



January 14, 2009

**Submitted via e-mail**

The Honorable Kevin Martin  
Chairman,  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington, DC 20554

**Re: Review of the Commission's Program Access Rules  
and Examination of Programming Tying Arrangements (MB Docket 07-198)**

Dear Chairman Martin:

The American Legislative Exchange Council (ALEC) writes to express its position concerning two important issues concerning the multichannel video programming distribution marketplace addressed in the Commission's *Report and Order and Notice of Proposed Rulemaking* ("Notice"). ALEC urges the Commission to reject any imposition of onerous restrictions on discounted video program bundling, such as mandatory stand-alone or "wholesale *a la carte*" requirements for programmers. In addition, ALEC supports the Commission's prior refusal to impose mandatory arbitration on private parties engaged in marketplace negotiations over multichannel video programming distribution. ALEC therefore urges the Commission to stand by that decision and to reject any mandatory "final offer" requirements.

**ALEC Opposes "Wholesale *a La Carte*" Regulations**

The *Notice* generated extensive comments, reply comments, ex parte filings, and late comments on whether the Commission should prohibit the sale of bundled video programming by programmers and require programmers sell such programming on a stand-alone or "wholesale *a la carte*" basis. ALEC believes that consumers are best served by a competitive marketplace rather than additional layers of government regulation. For reasons that follow, ALEC believes that the Commission should *not* interfere with the marketplace by imposing new restrictions on video programmers.

ALEC's *Resolution Opposing Intervention in the Multichannel Video Programming Distribution Marketplace Through A La Carte or Tiering Requirements* (2005) recognizes that "an impressive and vibrant multichannel video programming distribution industry has developed with minimal government control over programming distribution and marketing to consumers, and particularly without requiring a la carte or specialized tiering; and consumers have benefited by having the ability to choose among hundreds of diverse programming channels." The *Resolution* similarly upholds the "economic underpinnings and private property rights fundamentals upon which companies have invested billions of dollars in private risk capital to build new infrastructure and develop new programming that benefit consumers," recognizing that "a competitive marketplace,

not multiple layers of regulation, will most efficiently drive the price and diversity of programming available to consumers in the multichannel video marketplace.” Accordingly, the *Resolution* resolves that ALEC supports “minimal state and federal regulation of the manner in which the multichannel video programming distribution industry distributes and markets programming to consumers over its own infrastructure to the marketplace,” opposes “government-mandated a la carte distribution or specialized tiering,” and further opposes government intervention in a multichannel video programming distribution marketplace that has fostered unprecedented growth in the availability, quality and diversity of video programming to consumers.”

Consistent with this *Resolution*, ALEC opposes the imposition of any stand-alone or “wholesale *a la carte*” programming sales requirements for programmers.

At the outset, the *Notice* misleadingly characterized discount bundling of programming as “tying” arrangements. As commentators in the docket’s public comment period observed, “tying” is a term of art typically employed in the antitrust context. Where the facts and circumstances involving particular discount bundling arrangements used by particular programmers happens to raise tying arrangement concerns, existing antitrust law applies. However, use of that loaded term in the *Notice* is overly presumptive and unhelpful in clarifying the issues under consideration. Mere bundling of products and services is widely recognized as a beneficial business practice that can create efficiencies and enhance consumer choice.

In particular, bundling of video programming by programmers is entirely permissible under Section 628(b) of the Communications Act. The Commission should be mindful of the fact that programmers typically offer their programming both through discount bundling and on a stand-alone basis. Nonetheless, bundling of video programming offers viewers a diversity of niche programming at reduced prices. Prohibiting discount bundling would undermine niche programming availability. The fact that competition among multichannel video program distributors has continued to grow since the Cable Act of 1992 likewise suggests that new regulations are totally unwarranted.

Section 628(b) only prevents cable operators that own or are owned by programmers (i.e., vertically integrated programmers) from discriminating unreasonably against competing programming distributors the offering of their programming. Accordingly, the Commission lacks jurisdictional authority to impose stand-alone or “wholesale *a la carte*” requirements on programmers *not* affiliated with cable operators.

