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	)	

REPLY COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to comments filed in response to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] Both the facts and the law presented in those comments demonstrate that the Commission cannot and should not expand its regulations governing the sale of video programming.

I. INTRODUCTION AND SUMMARY.

As Comcast suggested in its comments, in deciding whether any expansion of the program access rules is warranted, the Commission should adhere to two core principles. First, *increased competition should be accompanied by decreased regulation*. Second, *regulatory action must be supported by statutory authority and evidence in the record*. As further demonstrated below, expansion of the program access rules as proposed by some commenters would be inconsistent with both of these principles. Comments filed in this proceeding prove

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[1] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791 (2007) ("*Notice*" or "*Program Access Order*," as appropriate), *appeals docketed sub nom. Cablevision Sys. Corp. v. FCC*, No. 07-1425 (D.C. Cir. filed Oct. 19, 2007), *Comcast Corp. v. FCC*, No. 07-1487 (D.C. Cir. filed Dec. 3, 2007).

that there is intense competition in the creation, aggregation, and distribution of programming. Moreover, although certain parties continue to claim that the Commission should adopt new rules and procedures for program access complaints, these parties do not, and cannot, provide the requisite legal or factual justification for doing so. In fact, as Commissioner McDowell recently explained,

> Deregulatory policies have spurred new investment and competition in the marketplace. As a result, new delivery platforms and new content providers have sprouted up, *supplanting the need for regulation*.[2]

The Commission should recognize that in a competitive marketplace expanded regulations governing the sale of video programming are not necessary and should be firmly rejected.[3] In particular, the Commission should not expand the program access rules to terrestrially-delivered cable-affiliated programming, adopt a "standstill" requirement, or impose any type of mandatory arbitration. Instead, as Comcast urged in its comments, the Commission

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[2] *In re the Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, FCC 07-219, Dissent of Commissioner Robert M. McDowell 95 (Feb. 11, 2008) ("*McDowell Dissent*") (emphasis added).

[3] It is particularly anomalous to propose new regulations in the name of lowering prices for multichannel video services while the Commission is still contemplating program carriage regulations that would increase prices. *See, e.g., Notice* ¶¶ 119-132 (examining "tying" of programming); Ted Hearn, *Specter to Martin: Sack NFL Net Plan*, Multichannel News, Nov. 20, 2007 (describing how, in response to Chairman Martin's endorsement of rules "that would, in effect, supply the NFL Network with some regulatory Gatorade," Senator Arlen Specter argued that the "only possible outcome would be higher costs to consumers"), *available at* http://www.multichannel.com/article/CA6504396.html.

Also anomalous is that, as the Commission goes out of its way to make sure that the telcos can "benefit" consumers, one of the most aggressive "rate hikes" for 2008 was announced by Verizon. *See, e.g.*, Craig Moffett, Bernstein Research, *U.S. Cable & Satellite Broadcasting: Weekend Media Blast: Death, Taxes . . . and Cable Rate Increases. A Look Beneath the Headlines* 1 (Dec. 7, 2007) (noting that "new entrant Verizon has *led* the charge, with an eye-popping [rate] increase of 12% for next year following on the heels of an 8% increase this year") (emphasis in original); Craig Moffett, Bernstein Research, *U.S. Cable & Satellite Broadcasting: All the Districts Are in, and Prices Are . . . You Guessed It . . . Going UP. Price Hikes Average 5%*, at 1-2 (Jan. 31, 2008) (noting that Verizon will increase its 2008 rates by 12%; DIRECTV by an average of 4-6%; and DISH Network by 4%).

should focus agency and industry efforts on more real, and more pressing, needs -- including most particularly ensuring a successful broadcast digital transition.[4]

II. THERE IS NO BASIS FOR THE COMMISSION TO EXTEND THE PROGRAM ACCESS RULES TO TERRESTRIALLY-DELIVERED PROGRAMMING.

The record provides absolutely no factual or legal basis to extend the program access rules to cover programming that is delivered terrestrially. Doing so would ignore marketplace realities and be contrary to the relevant statutory language, Congressional intent, and years of established Commission precedent.[5]

A. The Marketplace Is Intensely Competitive.

Video competition is thriving. Over the past two years, Comcast has provided the Commission a wealth of information depicting the competitive vigor of the video marketplace.[6] The overwhelming majority of evidence submitted in this proceeding confirms that the marketplace today is *more* competitive than ever.[7]

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4 *See* Comcast Comments at 6. For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 07-198.

5 Actions the Commission can take to reduce regulatory burdens are welcome. For example, Comcast and several other commenters support adoption of procedures to shorten the term of the extension of the exclusive contract prohibition. *See* Comcast Comments at 14-16; NCTA Comments at 11-12; Cablevision Comments at 12-13.

6 *See* Comcast Comments at 2-6; *see generally* Comcast Comments, MB Dkt. No. 06-189 (Nov. 29, 2006); Reply Comments of Comcast Corp., MB Dkt. No. 06-189 (Dec. 29, 2006) ("*2006 Comcast Video Competition Reply*"); Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189 (Mar. 30, 2007) (highlighting numerous significant video competition developments from December 29, 2006 through March 30, 2007).

