

July 25, 2008



Marlene Dortch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Written *Ex Parte* Presentation
MB Docket Number 07-198 (Review and Examination of
Wholesale Tying and Bundling Practices)

Dear Ms. Dortch,

On behalf of Public Knowledge, Consumers Union and Free Press, Media Access Project submits this written *ex parte* presentation to supplement the record in this proceeding. The Commission has asked whether it has the authority to adopt rules regarding the practice of wholesale tying and require both vertically and non-vertically integrated programmers to offer their programming to Multichannel Video Programming Distributors (“MVPDs”) on a stand-alone basis at reasonable rates, terms, and conditions. *See Report and Order and Notice of Proposed Rulemaking, Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 22 FCCRcd 17791, 17862-67 (2007)*. By tying popular programming with less popular programming, programmers use their leverage to dominate an MVPD’s bandwidth and channel positions with content that cable systems do not want to carry, but must accept as a condition of being able to carry very popular programming. This practice of “tying” hurts minority and independent programmers that are vying for space on cable systems since minority and independent programming is not included in the programming giants’ “bundles.”

The Commission retains authority to limit the practice of tying agreements under Sections 616, 628, and 303 of the Communications Act. Additionally, the Commission has ancillary

jurisdiction under Title I of the Communications Act to govern tying arrangements and may ensure that vertically and non-vertically integrated programming is offered on a stand-alone basis at reasonable rates and conditions. Moreover, the Commission can adopt these requirements, which govern the economic arrangements between programmers and MVPDs, without infringing on the programmers' First Amendment rights.

I. SECTION 628 CONFERS BROAD AUTHORITY ON THE COMMISSION TO ADOPT RULES REGARDING THE PRACTICES OF CABLE PROGRAMMERS.

Section 628 is the basic program access provision; it seeks to ensure the development of competition and diversity in video programming by ensuring that MVPDs have access to programming. Both the plain language of the provision and the legislative history allow the Commission broad authority to adopt rules to further these goals. Thus, the Commission can adopt rules that ensure that cable programmers offer their programming to MVPDs on a stand-alone basis at reasonable rates, terms, and conditions, rather than limiting MVPDs to essentially be forced to secure programming through tying arrangements.

A. The Plain Language of Section 628 Makes Clear the Commission Has Broad Authority to Ensure Diversity and Competition in Video Programming.

Section 628 plainly seeks to promote the public interest by increasing competition and diversity in the multichannel video programming market. *See* 47 U.S.C. §§548(a) and (c). Sections 628(b) and (c) provide a minimum set of standards and mechanisms to achieve these goals. This minimum set of rules, however, does not limit the Commission's ability to adopt additional rules to promote competition and diversity in programming, such as ensuring that cable operators and other MVPDs have access to vertically integrated and satellite programming on a stand-alone basis.

More specifically, Section 628(b) prohibits programmers from engaging in “unfair methods of competition or unfair or deceptive acts or practices” that effectively hinder an MVPD’s ability to provide satellite programming. *See* 47 U.S.C. §548(b). Section 628(c) then provides the Commission with the authority to promote competition and diversity by adopting rules that prohibit programmers from engaging in any unfair practices, as outlined in § 648(b). *See* 47 U.S.C. §548(c). Importantly, Section 628(c)(2), lays out only the “Minimum Contents of Regulations” the Commission can adopt. 47 U.S.C. §548(c)(2). The Commission has already determined that the use of the term “minimum” does foreclose the Commission from interpreting the provision to allow the Commission to adopt additional rules that will further the purpose of Section 628. *See Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, Second Report and Order, 11 FCCRcd 18223, 18320 (1996) (citations omitted) (Section 628(b) authorizes the Commission “to adopt additional rules to accomplish the program access statutory objectives ‘should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming.’”); *Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, Third Report and Order and Second Order on Reconsideration, 11 FCCRcd 20227, 20300 (1996) (Section 628(b) is a “clear repository of Commission jurisdiction” to address new issues and by entitling the section “Minimum Contents of Regulations,” Congress gave the Commission the authority to adopt additional rules that will further the purposes of Section 628; “it did not limit the Commission to adopting rules only as set forth in that statutory provision”).¹

¹ The *Second Report and Order* and *Third Report and Order* were consolidated on appeal to the Fifth Circuit and affirmed in part, reversed in part, and remanded, on other grounds. *See City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

B. The Legislative History of Section 628 Makes Clear the Commission Has Broad Authority to Ensure Diversity and Competition in Video Programming.

