadcast services” would have to be premised on “an immediate nexus to a means of programming distribution within the Commission’s jurisdiction,” especially given the Commission’s acknowledgment elsewhere that it has ““never exercised direct jurisdiction over networks or producers.”” NBCU at 23-24 (citing *Closed Captioning of and Video Description of Video Programming*, 13 FCC Rcd 3272, 3238 (1997)). The Commission is even further constrained in situations such as the present context, as the comments reflect, by the fact that Congress has expressly prohibited it (among others) from regulating the provision and content of cable services absent an express grant of Title VI authority. See *Fox* at 38; *Viacom* at 28 (both discussing 47 U.S.C. § 544(f)).

Where a reviewing court “ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). This

Chevron “track one” analysis applies in cases where “Congress has directly spoken to the precise question at issue.” If the court, “employing traditional tools of statutory construction,” finds that Congress had an intention on the specific provision before it, “that is the end of the matter.” *Id.* at 842-843. On the other hand, if the statute is either silent or ambiguous with respect to “the precise question at issue,” track two of *Chevron* asks whether the agency’s action is “a permissible construction of the statute.” *Id.* at 843.

Under *Chevron* “track one” analysis, the Cable Act clearly precludes imposition of program “tying” restrictions on programmers such as AETN that are not affiliated with a cable operator, since Congress did not confer on the Commission the authority to adopt such regulations. *Accord*, NBCU at 24-25; Fox at 34; Time Warner at 6-7. Although the *NPRM* asks generally whether Section 628(b) of the Act “requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions,” *NPRM* ¶ 131, the law extends only to cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendors.²⁷ Nothing in the Cable Act, or any other provision of the Communications Act, would empower the FCC to adopt the proposed rules with respect to unaffiliated cable programmers like AETN.

Notwithstanding the plain statutory language, and without offering any supporting explanation, the *NPRM* asks whether the FCC has the jurisdiction or authority to “require networks that are affiliated with neither a cable operator nor a broadcaster, such

²⁷ Section 628(b) provides: “It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” 47 U.S.C. § 548(b).

as networks affiliated with a non-cable MVPD or a non-affiliated independent network, to be offered on a stand-alone basis to all MVPDs.”²⁸ In addition to Section 628(b), it asks whether the necessary authority might be derived from a laundry list of Communications Act provisions, including Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), and 706. *Id.* At this point, without any FCC analysis, it is difficult to understand why it believes that any of these statutory provisions confer the necessary authority.²⁹

The D.C. Circuit has made quite clear that the FCC lacks the ability to leverage its general regulatory authority to adopt regulation of programming not otherwise specified in the Communications Act.³⁰ Several commenters document the inapplicability

²⁸ *NPRM* ¶ 132. Similarly, some advocates of anti-tying rules simply repeat without analysis the FCC’s bare assertion of authority under Section 628 and sundry other provisions, see, e.g., *OPASTCO et al.* at 5-6, 8, while others are silent on some or all of the various source of authority the *NPRM* cites. See, e.g., *RITTA* at 3. See also *DISH* at 18-20 (no reference to asserted sources of ancillary authority cited in *NPRM*).

²⁹ Certain of the cited provisions are clearly irrelevant to the proposed rules. The so-called “70/70 rule” contemplated in Section 612(g) relates solely to the regulation of commercial leased access channels, see, e.g., H. Rep. 98-934, 98th Cong., 2d Sess. 54 (Aug. 1, 1984) (emphasis added) (“House Report”), as some comments note. See, e.g., *NBCU* at 29; *Fox* at 35-36 (Section 612(g) is “extremely narrow in scope”); *Viacom* at 24; *NCTA* at 13. See also *Viacom* at 25 (“any regulation precluding the sale of networks in packages would in fact undermine Congress’ directive in Section 612(g) because it would create a substantial risk of reduced program diversity”). Other provisions may have been included in the *NPRM* as a result of a typographical error, since they have no possible bearing on the issues raised. See, e.g., Section 706 (relating to “War Emergency – Powers of President”). To the extent this refers to the statutory objective of “encourag[ing] the provision of new technologies and services,” see 47 U.S.C. § 157 (as amended by Pub. L. 104-104, § 706, Feb. 8, 1996), that provision has nothing to do with the content or distribution of programming, and therefore cannot serve as a basis of authority here, as some commenters suggest. See *Nat’l Telecom Coop. Assn., passim*; *ACA* at 51-52. As *NBCU* correctly notes, “the Commission itself has recognized that Section 706 does not constitute ‘an independent grant of authority.’” *NBCU* at 27-28 (quoting *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, 24044 (1998)).