7 *See, e.g.*, Nat'l Cable & Telecomm. Ass'n ("NCTA") Comments at 3-7 ("[A]s the Commission repeatedly has found in its annual video competition reports, there is intense competition among MVPDs. Year after year the share of MVPD customers served by traditional cable operators declines and the share of customers served by cable's competitors increases."); Time Warner Comments at 1 ("Today, the marketplace is working effectively. The industry is experiencing unprecedented growth and competitiveness and rapid technological changes are increasing the number of competitors and introducing new forms of competition. There is simply no evidentiary basis for additional regulations, and the Congressional directive to rely on the marketplace mandates that the Commission

(footnote continued…)

Certain key evidence cannot be disputed. The percentage of programming networks that are vertically integrated with a cable operator has declined drastically since 1992 from 57% to less than 15% today.[8] And with nearly 700 national and regional programming networks currently available in the marketplace,[9] American television viewers have "a collection of programming choices that is the envy of the world."[10] In addition, as Viacom explains, "no party dominates the market for the sale of video programming, and no program owner has market power. In fact, '[n]o supplier of wholesale video programming to [multichannel video program distributors ("MVPDs")] has as much as 25 percent of that business.'"[11] Viacom goes on to explain that no programmer "has a [market] share that is even close to the levels that are commonly associated with market power," and that the video programming industry's "structure [is] consistent with a high degree of competition."[12] The *Owen Study* concludes that, because the video marketplace "is not concentrated, and the largest supplier has less than 25% of the

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exercise restraint in this area."); Cablevision Comments at 1-2; NBC Universal Comments at 42-50; Disney Comments at 20; Fox Comments at 19-21; Viacom Comments at 4-9; Comcast Comments at 2-6.

8 *See* News Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* 4 (Nov. 27, 2007) ("*Video Competition News Release*") (noting that 14.9% of satellite-delivered national programming networks are vertically integrated with a cable operator); *see also* Viacom Comments at 6; Fox Comments at 20.

9 *See Video Competition News Release* at 4; NCTA Comments at 2; Viacom Comments at 6; Fox Comments at 2, 19.

10 Fox Comments at 2.

11 Viacom Comments at 6-7 (citing Bruce M. Owen, *Wholesale Packaging of Video Programming* 26 (Jan. 4, 2008) ("*Owen Study*")) (attached to the comments of Disney, Viacom, NBC Universal, and Fox).

12 *Id.* at 7 (citing *Owen Study* at 26-27).

business, . . . a regulatory intervention aimed at correcting a potential market failure . . . is misguided."[13]

Not only do Americans have an enormous array of programming to choose from, but almost every American household has at least a choice of three, and often a choice of four or five, competing MVPDs.[14] As of September 30, 2007, the two DBS providers served over 30.2 million customers, or more than 30% of all multichannel consumers.[15] Meanwhile, the telcos continue to expand their video offerings and anticipate further growth. Verizon's FiOS TV service currently has more than 1 million subscribers, up from 717,000 subscribers at the end of September.[16] Subscribership to AT&T's U-verse video service increased by almost one hundred percent in the fourth quarter of 2007, and AT&T predicts that U-verse will have more than 1 million subscribers by the end of this year.[17] Development of new multichannel video

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13 *Owen Study* at 1. A study prepared by Jeffrey A. Eisenach and submitted by Disney similarly proves this point by concluding, "The market for video programming is unconcentrated, ownership is diverse, and entry is free and commonplace . . . . [N]ew video networks continue to emerge, including networks that are not affiliated with broadcast programmers, a fact which undermines the basic premise of market power." Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* ¶ 48 (Jan. 4, 2008) ("*Eisenach Study*") (attached to Disney Comments at Ex. A).

14 *See Video Competition News Release* at 1 (reporting that almost all consumers can obtain programming through over-the-air broadcast television, a cable system, and at least two DBS providers); *Program Access Order* ¶ 25; Comcast Comments at 2; NCTA Comments at 2.

15 *See* Press Release, The DIRECTV Group, Inc., *The DIRECTV Group Announces Third Quarter 2007 Results* 3 (Nov. 7, 2007), *available at* http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q307Earnings.pdf; Press Release, EchoStar Communications Corp., *EchoStar Reports Third Quarter 2007 Financial Results* (Nov. 9, 2007), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=275179; SNL Kagan, *Media Money*, Sept. 18, 2007, at 6.

16 *See* Todd Spangler, *Verizon Pushes Past 1 Million Subscribers*, Multichannel News, Jan. 28, 2008, *available at* http://www.multichannel.com/article/CA6526156.html?nid=2734&rid=1315801124; *Verizon Investor Quarterly*, 4th Quarter 2007 Results at 3 (Jan. 28, 2008), *at* http://investor.verizon.com/financial/quarterly/vz/4Q2007/4Q07Bulletin.pdf.

17 *See* AT&T Inc., *AT&T Investor Briefing, 4Q 2007*, at 2-5 (Jan. 24, 2008) (noting that at the end of the 4th Quarter, AT&T's U-verse subscribership was 231,000, up from 126,000 three months earlier, with approximately

(footnote continued…)

technologies, including those using broadcast and mobile video platforms, will only further increase competition.[18] As the Commission noted in the *Program Access Order*, this competition has directly impacted the cable industry: "the number of cable subscribers has declined by 3.4 million since 2002, from 69 million to 65.4 million."[19]

Internet sources of video are becoming more powerful and cannot be ignored: the Commission recently found that "the amount of web-based video provided over the Internet continues to increase significantly each year."[20] Based on the great success of Internet programming alone, NCTA cautioned that "[w]ith the Internet marketplace working to expand the breadth of programming choices and to create alternative distribution models . . . the

(…footnote continued)

12,000 installs per week), *available at* http://www.att.com/Investor/Financial/Earning_Info/docs/4Q_07_IB_FINAL.pdf. AT&T expects "that its U-verse services will represent a multibillion-dollar revenue stream by 2010." *Id* at 14. In 2007-08, AT&T expects to spend between $4.5 billion and $5 billion on U-verse, with plans to reach 30 million customer locations by 2010. *See* Todd Spangler, *AT&T: 30 Million U-verse Homes by 2010*, Multichannel News, Dec. 11, 2007, *available at* http://www.multichannel.com/article/CA6511441.html.