In addition to the plain language of the statute, the legislative history of the Cable Television Consumer Protection Act of 1992 expresses the need for fair and just competition. While it does not speak directly to Section 628, the Senate Committee Report says that “[t]o encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition.” SEN. REP. NO. 102-92, at 28.

Statutory interpretation must account for both the overall statutory scheme and for the problems Congress sought to address. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (“it is a fundamental canon of statutory construction that the words of the statute be read in their context and with their view to the overall statutory scheme”) (citation omitted). When the statute was enacted, Congress was concerned with the unfair practices of vertically integrated cable operators and programmers to withhold programming. *See, e.g.*, SEN. REP. NO. 102-92, at 26-28. Indeed, as vertical integration and consolidation have continued, programmers are now able to force MVPDs into undesirable tying agreements. *See, e.g., Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of the American Cable Association (“Comments of ACA”) at 13-20 (filed Jan. 3, 2008). The record in this proceeding includes evidence that tying arrangements harm the MVPD from offering diverse programming and from offering a competitive service. *See Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*,

MB Docket No. 07-198, Reply Comments of the American Cable Association (“Reply Comments of ACA”) at 11-12 (filed Feb. 12, 2008).

While programmers and MVPD providers disagree about the methods of determining the effect that wholesale bundling and tying has on the industry and consumers, *Compare* Comments of ACA at 18-19, *with Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Reply Comments of NBC Universal, Inc. and NBC Telemundo License Co., at 2-3 (filed Feb. 12, 2008), the Commission does not need perfect knowledge of the potential effects when adopting regulations pursuant to Section 628. *Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1243 (D.C. Cir. 2007) (quoting *American Pub. Comms. Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000) (where the court noted that “[w]here existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of the information available.”)).

Thus, pursuant to Section 628 and the current record in the proceeding, the Commission can ensure that MVPDs are not limited in accessing programming via tying arrangements. Rather, the Commission can adopt rules that ensure that MVPDs have access to stand-alone channels at reasonable rates and conditions, affording an MVPD the ability to offer diverse programming and a competitive service.

II. SECTION 616 CONFERS BROAD AUTHORITY ON THE COMMISSION TO ADOPT RULES REGARDING THE PRACTICES OF VERTICALLY AND NON-VERTICALLY INTEGRATED PROGRAMMERS.

Section 616 seeks to ensure fair practices regarding carriage agreements between MVPDs and video programmers. Specifically, Section 616(a) states that “the Commission shall establish regulations *governing program carriage agreements and related practices* between cable operators or other multichannel video programming distributors and video programming vendors.” 47 U.S.C. §536 (emphasis added). In interpreting the language of the provision, the Commission’s role is to make interpretations “reasonably within the pale of statutory possibility.” *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 539 (2002) (the Commission had the discretion to define the plain meaning of the word “cost” in a statute, even though other possible definitions of the word existed). The only reasonable interpretation of the placement of the words “related practices” next to language that already gives the Commission the ability to regulate carriage agreements is that Congress intended to provide the Commission with the authority to adopt any rule relating to carriage. Thus, the Commission has the authority to address the issues raised by coerced tying arrangements and adopt rules that ensure that carriage of programming is available on a stand-alone basis at reasonable terms and prices.