³⁰ See *MPAA v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) (“To regulate in the area of programming, the FCC must find its authority in provisions other than § 1.”); *id.* at 806

under *MPAA* and *ALA* of the Act's general grants of power and "necessary and proper" clauses, such as that found in Sections 2 or 4(i), when the FCC seeks to regulate how programming is delivered, as it does here.³¹ Similarly, Section 616 cannot serve as a basis of authority for anti-tying regulations, as that provision confers authority on the Commission only for specific, limited purposes in Sections 616(a)(1)-(3) that have no application here, and otherwise deals with procedural issues in Sections 616(a)(4)-(6). See *Viacom* at 30; *NCTA* at 13. See also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992*, 9 FCC Rcd. 2642, 2648 (1993) (describing Section 616 as containing "specific prohibitions regarding actions between distributors and program vendors").

Even in the sphere of authority established by Section 628 of the Act, the Commission's assertion of jurisdiction to regulate so-called "tying arrangements" is not a permissible construction of the Act under *Chevron* "track two" analysis. Not only is the

(while "§ 303(r) ... permits the FCC to regulate in the public interest 'as may be necessary to carry out the provisions of [the] Act' the FCC cannot act in the 'public interest' if [it] does not otherwise have the authority to promulgate the regulations at issue" because "action in the public interest is not necessarily taken to 'carry out the provisions of the Act,' nor is it necessarily authorized by the Act" but rather FCC "must act pursuant to delegated authority before any 'public interest' inquiry"). See also *American Library Ass'n. v. FCC*, 406 F.3d 689, 699-704 (D.C. Cir. 2005) (explaining limits of ancillary FCC authority).

³¹ See, e.g., *NBCU* at 25-26; *NCTA* at 13. Compare also *Nat'l Telecom Coop. Assn.* at 10 (positing that Section 601(4) may empower FCC in adopting programming tying rules) with *Viacom* at 30 (Section 601 of the Act does not confer authority on Commission), and *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 n.9 (D.C. Cir. 1995). In addition, Chairman Martin has in the past expressed "discomfort" with "interpreting these provisions [Sections 4(i) and 303(r)] so broadly," especially where doing so would, as here, "offer[] no limitation on [FCC] authority." *Telecommunications Services Inside Wiring and Customer Premises Equipment, Implementation Of The Cable Television Consumer Protection And Competition Act Of 1992*, 18 FCC Rcd. 1342, 1400 (2003) (Martin, Comm'r, dissenting in part).

Commission's expansive reading of its statutory authority over programming networks unreasonable as a general proposition, it conflicts with the "means" prescribed by Congress "for the pursuit of those purposes." *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994). The *NPRM* cites neither the text of Section 628(b) nor the legislative history of the Cable Act to support the proposition that Congress delegated to the Commission the authority to regulate "tying" arrangements as it now proposes.³² There is good reason for this lapse, as nothing in the legislative materials supports the Commission's current position.³³