18 *See McDowell Dissent* at 2 ("[T]oday's video market will only become more competitive as broadcasters beam new HDTV and multi-cast video programming, over-the-air, for *free*, and as wireless providers build out powerful new platforms using [the] recently-auctioned Advanced Wireless Services spectrum and the 700 MHz spectrum being auctioned next month."); NCTA Comments at 6 (noting that the upcoming DTV transition will provide additional programming choices, as broadcasters plan to use their multicast channels to "offer additional programming options, and already a new 'network' has been formed that will offer programming to broadcasters to fill these multicast channels").

19 *Program Access Order* ¶ 23.

20 *Video Competition News Release* at 4 ("In July 2006, 107 million Americans, three out of every five Internet users, viewed video online. In July 2006, about 60 percent of U.S. Internet users downloaded videos. More than 7 billion videos were downloaded that month."); *McDowell Dissent* at 2 (noting that "today there is so much Internet video, that YouTube alone requires more bandwidth than the *entire Internet* did in 2000 . . . [and] that's not counting new ventures such as Joost, Cinema Now, Movielink and others").

Commission should be extremely hesitant to impose new regulatory obligations on programmers or cable operators."[21]

Despite the overwhelming evidence that the video marketplace is highly competitive, certain parties continue to advocate for more government regulation. Those parties ignore the realities of the marketplace, including their own actions that provide the best proof of how competitive the marketplace really is. For example, cable competitors often claim that they have better programming than their marketplace foes.[22] As NCTA noted in its comments,

> When the marketplace has reached a point where new and established competitors claim that they have better programming than incumbent cable operators, it is almost impossible to justify retention of the existing regulation of cable-affiliated programming, let alone expansion of those regulations.[23]

Meanwhile, none of the proponents of expanded program access rules provide evidence that they have been denied the programming they need to compete. Instead, they offer baseless claims,[24]

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21 NCTA Comments at 6-7 ("Not only does the growth in broadband Internet access services mean that existing programmers have an alternative distribution mechanism for their programming, it also has spurred the creation of new programming services. Increasingly, this programming will be available not just on computers or televisions in the home, but also on mobile devices.").

22 *See, e.g.,* NCTA Comments at 5 ("Verizon . . . recently announced that it will offer over 150 HD channels by the end of next year. DIRECTV also has based its marketing on the supposed superiority of its HD offerings. Both companies also claim to make available programming that is not found on any cable system.") (internal citations omitted).

23 *Id.*

24 For example, a handful of parties attempt to discount DBS competition, arguing that only wireline MVPD competition is effective. *See, e.g.,* Broadband Service Providers Ass'n ("BSPA") Comments at 2-3; U.S. Telecomm. Ass'n ("USTelecom") Comments at 4-5; Verizon Comments at 3-4 & n.6. Such claims are advanced by the telephone companies to gain regulatory favor. Comcast addressed this claim in last year's program access proceeding and has disproved it each of the past three years in the context of the Commission's annual video competition inquiry. *See* Comcast Reply Comments, MB Dkt. No. 07-29, at 10-12 (Apr. 16, 2007) ("*2007 Comcast Program Access Reply*"); *2006 Comcast Video Competition Reply* at 22-25; Comcast Reply Comments, MB Dkt. No. 05-255, at 37-41 (Oct. 11, 2005) ("*2005 Comcast Video Competition Reply*"); Comcast Reply Comments, MB Docket No. 04-227, at 12-17 (Aug. 25, 2004). Based on a 2004 GAO report, USTelecom reiterates its claim that "wireline video entry provides more price discipline to cable than direct broadcast satellite (DBS) and is more likely to force cable operators to enhance their own services and to improve customer service." USTelecom Comments at 4. As Comcast previously explained, the report has extremely limited, if any, evidentiary value. *See 2007 Comcast*

(footnote continued…)

allege that expanding the rules will promote broadband deployment,[25] and rely on conjecture about future instances where they may be denied "must have" programming.[26] Such speculation cannot serve as a basis for new regulations.[27] As explained by Viacom, "the Commission has no compelling reason to ignore the overwhelming evidence that the video programming market is

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Program Access Reply at 11 & n.31 (enumerating key deficiencies of the report). Comcast also explained that even GAO recognized that its analysis of a handful of markets is "not generalizable." *See id.* at 11 (quoting Gen. Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241, at 4 (Feb. 2004)). USTelecom's continued reliance on a 2003 GAO Report is similarly unavailing. USTelecom Comments at 4 & n.9 (*citing Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Oct. 2003)). As Comcast has previously pointed out, the 2003 GAO Report was critically flawed. *See 2007 Comcast Program Access Reply* at 12 & n.34. Finally, USTelecom also cites to the findings of the Commission's 2005 *Report on Cable Industry Prices*, 21 FCC Rcd. 15087 (2006). *See* USTelecom Comments at 4 & n.9. NCTA has demonstrated that the pricing analysis in that report is flawed and out of date. *See* NCTA, *Cable Prices: The Real Story* (Dec. 19, 2006), *available at* http://www.ncta.com/PublicationType/TalkingPoint/3471.aspx.

25 *See, e.g.,* Nat'l Telecomm. Coop. Ass'n ("NTCA") Comments at 11-13; Organization for the Promotion & Advancement of Telecomm. Cos., et al. ("OPASTCO") Comments at 4-6; USTelecom Comments at 7-8 AT&T Comments at 3; CA2C Comments at 18-20. Even granting the assumption that the ability to offer a viable video service is "linked intrinsically" to broadband deployment, there is no conceivable basis for assuming that access to any particular terrestrially-delivered network is a precondition for offering a viable video service. *See, e.g., Owen Study* at 2 ("Few, if any, MVPDs are likely to go out of business for lack of a particular network; instead, they will simply adjust other programming choices, prices, and marketing strategy.").

26 *See, e.g.,* CA2C Comments at 5-12; DIRECTV Comments at 13; USTelecom Comments at 6-7; AT&T Comments at 1-3; BSPA Comments at 5; Verizon Comments at 3-4. Instead of offering any new or meaningful evidence, parties that assert that the program access rules should be expanded to cover terrestrial programming largely rely on the Commission's "findings" in the *Program Access Order*. *See, e.g.,* AT&T Comments at 3 ("The only issue in this proceeding, then, is whether the Commission has authority to so extend [the exclusivity] prohibition."); Verizon Comments at 5-7; USTelecom Comments at 6-7; CA2C Comments at 6, 8-12. Comcast does not accept the validity of these allegations; however, as Comcast noted in its comments, this is now a matter of judicial review in a separate proceeding and will not be addressed further here. *See* Comcast Comments at 8 & n.24.

27 *See Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 664 (1994) ("When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal citations omitted).

operating in a competitive, economically efficient manner."[28] Moreover, as top executives from News Corp, Disney, Viacom, and NBC Universal recently stressed,

> Media content is one of the few industry sectors in which the United States is still preeminent on the world stage. Ill-considered and unjustified government interventions cannot be permitted to undermine this vibrant American industry.[29]

B. The Commission Does Not Have Authority To Expand the Program Access Rules to Terrestrially-Delivered Programming.

Several commenters joined Comcast in explaining that neither Section 628 nor any other statutory source provides the Commission with the authority necessary to extend the program access rules to programming delivered terrestrially.[30]

Section 628. It is remarkable for the *Notice* to suggest, and for several commenters to assert, that the Commission may rely upon Section 628(b) as authority to expand the program access rules to terrestrially delivered cable-affiliated programming.[31] "The Commission has repeatedly ruled that Section 628 does not apply to terrestrially-delivered programming, and there is no basis for the Commission to reverse its long-standing position."[32] As Comcast and others explained in the comment round, Congress made a deliberate choice to exempt

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28 Viacom Comments at 8; *see also* Letter from Peter Chernin, President and Chief Operating Officer, News Corp., Robert Iger, President and Chief Executive Officer, Walt Disney Co., Philippe Dauman, Chief Executive Officer, Viacom, and Jeff Zucker, President and Chief Executive Officer, NBC Universal, to Chairman Martin and Commissioners, FCC, MB Dkt. Nos. 06-189, 07-42, at 2 (Nov. 20, 2007) ("Because of the vibrant competition in both programming and distribution, and because of the myriad options and alternatives available to consumers, there is no conceivable justification for government intervention into this marketplace.").

29 *Id.*

30 *See* Comcast Comments at 6-13; NCTA Comments at 12-13; Cablevision Comments at 13-19.

31 *See Notice* ¶¶ 115-117; DIRECTV Comments at 8-13; AT&T Comments at 5; Verizon Comments at 9-10; OPASTCO Comments at 5-7; USTelecom Comments at 8; BSPA Comments at 6; CA2C Comments at 18.

32 Cablevision Comments at 13 (internal citations omitted).

terrestrially delivered cable-affiliated programming from the program access rules.[33] The Commission and the courts have recognized that there are valid business and economic reasons to opt for terrestrial delivery,[34] and as Cablevision notes,

> [A] vertically-integrated cable programmer's otherwise lawful business decision . . . does not become unlawful (or unfair or deceptive) merely because it has the effect of exempting that programming from regulation under section 628. There are 'many occasions on which persons, without violating any law, may structure transactions in order to avoid the impact of some regulation or tax.' [No] cable operator is under a statutory obligation to ensure that any and all programming they create must become or remain subject to the constraints of section 628 in perpetuity.[35]

Moreover, as Fox explains, "Section 628 is not an all-purpose vehicle for regulating all aspects of program access," and it "does not provide the FCC with a blank check."[36] Urging the Commission to take a limited view of Section 628(b), even DIRECTV notes that the provision "does not prohibit 'unfair practices' generally" and that the Commission "cannot, by definition, reach conduct that is *not* prohibited by, and entities *not* covered by, Section 628(b)."[37]

Ironically, even as DIRECTV asserts that the Commission's authority under Section 628(b) is limited and may not be expanded to non-cable MVPDs,[38] it joins with other parties

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33 *See* Comcast Comments at 7; NCTA Comments at 12-13; Cablevision Comments at 17-18.

34 *See, e.g., RCN Telecom Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 14 FCC Rcd. 17093 (1999), *aff'd*, Memorandum Opinion & Order, 16 FCC Rcd. 12048 (2001); *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822 (1998), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089 (1999), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000), *aff'd, EchoStar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

35 Cablevision Comments at 18-19 & n.53 (citing *Ratzlaf v. United States*, 510 U.S. 135, 145 (1994) (internal quotation marks and internal citations omitted)).