There is no basis for believing that bundling harms consumers. Requiring stand-alone or “wholesale a la carte” sales of video programming offers no tangible benefit to consumers. Based on the Commission’s previous consideration of *a la carte* mandates for programming offered directly to consumers, this docket might be interpreted as an attempt to encourage or otherwise pressure programmers into offering consumers programming *a la carte*. However, there is no basis for believing that wholesale *a la carte* would translate into *a la carte* for consumers. Consistent with ALEC’s opposition to *a la carte* mandates for consumer programming choices as heavy-handed and harmful to consumer welfare, ALEC opposes “wholesale *a la carte*” for similar reasons provided above.

ALEC Opposes Government Involvement in Commercial Negotiations

In the *Notice* the Commission acknowledged its decision not to impose mandatory arbitration on private parties as part of the Commission’s video programming access complaint procedures. However, the *Notice* sought comment on whether the Commission should adopt new procedures to allow it to request the parties each submit their best “final offer” for rates, terms, or conditions and to give the Commission discretion to adopt one of the parties’ proposals as the remedy. For reasons that follow, ALEC believes that the Commission should reaffirm its prior decision not to impose mandatory arbitration and that it should therefore *not* impose any “final offer” requirement.

ALEC’s *Resolution Opposing Government Involvement in Commercial Negotiations* (2008) recognizes that “many networks have successfully negotiated with all manner of video distributors, including cable operators, Direct Broadcast Satellite operators, telephone companies and others for carriage of their networks without any government intervention.” Likewise, the *Resolution* observes that “a myriad of programming choices have resulted from the successful private negotiation of contracts between program networks and video distributors without government interjection requiring the parties to submit to mandatory arbitration,” stating that “parties ought to be free to negotiate without the threat of government intervention tipping the scales in one party’s favor.” Accordingly, the *Resolution* calls upon the government to oppose efforts to adopt legislation requiring mandatory arbitration to resolve commercial disputes. The *Resolution* also asserts ALEC’s belief that “the marketplace, as established by America’s capitalist system, the most successful and enduring economic system ever conceived, is fully capable of resolving private negotiations without invoking the heavy hand of government.”

Consistent with this *Resolution*, ALEC supports the Commission’s prior decision not to impose mandatory arbitration in video programming access disputes and it opposes the imposition of any “final offer” arbitration requirement in such disputes.

The free market system for negotiating between vertically integrated programmers and independent programming distributors is in large part responsible for the rise of over 550 national programming networks. Programmers reach commercial carriage agreements through hard bargaining that involves particularized weighing of the perceived value of particular programming and existing alternatives. In particular, the bundling of video programming typically involves case-specific economic efficiencies for programmers that allow them to offer such bundles at discounted wholesale prices. Government interference in marketplace negotiations is totally unnecessary.

Moreover, having government resolve a negotiation dispute through a mechanism allowing for only two “final offer” options is a dubious means for resolution. Such an approach is hardly consistent with the general understanding of arbitration as a voluntary undertaking.

There is also strong reason to believe that the Commission has no authority to impose mandatory arbitration requirements under Section 628. Nowhere is the Commission expressly granted authority to sub-delegate its duties to resolve video programming to third-party arbitrators.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL  
**ALEC**

To reiterate, ALEC believes that the consumer preferences in video programming are best addressed by the free marketplace, not government regulation. ALEC urges the Commission to reject onerous restrictions on discounted video program bundling, including stand-alone or “wholesale *a la carte*” mandates. In addition, ALEC supports the Commission’s previous refusal to interfere with marketplace negotiations over video programming distribution through mandatory arbitration requirements. The Commission should stand by that decision and to reject mandatory “final offer” requirements.

Sincerely,



Seth Cooper  
Director  
Telecommunications & Information Technology Task Force

cc: The Honorable Michael J. Copps  
The Honorable Jonathan S. Adelstein  
The Honorable Robert M. McDowell

*The American Legislative Exchange Council (ALEC) is the nation’s largest nonpartisan, individual membership organization of state legislators, promoting Jeffersonian principles of limited government, federalism, free markets, and individual liberty. ALEC’s Telecommunications and Information Technology Task Force develops public policy to preserve free-market principles, reduce regulatory uncertainty, and promote consumer welfare.*