To the contrary, what little discussion there is in the legislative materials suggests strongly that Congress did not intend to authorize the FCC to regulate the marketing practices of cable programmers. Virtually all of the analysis in the legislative materials concerned regulation of vertical integration – precisely mirroring the language ultimately adopted. By sharp contrast, the ability of programmers to enhance their negotiating ability based on the quality and diversity of programming was described in positive terms as a remedy for the type of market power Congress sought to regulate. The Senate Report, for example, noted certain programmers could "fend for themselves" because "[i]t is difficult to believe a cable system would not carry the sports channel,

³² Similarly, by jumping directly to consideration of whether Section 616 of the Act or any exercise of ancillary authority enables to Commission to regulate as the *NPRM* proposes, ACA, for one, effectively concedes that Section 628 does not provide the necessary grant of authority. See ACA at 48-51.

³³ Section 628, and in particular, the specific rules prescribed in Section 628(c), are designed to limit the ability of vertically integrated cable operators from engaging in certain specified practices. 47 U.S.C. § 548(c). See *a/so* NCTA at 13.

ESPN, or the news channel, CNN.”³⁴ It added that “[t]hese factors counterbalance some of the Committee’s concerns regarding the market power of the cable operator vis-à-vis the programmer.” S. Rpt. 102-92 at 24. The Committee eschewed legislative solutions that “would result in a fundamental restructuring of the cable industry and the way it does business.” *Id.* at 27. Rather, it expressly intended 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.”³⁵ Nothing in this discussion supports the Commission’s current reading of the law.

Similarly, the legislative history of Section 325 of the Act further supports the view that Congress did not intend to regulate wholesale programming agreements. Here, although the *NPRM* seeks comment on the issue, the Commission acknowledges that “Congress appeared to contemplate carriage of broadcast-affiliated cable channels as part of legitimate retransmission consent negotiations.” *NPRM* ¶ 126 (quoting S. Rpt. 102-92 at 35-36). The Senate Report expressed an intention “to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace

³⁴ S. Rpt. 102-92 at 24, accompanying S. 12, 102nd Cong. (1991). It is noteworthy that the legislative history described sports and news channels, respectively, in the singular. Since the Act was adopted, the market has produced no fewer than 10 competing national news channels (which increases to more than 50 news channels when regional networks are included) and 16 competing national sports channels (which also becomes more than 50 sports channels if regional networks are included). *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2622-2649 (Tables C-1, C-2 & C-3). And these figures do not include news channels in the Commission’s separate categorization for foreign-language programming services. See *id.* at 2632-38 (Table C-2).

³⁵ S. Rpt. 102-92 at 28. In this regard, the Senate Report noted that the Cable Act did not affect existing antitrust remedies, which would remain available “to challenge the practices of both affiliated and independent programmers.” *Id.* at 29.

negotiations.” In doing so, the Committee acknowledged that broadcasters may seek non-monetary consideration, including “the right to program an additional channel on a cable system.” S. Rpt. 102-92 at 35-36.

Although it is impossible to describe the regulatory advantages established by the must-carry and retransmission consent schemes as a “free market,” it is clear that Congress, in its attempt to “to establish a marketplace for the disposition of the rights to retransmit broadcast signals,” *Id.* at 35-36, recognized that the ability to negotiate carriage for multiple networks is a “part of legitimate ... negotiations.” *Id.* Accordingly, it is not a reasonable construction of the statute to suggest that Congress intended to permit tying arrangements by broadcast programmers while simultaneously empowering the FCC to ban the same practice by cable programmers, who lack the regulatory advantages created by the Act.³⁶ The Commission’s reading of the Act in the *NPRM* is plainly wrong in that it fails to present a “symmetrical and coherent regulatory scheme.” *Brown & Williamson*, 529 U.S. at 132-133 (citation omitted).³⁷

Given the complete absence of support in the Act and legislative history, the *NPRM* searches for supporting authority for the proposed rules in the *First Report and Order*, in which the initial program access rules were adopted. See *NPRM* ¶ 129

³⁶ Even if it were a reasonable interpretation, the Commission bears the burden of explaining its departures from prior determinations, see, e.g., *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), and as Disney notes, “the Commission consistently has reached two conclusions – that it does not have the legal authority to prohibit tying or bundling and, two, even if it did ... it should not prohibit such arrangements given marketplace conditions.” Disney at 18.