36 Fox Comments at 34.

37 DIRECTV Comments at 3-4 (emphasis in original).

38 DIRECTV firmly rejects extending the prohibition to unaffiliated programming, making it explicit that it is determined to preserve its exclusive access to NFL SUNDAY TICKET. *See* DIRECTV Comments at 2 & n.2.

who urge the Commission to *expand* the program access rules pursuant to its Section 628(b) authority to regulate cable-affiliated programming delivered terrestrially.[39] DIRECTV can't rationally have it both ways. As Comcast explained in its comments, because terrestrially-delivered programming is clearly outside the scope of the express exclusivity provision of Section 628(c), the Commission cannot use Section 628(b) to fashion a new exclusivity provision that applies to terrestrially-delivered programming.[40] The Media Bureau explained it best in a decision rejecting DIRECTV's similar arguments years ago when it said that Section 628(b) cannot "be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate."[41]

AT&T's rationale for the Commission's authority to expand the program access rules to terrestrial programming is even more preposterous. AT&T contends that terrestrial delivery was

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[39] *See* DIRECTV Comments at 8-13; *see also* AT&T Comments at 5; Verizon Comments at 4-5; OPASTCO Comments at 5-7; USTelecom Comments at 5-8; BSPA Comments at 6; CA2C Comments at 18; NTCA Comments at 8. As indicated in Comcast's comments, Comcast agrees with DIRECTV's assertion that the Commission does not have statutory authority to expand the program access rules to apply to non-cable MVPDs. *See* Comcast Comments at 13-14. Although Comcast believes that all MVPDs should be on equal footing, that does not mean that the Commission should rewrite the law. Despite DIRECTV's claim that cable operators possess market power and that "[s]atellite operators, by contrast, do not and will not for the foreseeable future," DIRECTV Comments at ii, 2, the Commission clearly found differently when it imposed conditions on DIRECTV regarding RSN programming. *See In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee*, Memorandum Opinion & Order, 19 FCC Rcd. 473 ¶¶ 147-179 (2004) (imposing certain program access conditions on DIRECTV) ("*News Corp./DIRECTV Order*").

[40] Even Section 628(b) maintains the distinction between satellite and terrestrial delivery of programming. *See* 47 U.S.C. § 548(b).

[41] *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822 ¶ 33 (1998), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000) (emphasis added) (internal citations omitted). Although DIRECTV, the second largest MVPD, argues that its efforts to compete have been hindered by actions by cable operators that are well within the law, it continues to experience significant subscriber growth, even without the carriage of certain terrestrially delivered cable-affiliated programming. Based on data from Media Business Corp. (as of the third quarter of 2007), DIRECTV has over 248,000 subscribers in Philadelphia, an increase of 577% from when it filed its program access complaint in September 1997. *See In re DIRECTV, Inc. v. Comcast Corp.*, Program Access Complaint, CSR 5112-P at 3 (Sept. 23, 1997) (noting that, as of September 1997, DIRECTV had over 43,000 subscribers in the Philadelphia area). As explained above, it is clear that DIRECTV faces no competitive obstacles that it needs new regulatory advantages to surmount.

not considered in 1992, so "its omission [in Section 628] would mean nothing at all."[42] This is nonsense. Terrestrial delivery did in fact exist in 1992,[43] and Congress specifically considered it in writing the law the way it did. Congress made a deliberate choice to limit the application of the program access rules to only "satellite cable programming vendor[s] affiliated with a cable operator," and rejected a version of the law that would have applied the provisions to all "national and regional cable programmers who are affiliated with cable operators."[44] It is not the role of the Commission to countermand such deliberate Congressional choices.

In general, arguments to expand the program access rules rely on an assumption that MVPDs are not able to obtain the programming they need to compete. Proponents of expanded program access rules argue that the Commission can invoke Section 628(b) to reach terrestrial programming because "unfair practices involving terrestrially delivered programming have the

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42 *See* AT&T Comments at 6 (internal citations omitted); NTCA Comments at 9.

43 A means to deliver terrestrial programming by wires and microwaves was developed more than a half century ago, as AT&T well knows. Terrestrial delivery of broadcast television network programming to affiliates began in 1948. *See* AT&T, *History of AT&T and Television*, *at* http://www.corp.att.com/history/television/ (last visited Feb. 12, 2008) ("While commercial television evolved through other technologies, AT&T devised, built and operated the system that made network transmission possible. Beginning in 1948 with a network connecting stations from Boston to St. Louis, AT&T constructed cable and microwave-relay facilities that spanned North America."). At the time Congress was considering the program access provisions, a number of cable networks were delivered terrestrially. *See* Warren Publishing, *Television & Cable Factbook*, Cable & Services Vol. 60, at F-2, -4, -8 , -9, -10, -12 (1992) (listing several networks delivered by terrestrial means, including by tape and microwave distribution).

44 H.R. Conf. Rep. No. 102-862, at 92-93 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1274-75. The earlier Senate version also explicitly recognized that certain programming should be exempt to get the benefit of exclusivity. *See* S. Rep. 102-92, at 28 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 (noting that the bill was "limited to national and regional cable programmers, that is, programmers which license for distribution to more than one cable community to allow nascent programmers to gain a foothold through exclusive arrangements"). Distinguishing "satellite" delivery clarified that Congress only intended to apply the restriction to satellite-delivered cable and broadcast programming.

'effect' of hindering the delivery of satellite cable programming."[45] However, as explained above, no party offered specific, credible evidence that MVPDs are not getting the programming they need to compete. To the contrary, MVPD competitors are growing rapidly, and two of the most persistent proponents of expanded program access rules have become the second and third largest MVPDs in the nation[46] and continue to grow.[47]

Other Authority. Although commenters cited to a bevy of "sources" of Commission authority to expand the program access rules,[48] Comcast and others have shown that no provision provides the necessary authority.[49] Little more needs to be said, but a few of the comments must

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45 DIRECTV Comments at 13-14; *see also* AT&T Comments at 10; Verizon Comments at 9; OPASTCO Comments at 4; USTelecom Comments at 8-9; CA2C Comments at 13-14, 16-17. Several of these parties rely on the Commission's decision to invoke Section 628(b) in the MDU proceeding. That decision is now subject to judicial appeal, and Comcast believes it will be overturned by the court. *See In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20235 ¶ 44 (2007), *appeal docketed sub nom. NCTA v. FCC*, No. 08-1016 (D.C. Cir. filed Jan. 16, 2008).

46 *See* DISH Network Comments at 1 & n.1; DIRECTV, Inc., *Company Overview*, *at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-homeprofile (last visited Feb. 12, 2008) (reporting that DIRECTV is "the second largest provider in the [MVPD] industry in the United States").

47 DIRECTV helpfully cites Commission language from 1998 wherein the Commission concluded that there was *no* evidence that "moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules" was "significant and causing demonstrative competitive harm." DIRECTV Comments at 12 & n.33 (citing *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report & Order, 13 FCC Rcd. 15822 ¶ 71 (1998)). As described above, cable's market share has continued to decline since that decision, while the market shares of DBS providers and the telcos are following a steady upward trajectory.

48 *See, e.g.,* AT&T Comments at 10-12; NTCA Comments at 5-12; BSPA Comments at 7-8; OPASTCO Comments at 6.

49 *See* Comcast Comments at 8-13; NCTA Comments at 12-14; Cablevision Comments 15-16. Contrary to the claims of NTCA and AT&T, *see* NTCA Comments at 5, 7, 10 (asserting that Sections 2(a) and 601(4) provide the necessary authority); AT&T Comments at 10 (asserting that the Commission has ancillary authority pursuant to Sections 1 and 2(a)), reliance on Sections 1, 2(a), and 601(4) of the Communications Act as bases of Commission authority are unavailing. Sections 1 and 2(a) are not express grants of authority to regulate cable services, much less cable programming. Section 2(a) references the Title VI provisions which, as Comcast has already shown in its comments, do not provide the necessary authority. *See* Comcast Comments at 6-13. Section 601(4), like Section 601(6), does not provide any authority; it is a statement of the purposes of the 1984 Cable Act. *See* 47 U.S.C. §

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be addressed. For example, some parties cite to Section 706 as an independent source of authority to expand the program access rules.[50] AT&T, which previously opposed the Commission's use of Section 706 as a source of independent authority[51] -- a position with which the Commission agreed[52] -- now argues the opposite, and its new position is plainly wrong.

The National Telecommunications Cooperative Association ("NTCA") argues that the Commission has authority to expand the program access rules based on its ancillary authority as explained in the *Southwestern Cable* case.[53] NTCA correctly notes, however, that at the time that case was decided, there was "an absence of specific laws providing for the regulation of CATV providers."[54] Since that time, Congress has enacted several laws governing cable television and given very specific guidance that affords the Commission much less latitude to make up its own rules. Thus, *Southwestern Cable* has no bearing on the instant proceeding.

Verizon argues that, although Section 628 "generally speak[s] to 'satellite delivered' programming, the modest extensions to the current rules to cover all vertically-integrated RSNs as well as the HD feeds of otherwise covered programming are within the Commission's

(…footnote continued)

521(4). None of these provisions empower the Commission to countermand specific statutory language. *See* Comcast Comments at 7-9.

50 *See* AT&T Comments at 13 ("[T]he Commission is independently required under section 706 of the Act to take action to encourage deployment of broadband and other advanced telecommunications services . . . ."); Verizon Comments at 14; OPASTCO Comments at 4-6; NTCA Comments at 11-12; BSPA Comments at 3.

51 *See* AT&T Comments, CC Dkt. No. 98-11, at 6-7 (Oct. 5, 1998).

52 *See* Comcast Comments at 12 & n.42 (citing *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion & Order & Notice of Proposed Rulemaking, 13 FCC Rcd. 24011 ¶ 69 (1998)).

53 *See* NTCA Comments at 6 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)).

54 *Id*.

ancillary authority because they are necessary to effectuate Section 628 and to further Congress's underlying goals in Section 628."[55] It is irrelevant whether the regulation is "modest" or not, because Congress did not confer upon the Commission the authority necessary to adopt any such regulation.

The Commission has repeatedly concluded that it does not have the authority to extend the program access rules to reach programming that is delivered terrestrially. Particularly in the context of today's highly competitive video landscape, there is no rational basis for the Commission to dramatically shift its approach and abandon those decisions, and any attempt to do so would be arbitrary, capricious, an abuse of discretion, and contrary to law.[56]

III. THE COMMISSION SHOULD NOT IMPOSE A STANDSTILL REQUIREMENT TO ALLOW MVPDS TO REQUIRE CARRIAGE OF PROGRAMMING IN THE ABSENCE OF AN AGREEMENT.

As Comcast, NCTA, and Time Warner explained, Congress has not given the Commission authority to impose "standstill" requirements except as a remedy after an adjudication.[57] The reason is clear: the Commission only has authority to impose remedies only *after* the conclusion of an adjudication in which it finds that a programmer has violated the rules.[58] The Commission itself has acknowledged that its authority to impose standstill requirements in the analogous situation of retransmission consent disputes is limited, and "absent

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[55] Verizon Comments at 10.

[56] *See* 5 U.S.C. § 706(2)(A) (directing reviewing courts to invalidate agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[57] *See* Comcast Comments at 16; *see also* NCTA Comments at 16; Time Warner Comments at 3 (noting that the "principal question is whether Congress 'delegated authority to the FCC to promulgate' the proposed rule") (citing *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801(D.C. Cir. 2002)).

[58] *See* Time Warner Comments at 4.

a finding of a violation, the Commission is without authority to grant" interim relief.[59] Instead, at most, standstill remedies can only be imposed after a finding of a violation.

Even if the Commission had the authority to adopt a prospective standstill requirement, the Commission should refrain from doing so. First, commenters that favor a standstill provision have offered no relevant evidence that the marketplace is not working or that programmers have engaged in bad behavior that warrants the adoption of a standstill requirement.[60] Instead, because "there is well established Commission precedent for granting injunctive relief" following adjudications under the current program access rules, there is no need to adopt a mandatory standstill requirement in this proceeding.[61] In a functioning marketplace, if a privately-negotiated contract expires, it just expires, and similar to the retransmission consent context, the negotiation of a new contract after the expiration of an old contract is not a situation that calls for Commission interference.[62] Second, as noted by Time Warner, adopting a

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[59] *See Mediacom Communications Corp. v. Sinclair Broad. Group*, Order, 22 FCC Rcd. 284 ¶ 3 (2007) (internal citations omitted); *see also* Time Warner Comments at 4-5; Comcast Comments at 16-17; NCTA Comments at 16. In fact, even in the adjudicatory context where the Commission has some authority to impose a standstill requirement as a remedy once a violation has been found, the Commission's use of standstill remedies has still been extremely rare.

[60] *See* DISH Network Comments at 5 (providing empty assertions that programmers use the threat of denying access to programming as leverage in programming disputes, without providing any evidence of this allegation); Verizon Comments at 15 (same); BSPA Comments at 14-15 (same); OPASTCO Comments at 17 (same); *see also* ACA Comments at 26; NTCA Comments at 34.

[61] NCTA Comments at 16.

[62] NTCA takes an even more aggressive stance. It argues that the Commission should go beyond preserving the status quo with a standstill requirement and force programming vendors to provide programming for carriage during the pendency of a complaint in the case of first-time carriage requests. *See* NTCA Comments at 35-36. NTCA's proposal should be rejected. The Commission has rejected such a proposal in an analogous context because of the disruption that would result from a Commission ruling against the complainant, which would require deletion of the recently-added programming by the MVPD. *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates Request by TV 14, Inc. to*

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mandatory standstill provision would run afoul of the First Amendment by dictating that a programmer must continue to provide its programming to outlets through which it does not want to speak after the expiration of a contract.[63] Because proponents fail to show that an important governmental interest would be served by a standstill requirement, the First Amendment precludes the Commission from interfering with programmers' choices in this area.

It is clear that MVPDs supporting a standstill requirement are simply trying to game the system so as to gain leverage in program access disputes. If the Commission adopts a standstill requirement, MVPDs would be assured of continued access to programming after a contract expired simply by filing a program access complaint, and they therefore would have less incentive to bargain reasonably prior to the expiration of the contract. This scenario would be especially likely if a standstill requirement were to apply in all instances after a program access dispute has been filed and for the full duration of the dispute, as some commenters request.[64] Moreover, in negotiating new contracts, a standstill requirement would allow MVPDs to threaten the filing of a program access complaint to gain leverage over programmers. In turn, programmers would have decreased ability to protect themselves from unauthorized carriage of

(…footnote continued)

Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market, Report & Order, 8 FCC Rcd. 2965 ¶ 46 (1993) (rejecting a proposal to require a broadcast signal to be added to a cable system while a television market change petition is pending, "since an adverse Commission decision would result in the unnecessary and potentially harmful disruption of a recently added signal quickly losing carriage"); *see also In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion & Order, 21 FCC Rcd. 8203, App. B, § (2)(d) (2006) (adopting a program access condition requiring preservation of the status quo during pendency of a program access dispute, but not requiring sale of the requested programming to a first time buyer); *News Corp./DIRECTV Order* App. F § III (same).

63 *See* Time Warner Comments at 8-11.

64 *See, e.g.*, DISH Network Comments at 5-6; Verizon Comments at 16.

their programming.[65] Inevitably, a standstill requirement would lead to the filing of more program access complaints solely as a means to continue carriage of programming without the pressures of reaching a mutually acceptable freely-negotiated agreement. Accordingly, the Commission should reject calls to impose a standstill requirement.[66]

IV. THE COMMISSION SHOULD NOT IMPLEMENT A MANDATORY "ARBITRATION-TYPE STEP" FOR PROGRAM ACCESS COMPLAINTS.

Some parties urge the Commission to interject an "arbitration-type step" into the program access complaint procedures.[67] Considering the lack of evidence that such a step is needed, and the serious questions about whether the Commission may adopt *any* arbitration procedure for program access disputes, the Commission should reject calls to adopt such a measure.[68]

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[65] *See* Comcast Comments at 16-17.

[66] Similarly, the Commission should not adopt other proposed program access regulations further interfering with programming contract terms. Specifically, the Commission should dismiss calls for increased regulation with respect to a veritable "grab bag" of issues including vague allegations about non-disclosure agreements, shared headends, encryption, and other issues. *See, e.g.,* OPASTCO Comments at 15 ("[T]he Commission should preclude the use of mandatory non-disclosure provisions in programming contracts."); Rural Iowa Independent Telephone Ass'n Comments at 2 (asserting "encryption should not be mandatory"). The record does not contain the particularized evidence necessary for the Commission to take action on these concerns, nor does it support a finding that such issues cannot be overcome through private negotiations in a competitive marketplace. Indeed, while some commenters claim that additional regulation is needed, at the same time, they admit that such alleged problems are not widespread. *See, e.g.,* NTCA Comments at 27 (noting that "the vast majority of video programming vendors do not discriminate against small IPTV and CATV shared head-end providers").