III. TITLE I GIVES THE FCC ANCILLARY JURISDICTION TO PROMOTE DIVERSITY BY ENSURING REASONABLE ACCESS TO PROGRAMMING.

In addition to having direct jurisdiction under Sections 628 and 616, the Commission also has authority through Title I ancillary jurisdiction to ensure access to vertically and non-vertically integrated programming. The Commission can use its ancillary jurisdiction in circumstances where: (1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations

and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

First, Title I clearly grants the Commission jurisdiction to adopt rules that govern the ability of MVPDs to access programming. As the Supreme Court has recognized, pursuant to Section 2(a), 47 U.S.C. §152(a), the "Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.' It was for this purpose given 'broad authority.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (internal citations omitted). Programming carried by MVPDs is necessarily a form of electrical communication. Moreover, requiring cable programmers to provide stand-alone channels on reasonable terms is also covered by Section 154(i). *See* 47 U.S.C. §154(i). Section 154(i) allows the Commission to "make such rules and regulations...not inconsistent with this Chapter, as may be necessary in the execution of its functions." Thus, as a form of electrical communications and the Commission's broad grant of power to make rules and regulations, the Commission's jurisdiction necessarily includes the ability to ensure that MVPDs have access programming under reasonable rates and terms.

Furthermore, as the Supreme Court recognized in *Southwestern Cable*, the Commission has broad powers under its Title I ancillary authority to regulate the cable industry. While Congress has from time to time defined certain aspects of that authority when creating Title VI and adopting the 1984 and 1992 Cable Acts, the creation of Title VI did not somehow eliminate the Commission's ancillary authority to regulate cable and cable programmers. Rather, the inclusion of §§616 and 628

in the 1992 Cable Act shows that Congress intended the Commission to address issues such as program bundling where the impact harmed diversity and competition.

Next, requiring cable programmers to offer programming on a stand-alone basis under reasonable rates and terms and limiting the use of tying agreements is reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. More specifically, the Commission is required to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. §521(4); *see also*, 47 U.S.C. §532(g) ("the Commission may promulgate any additional rules necessary to provide diversity of information sources."). The Commission is also responsible for "promoti[ing] competition in cable communications...." 47 U.S.C. §521(6).

The record in this proceeding includes evidence that tying arrangements harm the MVPD from offering diverse programming and from offering a competitive service. Thus, a rule ensuring the ability of MVPDs to purchase programming on a stand-alone basis at reasonable terms would serve the public interest and is reasonably ancillary to the effective performance of the Commission's various responsibilities.

IV. SECTION 303 CONFERS BROAD AUTHORITY ON THE COMMISSION TO ADOPT RULES REGARDING THE PRACTICES OF BROADCASTERS.

The Commission also has the authority to ensure that broadcasters do not use retransmission consent negotiations to effectively mandate carriage of other owned or affiliated programming channels. The Communications Act clearly confers authority upon the Commission to govern the actions of broadcasting entities. *See* 47 U.S.C. §301, *et al.* Additionally, the Commission retains ancillary jurisdiction to govern the actions of broadcasting entities. This broad authority includes the

ability to adopt provisions that would prevent broadcasters from unreasonably tying the carriage of their broadcast signals to the carriage of other owned or affiliated programming and offering the channels on a stand-alone basis at reasonable terms and rates.

A. Title III Provides the Commission with Broad Authority to Ensure Diversity and Competition in Video Programming.

Under Section 303(r), the Commission has an extremely expansive grant of power to adopt rules that will further the public interest. The Supreme Court has explained:

Section 303(r) of the Communications Act...provides that “the Commission from time to time, as public convenience, interest, or necessity requires, shall...[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act].” [I]t is now well established that this general rule-making authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable.

FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775, 793 (1978) (internal citations omitted).

Among other factors, the Commission’s public interest standard is guided by promoting competition and offering the public a diversity of voices. The Commission itself has recognized competition and diversity as essential goals to promoting the public interest. *See 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCCRcd 8834, 8837 (2006). Thus, under the Commission’s general Title III powers, the Commission has the authority to adopt rules that ensure broadcasters are serving diversity and competition, rather than harming diversity and competition.