³⁷ In addition, there is no plausible argument that the FCC has authority to adopt rules in this area unless Congress specifically forbade it to do so. *MPAA v. FCC*, 309 F.3d at 805-806. See also *Halverson v. Slater*, 129 F.3d 180, 187 (D.C. Cir. 1997); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (“We refuse to presume a delegation of power merely because Congress has not expressly withheld such power.”).

(suggesting certain unspecified rules might be possible pursuant to Section 628). However, this reference does not support any argument for statutory authority to adopt program tying regulations. It identifies no source of authority in the Act for rules on joint program marketing or for the application of rules to non-vertically integrated programmers. Moreover, the obscurity of the cited passage betrays the vulnerability of the *NPRM*'s reliance on it. In the three initial rulemaking orders this single reference – in which further rules were *rejected* – is the sole mention of tying.³⁸

Finally, the FCC's broad interpretation of its authority to regulate programming contracts is suspect because it raises unnecessary and substantial First Amendment problems. *MPAA v. FCC*, 309 F.3d at 805 (“To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content.”). See also *Jones v. United States*, 526 U.S. 227, 239 (1999) (“where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter”) (quotation omitted). As explained in more detail in the next section, any extension of FCC authority to regulate joint programming arrangements would present significant First Amendment problems. Consequently, the *NPRM*'s assertion of authority is not based on a permissible construction of the statute.

B. First Amendment Concerns

The *NPRM* also asks “whether Commission action to preclude tying arrangements by satellite cable programmers is consistent with the First Amendment,” *NPRM*

³⁸ In the nearly 150 pages of the *First Report and Order*, *Order on Reconsideration*, and *Order on Further Reconsideration*, there is no other mention of tying at all, and no discussion of any possible statutory authority for rules as contemplated in the *NPRM*.

¶ 131, but hinted at a proposed answer to this question in the section of the *NPRM* asking whether it may regulate “tying arrangements” associated with retransmission consent. In that discussion, although the Commission expressed substantial doubt about its statutory authority to regulate multichannel deals arising from retransmission consent negotiations,³⁹ it nevertheless suggested such regulations would not face a significant constitutional hurdle. The Commission likewise asked whether the First Amendment would limit its ability to regulate the marketing practices of cable programmers, but provided no further constitutional analysis.

This abbreviated discussion of constitutional issues in the *NPRM* not only fails to ask the right question, it suggests the wrong answer as well. While acknowledging that “it could be argued that restricting such arrangements infringes the right of broadcasters to express a message by packaging together certain content,” the *NPRM* implies that a new regulation would not infringe speech if joint marketing of channels is not intended to convey a specific message. In support of this supposition the *NPRM* cites Supreme Court dictum that “programming offered on various channels” by cable operators consists of “individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience,” and that the collective offering does not “contribute something to a common theme” expressed to subscribers. *Id.* ¶ 128 (quoting *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 576 (1995)). The *NPRM* does not draw a conclusion from this, but the implication of this reference is clear.

³⁹ *NPRM* ¶ 128. The Commission noted that “Congress appeared to contemplate carriage of broadcast-affiliated cable channels as part of legitimate retransmission consent negotiations.” *Id.* ¶ 126.

However, the *NPRM's* reference to *Hurley* misstates the constitutional issue implicated by a regulation that would “preclude tying arrangements by ... programmers.” *NPRM* ¶ 131. The question is not whether a cable *operator* is seeking to convey a message by its selection of programming channels to be offered to subscribers, which is the hypothetical scenario presented in *Hurley*. Instead, the issue presented by the proposed rule is whether *programmers* – which create networks, produce and license programming on selected subjects, and offer channels to operators either alone or in combination with others – have a right to make such editorial and marketing decisions without governmental interference.⁴⁰ Any regulation that dictates how programming must be marketed necessarily implicates the First Amendment because “liberty of circulation” is constitutionally protected. *E.g., Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003).

In this regard, commenters favoring the proposed regulations would turn First Amendment (and copyright) law upside down by depriving programming networks from, for example, exercising the right to specify particular packages in which their networks are offered, DISH at 3, and/or the tier on which a programmer agrees to have its content carried. For example, DISH complains that CBS and CBS “alone decides on what terms [its] content is available to MVPDs.” DISH at 14. But that is exactly the kind of right that our Constitution confers on content creators/owners. In fact, stripped of the “public interest” rhetoric that predominates in proceedings like this, it is evident that the

⁴⁰ There would be a significant constitutional problem even if the *NPRM* had more accurately framed the issue. Just as bookstores and magazine stands have a First Amendment right to decide which books and publications to make available to the public, *see, e.g., Smith v. California*, 361 U.S. 147 (1959), a cable operator’s editorial choices regarding channel selection are constitutionally protected. *See* Disney at 74 (“cable programmers often do promote [] content as a whole to contribute to a theme”).

pro-regulatory faction simply wishes to have such powers taken from programmers, and given to them. See, e.g., ACA, *passim*. In short, rather than having content creators/owners decide whether their programming will be disseminated in packages, and of what size and composition, the advocates of new rules seek to commandeer the power to create such packages for themselves.⁴¹ In this instance, where restrictions would be imposed directly on the marketing practices of *programmers*, any rules would be particularly subject to First Amendment scrutiny.

1. Intermediate Scrutiny

Even if the Commission's characterization were accurate, the relevant question is not whether the First Amendment would apply to programming marketing restrictions, but rather, what level of scrutiny would be appropriate. In *Hurley*, the Supreme Court reasoned that regulating the participants of a parade was content-based, since it necessarily affects the organizers' message. The Court distinguished that situation

⁴¹ See, e.g., ACA at vii (listing in stark detail rights held by content owners/creators that ACA's members would like to wield themselves). See also *id.* at 22 (proposing to strip from programmers the right to decide the tiers on which they will allow their content to be disseminated). Examples provided by commenters favoring anti-tying regulations, regarding how they would tier various networks given free rein to do so, are particularly telling. In examples provided at Section V of ACA's comments, one ACA member would relegate A&E Network to an optional "entertainment" tier, and not carry The History Channel® at all. *Id.* at 31. Others would relegate A&E Network to a "variety" tier while clustering The History Channel®, History International®, and the Military History Channel™ or BIO™, to a "science and educational" tier. *Id.* at 33, 42. Yet another would place The History Channel® on a "family" tier, *id.* at 35, while another would place it, along with History International® and BIO™, on something called "IQTV." *Id.* at 36. Still another would put Military History Channel™ on a "family" tier but would keep The History Channel® and History International® on a "news and information tier." *Id.* at 38. Significantly, ACA's members would place these various offerings on the specified tiers regardless of whether AETN wants the given channel(s) to be part of the themed tier in question, thereby usurping AETN's ability to make such choices for itself, or to at least negotiate on what tier(s) its networks appear and what AETN willing to provide as compensation and/or receive as concessions for such tier placement.

from cable operators, who function largely as conduits for speech produced by unaffiliated programmers, but it nevertheless made clear that “[c]able operators ... are engaged in protected speech activities *even when they only select programming originally produced by others.*” *Hurley*, 515 U.S. at 570 (emphasis added). See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“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”) (“*Turner I*”). See also NBCU at 30-31; Disney at 74. Cf. Owen Report at 63 (“Whether, and how, to bundle components is an important aspect of the competitive strategies of individual firms.”).

Consequently, any new rules to restrict the marketing of multichannel networks would be subject to intermediate First Amendment scrutiny *at a minimum*. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Turner I*, 512 U.S. 661-62; *Time Warner Entm't Co. L.P. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001) (“cable operators ... exercise[] editorial discretion in selecting the programming [they] will make available to [their] subscribers ... and are entitled to the protection of the speech and press provisions of the First Amendment”) (citation omitted); *Time Warner* at 9. Under intermediate scrutiny the FCC has the burden to demonstrate a substantial governmental interest, that its regulations will directly and materially serve that interest, and that the restrictions on speech are not greater than necessary. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189-90 (1997) (“*Turner II*”); *Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1318 (D.C. Cir. 2000). This level of review, though not as stringent as strict scrutiny, is an exacting one that holds “[c]onstitutional authority to impose some [regulation] is not authority to impose any [regulation] imaginable.” *Time Warner*, 240 F.3d at 1130.

Even under intermediate First Amendment review the rules proposed in the *NPRM* are constitutionally infirm. In this regard, no substantial governmental interest has been identified as the Constitution requires. There is no discussion whatsoever in the legislative history of Section 628 regarding a need to restrict programmers' ability to bargain based on their ownership of multiple channels. Additionally, the discussion of the issue in the *NPRM* assumes the "harm" of "tying arrangements" without any proof. See *supra* at 17-18 (citing *Disney* at 21-22). The discussion of potential ill-effects is entirely speculative, with the Commission suggesting the wholesale marketing of programming packages *may* cause operators to incur higher costs and that subscribers *might* not see channels they would prefer. See *NBCU* at 33 ("Nor has the Commission offered any evidence – beyond mere presumptions in the *NPRM* – of consumer harm stemming from the wholesale packaging of programming."). As the comments note, "[e]specially given the First Amendment interests at stake, the Commission is required to establish on the administrative record the factual basis for its assertion[s] ... and it has not done so." *Disney* at 81. See *also* *Time Warner* at 10 (same).

Such speculation is entirely insufficient to support the adoption of a rule. See *Turner I*, 512 U.S. at 640 ("the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media"). See *also* *Time Warner Entm't*, 240 F.3d at 1134 ("Having failed to identify a non-conjectural harm, the Commission could not possibly have addressed the connection between harm and market power."); *id.* at 1136 ("the Commission has pointed to nothing in the record supporting a non-conjectural risk of anticompetitive behavior"). Although the Commission suggests

that it might be able to exercise expanded authority “should additional types of conduct emerge as barriers to competition and obstacles to broader distribution of satellite cable ... programming,” *NPRM* ¶ 129 (quoting *First Report and Order*, 8 FCC Rcd. at 3373), the amount and variety of programming available to video programming distributors has greatly increased since the Cable Act was adopted.⁴²

In addition, rules proposed in the *NPRM* would also restrict more speech than necessary in violation of the First Amendment. The *NPRM* contemplates adoption of a blanket rule even as it suggests that any adverse effects it seeks to cure primarily affect “small cable operators and their customers.” *NPRM* ¶ 130. See also *Time Warner* at 10 (“the *only* interest that can be inferred from the [*NPRM*] is the protection of small, rural cable operators that supposedly lack leverage in their negotiations with programmers”) (emphasis original). As a consequence, the proposed rule would be excessively burdensome even as proposed by the Commission. In addition, the rules effectively would bar programmers from using their editorial discretion with respect to how they choose to package their offerings. Indeed, the only cable operators complaining about alleged “tying” arrangements are small companies,⁴³ thereby confirming that any blanket rules “precluding” any cable programmer conduct would be vastly overbroad.

In the case of AETN, it would preclude it from selling A&E and The History Channel® in any combined form. The same would hold true of any effort to package

⁴² As noted above, the number of available channels has increased by over 400 percent since the Cable Act was enacted. R&O ¶ 64 (comparing *First Annual Video Competition Report*, 9 FCC Rcd. 7442, 7589-92, with *Twelfth Annual Video Competition Report*, 21 FCC Rcd. at 2575).