[67] *See* BSPA Comments at 11-13; NTCA Comments at 3, 29-32; RIITA Comments at 3; OPASTCO Comments at 18. The Commission did not seek comment on whether it should mandate third-party arbitration. Nevertheless, a few commenters lobbied for mandatory, third-party, "Adelphia-style" arbitration procedures. *See, e.g.,* OPASTCO Comments at 18; DISH Network Comments at 6-7. These comments should be disregarded because the Commission has already rejected such an approach. *See Program Access Order* ¶ 112 (declining to impose mandatory arbitration as a rule in all program access cases without sufficient information in the record). For those parties who disagreed with the Commission's decision, the proper recourse would have been to file a timely petition for reconsideration rather than to try to interject the proposal into the proceedings on the *Notice*.

[68] In addition, the Commission should summarily reject ACA's suggestion that "the burden of proof" in a program access complaint "should be allocated to . . . the programmer." *See* ACA Comments at 24. Any such action would be a gross departure from legal norms. Moreover, ACA has made no serious effort to justify its assertion, either factually or legally.

Commenters have provided no evidence that the current procedures have failed, or that an additional "arbitration-type step" would improve complaint resolution.[69] In fact, the opposite would occur. It would add one more step in an already complex process and lead to unreasonable outcomes that are likely to generate appeals and further complicate matters. Furthermore, baseball-style arbitrations are appropriate only in those disputes that include abundant publicly available statistics and clear examples for comparison (*i.e.*, the win-loss and statistical record of one pitcher compared to another). No such clear point of comparison exists in the case of program access disputes. Program access disputes typically involve complex and interrelated issues that range far beyond the simple pricing issues that baseball-style arbitration was designed to address.[70] A mandatory arbitration procedure would fail to adequately address the many complex issues.[71]

Most importantly, as Comcast and others have previously explained, there is no law that authorizes the Commission to mandate binding arbitration of program access disputes.[72] In fact,

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[69] The Commission's current complaint procedures work well -- they actively and rightly encourage parties to resolve their disagreements at the bargaining table instead of before a federal agency. In the fifteen-year history of the program access rules, fewer than 50 complaints have been filed with the Commission, and the majority of these have been settled through private negotiations. In the remaining cases, the Commission has only found discrimination in two instances, while the other twelve cases were denied outright. *See* Comcast Comments at 27-28, MB Dkt. No. 07-29 (Apr. 2, 2007) ("*2007 Comcast Program Access Comments*").

[70] To name just a few, issues can include channel placement, tiering, advertising time, security, and billing. Each of these considerations carries independent and significant economic value that is not reflected in the price or fee.

[71] *See* Disney Comments at 71. Even proponents of an "arbitration-type step" have noted that arbitration is not effective in all situations. For example, NTCA has limited its call for an "arbitration-type" step to pricing disputes and explicitly disavowed the use of final-offer arbitration in "complaints that involve complicated and highly disputed issues." *See* NTCA Comments at 29-32.

[72] *See 2007 Comcast Program Access Comments* at 29-30; NCTA Reply Comments, MB Dkt. No. 07-29, at 13 (Apr. 16, 2007) (noting that alternative dispute resolution mechanisms are "voluntary procedures which supplement rather than limit other available agency dispute resolution techniques") (internal citations omitted); *see also* NAB Comments at 26-27 (noting that "cable operators have, in the context of carriage for non-broadcast

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the Alternative Dispute Resolution Act ("ADRA") *prohibits* the Commission from requiring parties to engage in arbitration.[73] Moreover, mandatory binding arbitration is also inconsistent with the Commission's own Alternative Dispute Resolution ("ADR") Policy Statement, wherein the Commission explained that it intended to "honor the results of ADR unless they are inconsistent with our statutory mandate" and emphasized that ADR "techniques are *purely voluntary* and that any parties choosing not to use ADR procedures will not be penalized in any manner."[74]

(…footnote continued)

programming, expressly opposed government-imposed arbitration [and that] NAB similarly believes that imposition of mandatory arbitration is inappropriate and unnecessary to resolve private program carriage disputes arising out of the broadcast retransmission consent process").

73 Under ADRA, "[a]n agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit." 5 U.S.C. § 575(a)(3); *see also Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 876 (1998) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); 5 U.S.C. § 575(a)(1) (explaining that arbitration can be used only "whenever all parties consent"). Further, if an arbitration requirement violates ADRA, the Commission cannot enforce it without violating the Administrative Procedure Act ("APA"). *See*, *e.g.*, *S. Pac. Transp. Co. v. I.C.C.*, 69 F.3d 583, 599 (D.C. Cir. 1995) (Rogers, J., dissenting on other grounds) (supporting remand of a case in part because the agency failed to provide a satisfactory explanation as to why an arbitration mandate was not imposed as a condition for obtaining a benefit in violation of ADRA). It is also significant that ADRA prohibits an agency from requiring binding arbitration if, among other things, the matter involves significant government policy questions, requires consistent policies that should not be subject to individual decisions, may significantly affect third parties, or a full public record of the proceeding is important. *See* 5 U.S.C. § 572(b). Taken in combination, these provisions thoroughly demonstrate that the Commission cannot properly require that program access complaints be addressed through compulsory arbitration.

74 *In re Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Initial Policy Statement & Order, 6 FCC Rcd. 5669 ¶ 12 (1991) (emphasis added). When the Commission revised its cable complaint procedures, it specifically incorporated voluntary alternative dispute resolution procedures into Section 76.7(g)(2) of its rules.

V. CONCLUSION

For the reasons set forth above, the Commission should not expand the program access rules to terrestrially-delivered programming, should not adopt standstill requirements, and should not impose any type of arbitration. Any such rules are unnecessary, and all such rules would be unlawful. The Commission should focus its energies elsewhere.

Respectfully submitted,

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