Moreover, pursuant to Section 303(i), the Commission also has the “authority to make special regulations applicable to radio stations engaged in chain broadcasting.” 47 U.S.C. §303(i). The Supreme Court has already determined that “when networks transmit their signals from a network owned station..., and these signals are then relayed to the public by other network owned stations and by affiliated licensees, both the networks and the licensees are encompassed by the terms ‘radio stations engaged in chain broadcasting.’” *Mt. Mansfield Television Inc. v. FCC*, 442 F.2d 470, 481 (1971). By engaging in chain broadcasting, network broadcasters and their affiliates are subject to any rule adopted by the Commission. Thus, the Commission may also adopt rules regarding the terms of retransmission agreements pursuant to Section 303(i).

Several parties have presented evidence that current retransmission consent practices, such as tying, harm competition and diversity. *See* Comments of ACA at 18-20; *see also Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Letter of Sí TV, Inc. at 2 (filed Feb. 20, 2008). By refusing to provide reasonable rates and terms for a broadcast channel on a stand-alone basis, and effectively forcing MVPDs into tying arrangements, broadcasters are inhibiting cable operators and other MVPDs from offering other diverse programming. *See Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Consumers Union, at 3 (filed Feb. 12, 2008). Instead, broadcasters are harming the public interest - which they are required to serve - by using their licenses to leverage the carriage of other affiliated stations. Thus, under the Commission’s general Title III powers, the Commission can adopt rules

that allow for reasonable terms and prices for stand-alone broadcast channels, thereby preventing broadcasters from engaging in practices that harm competition and diversity.

B. The Commission Retains Ancillary Authority to Ensure Diversity and Competition in Video Programming.

In the alternative, the Commission may revise its rules regarding retransmission negotiations pursuant to its ancillary jurisdiction. The Commission can use its ancillary jurisdiction in circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. *See Am. Library Ass'n*, 406 F.3d at 700.

As discussed above, the Commission clearly has the jurisdiction to adopt rules that relate to the programming and behavior of broadcasters. *See, supra*, Section III (Commission has "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio"). Moreover, the Commission is statutorily mandated to adopt rules that will further the public interest in diverse programming and competition. *See, e.g.*, 47 U.S.C. §303, *et al* (providing the Commission general powers to act "as public convenience, interest, or necessity requires"); 47 U.S.C. §309(a) ("the Commission shall determine, in the case of each [license] application....whether the public interest, convenience, and necessity will be served..."). Thus, the Commission may adopt rules that allow MVPDs to purchase stand-alone broadcast channels at reasonable terms and rates.

While limiting the ability of broadcasters to pursue tying arrangements will benefit the ability of MVPDs to provide competition and diverse programming, the Courts have previously recognized

the Commission's authority to regulate one service in an effort to promote the objectives of another service. For example, in *United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972), the Supreme Court found that the Commission's broad ancillary authority was more than sufficient to prescribe local television carriage requirements for cable systems. As the Court noted, the rule would "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *Id.*²

Similarly, the objective here is to ensure that viewers are provided with diverse programming choices. The Commission can further this goal by ensuring that broadcasters offer stand-alone channels on reasonable prices and terms. Such a provision would not inhibit broadcasters from entering into tying agreements. Rather, such a rule would make sure that broadcasters do not use their licenses as leverage to get carriage of affiliated stations. Indeed, in granting licenses, the "Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.'" *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 145 (1940). Thus, such a rule would serve the public interest and is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

²The Court later narrowed its ruling in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). There, the Court found that the Commission did not have ancillary authority to institute common carrier obligations on cable systems, primarily because Congress had expressly stated in the Communications Act that the Commission was not to treat broadcasters as common carriers. This holding does not affect the Commission's authority with respect to the purpose for which it is cited here.

V. THE OFFERING OF STAND-ALONE CHANNELS ON REASONABLE TERMS AND RATES WOULD NOT IMPLICATE PROGRAMMERS' FIRST AMENDMENT RIGHTS, AND AT MOST WOULD PASS INTERMEDIATE SCRUTINY.