⁴³ See generally *ACA* at 5-7, 21-23; Nat’l Telecom Coop. Assn. at 13-19; Comments of the Small Cable System Operators for Change (“SCSOC”), *passim*; OPASTCO at 11.

History International® with The History Channel en Español™ despite the obvious synergies between the two. Parties commenting in support of the NPRM also would eliminate AETN having any control over the tiers on which its networks appear. See *supra* n.41. Such interference with how a speaker combines its various messages, and the adverse impact on its ability to negotiate and to launch new networks, plainly imposes too great a burden even under intermediate scrutiny, especially given the *NPRM's* silence on this point. See, e.g., *Time Warner Entm't*, 240 F.3d at 1137 (FCC analysis under intermediate First Amendment scrutiny is inadequate where “it says nothing about plans that the rule may have scuttled”).

2. Strict Scrutiny

Although the proposed rules would fail to survive even intermediate First Amendment scrutiny, it is far from clear that this reduced level of constitutional review would be appropriate. The Supreme Court has explained that regulations predicated on government antipathy for particular speech or given speakers must be analyzed under strict scrutiny, and “even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.” *Turner I*, 512 U.S. 645. This is true even when government regulations are “a subtle means of exercising a content preference.” *Id.* As a consequence, various cases have applied strict scrutiny to strike down regulations that imposed an economic burden on speakers despite the fact that the rules were defended on seemingly neutral economic terms.⁴⁴

⁴⁴ See, e.g., *Simon and Schuster*, 502 U.S. 105 (1991); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988). Cf. *Disney* at 73 (“The [] proposed regulations warrant particularly close First Amendment scrutiny because they seek to impose on programmers a mandatory unbundling regime that is inapplicable to any medium other than video programming. (Indeed, no one would suggest that such a scheme could satisfy the

In this case, if the proposed regulation of wholesale marketing is merely misdirection for the Commission's ultimate purpose of requiring *à la carte* service to subscribers, as several commenters, on both sides of the issue, recognize it may well be,⁴⁵ a content-based purpose would not be difficult to identify.⁴⁶ Such a purpose would trigger strict scrutiny, under which the proposed restrictions would be presumed invalid. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (“the Constitution demands that content-based restrictions on speech be presumed invalid”); *United States v. Playboy Entm’t Group*, 529 U.S. 803, 817 (2000). Restrictions on program marketing would not withstand constitutional review under strict scrutiny because no interest the government might advance is likely to be sufficiently compelling, nor would the rules be the least restrictive means of achieving the asserted objective. See *Playboy Entm’t Group*, 529 U.S. at 818-820; *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Indeed, even commenters favoring pro-

First Amendment if it were applied to other media such as newspapers, magazines, books, or pamphlets.)”).

⁴⁵ See, e.g., NBCU at 51; Disney at 75 (noting that it is “evident” that “*à la carte* at the wholesale level ... grows directly out of the Commission’s, and in particular Chairman Martin’s, policy of encouraging family-friendly speech and discouraging what the Commission perceives to be vulgar and coarse programming (sweepingly labeled by the Commission as ‘indecent’)”).

⁴⁶ Chairman Martin’s statement accompanying the *NPRM* may be fairly construed as expressing support for an *à la carte* regime. In this regard, a primary impetus for *à la carte* proposals has been to limit programming that policymakers deem as “undesirable.” Compare *United States v. Eichman*, 496 U.S. 310, 315 (1990) (facially neutral law is considered content-based when “the Government’s asserted *interest* is related to the suppression of free expression”) (emphasis in original). See Disney at 76 (“there can be little doubt that the Commission’s true aim is, as Chairman Martin put it, to discourage what is, in the Commission’s view, ‘unwanted of less desirable programming’ by permitting individual channel selections”) (footnote omitted).