The Commission not only has the authority to ensure that MVPDs can access both cable and broadcast channels on a stand-alone basis, at reasonable terms and rates, but it can do so without violating the First Amendment rights of those programmers. Generally, broadcasters and cable programmers are entitled to some First Amendment protection with regard to legitimate expressive content. *See, e.g., Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *see also Leathers v. Medlock*, 499 U.S. 439 (1991). However, an economically-based rule requiring the offering of channels on a stand-alone basis, which may impact, but not prohibit, tying arrangements, does not implicate such rights because such a rule does not impact a programmer's right to expressive content. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Turner I"). In fact, the Supreme Court has stated that, in general, there is a strong governmental interest in certain types of economic regulation, specifically relating to unfair trade practices, regardless of a regulation's effect on rights of speech and association. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (discussing the balance between government power to promulgate economic regulations and the value of particular speech).

Furthermore, communications industry companies are not immune from trade regulation of anti-competitive practices simply by virtue of their type of work. *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945) (holding that antitrust regulations of general applicability were equally applicable to the press, regardless of incidental First Amendment concerns). Thus, if video programmers engage in anti-competitive conduct - such as refusing to offer channels on a stand-alone basis at reasonable rates and terms - they are not, as media companies, exempt from general rules

governing fair competition because of the First Amendment. *Cf. Storer Cable Commc'ns v. City of Montgomery, Alabama*, 806 F.Supp. 1518, 1561 (M.D. Ala. 1992) (citing *Central Telecomms. Inc. v. TCI Cablevision*, 610 F.Supp. 891, 898 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987)).

Moreover, ensuring reasonable practices in financial agreements is not intended to suppress any sort of message on the part of broadcasters and cable programmers. While such a rule may affect the programmers' profits, it does not prohibit any broadcaster or cable programmer from creating any particular content. *See Storer*, 806 F.Supp at 1546. Thus, such a rule does not implicate First Amendment scrutiny. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression.").

Even assuming, *arguendo*, that requiring programmers to offer channels on a stand-alone basis at reasonable prices and terms was found to implicate some First Amendment concern, the rule would still be upheld in order to serve an important government interest. That is, in order to be permissible, the regulation would need to be within the constitutional power of the Government, furthering an important governmental interest which is unrelated to the suppression of free expression, and the restriction on speech may be no greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Any potential rules concerning reasonable practices in the financial arrangement regarding tying would certainly narrowly advance two important governmental interests -- promotion of diversity and preservation of competition -- as required by intermediate scrutiny. *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313, 1319 (D.C. Cir. 2000); *see also Turner I*, 512 U.S.

at 662-64 (both confirming that diversity and competition qualify as important governmental objectives for purposes of intermediate scrutiny). In fact, the Court has recognized the fundamental importance in the public's constitutional right of access. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (viewers have First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences...."); *see also Turner Broad. System, Inc.*, 520 U.S. 180, 181 (1997) ("[T]here is a...governmental purpose of the highest order in ensuring public access to a multiplicity of information sources...."). Congress has also determined that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." CONF. REP. NO. 102-862, at 74. Thus, a rule limiting tying arrangements and requiring reasonable access to stand-alone channels would be permissible.

VI. CONCLUSION

The Commission should adopt rules that limit tying agreements and require both vertically and non-vertically integrated programmers to offer channels on a stand-alone basis at reasonable rates, terms and condition. It is evident the Commission has the authority to adopt such rules under Sections 616, 628, and 303 of the Communications Act. Additionally, the Commission has ancillary jurisdiction under Title I of the Communications Act to govern tying arrangements and may ensure that vertically and non-vertically integrated programming is offered on a stand-alone basis at reasonable rates and conditions. Moreover, the Commission can adopt these requirements, which govern the economic arrangements between programmers and MVPDs, without infringing on the programmers' First Amendment rights.

Respectfully Submitted,

/s/

Parul P. Desai

Cc: Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell