

the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors;¹¹⁴ and (iii) defendants will have 45 days -- rather than the usual 20 days -- from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.¹¹⁵ In addition, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply.¹¹⁶ The *Order* also establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.¹¹⁷

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

30. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹¹⁸ The *NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities.¹¹⁹

31. As discussed in Section A, the decision to establish rules to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis, and to establish procedures for the Commission's consideration of requests for a temporary standstill, will facilitate competition in the video distribution market and promote broadband deployment. The decision therefore confers benefits upon various MVPDs, including those that are smaller entities. Thus, the decision benefits smaller entities as well as larger entities. In general, because the decision confers these benefits on smaller entities, a discussion of alternatives to the adopted rules is of secondary importance. We note that the Commission found a lack of record evidence to reach a general conclusion that unfair acts involving this programming will significantly hinder an MVPD from providing video services in every case.¹²⁰ A case-by-case approach is less burdensome than declining to consider complaints alleging that a cable operator has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming, because small MVPDs would lack relief in such situations. Moreover, while the *Order* provides illustrative examples of evidence a complainant may provide, such as a regression analysis or market

¹¹⁴ *See id.*

¹¹⁵ *See id.* at Section III.D.1.

¹¹⁶ *See* 47 C.F.R. §§ 76.7, 76.1003.

¹¹⁷ *See Order* at Section III.F.

¹¹⁸ 5 U.S.C. § 603(c).

¹¹⁹ *See NPRM*, 22 FCC Rcd at 11871-72, ¶ 144 and 17900-14, App. F.

¹²⁰ *See Order* at Section III.B.3.a.

survey, it also recognizes that not all potential complainants will have the resources to provide this type of evidence.¹²¹ In addition, a case-by-case approach is consistent with the First Amendment.¹²²

F. Report to Congress

32. The Commission will send a copy of the *First Report and Order* in MB Docket No. 07-198, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹²³ In addition, the Commission will send a copy of the *First Report and Order* in MB Docket No. 07-198, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *First Report and Order* in MB Docket No. 07-198 and FRFA (or summaries thereof) will also be published in the *Federal Register*.¹²⁴

¹²¹ See *Order* at ¶ 56.

¹²² See *id.* at Section III.C.

¹²³ See 5 U.S.C. § 801(a)(1)(A).

¹²⁴ See 5 U.S.C. § 604(b).

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198

Today, the Commission takes an important step in promoting competition, empowering consumers, and fostering innovation by closing a loophole in our Program Access rules. The loophole gives free rein to cable-TV operators to lock up local sports events and other popular programming and withhold them from rival providers. Locking up a much-loved local sports franchise could be game, set, match for cable competition. Consumers who want to switch video providers shouldn't have to give up their favorite team in the process. Today the Commission levels the competitive playing field.

This flows directly from both the record in this proceeding, and the steps that Congress and the Commission have taken in recent years to promote competition in the delivery of video programming. As a result of policies consistently implemented, consumers can increasingly choose their video service provider from among cable, direct broadcast satellite, and telephone company providers. But as Congress recognized in the Cable Act of 1992, for competition to remain vibrant, cable operators cannot unjustly deny competitors access to "must have" programming.

As we've heard, Commission rules implementing the Cable Act prohibited cable operators from using their control of the *satellite*-delivered programming that they own to harm competitors. At the time the rules were adopted, there was no inconsistency between the limitation to 'satellite' and the objective of promoting competition. However, over the years since the rules were first adopted, technological developments have made it increasingly cost effective for content providers to deliver their programming -- including local and regional content -- through fiber-optic or other non-satellite means. And so what originally was immaterial became a major loophole in our video competition rules.

In our 2007 Program Access Order, the FCC recognized that cable operators have a financial incentive to withhold programming from competitors. And indeed the record contains many examples of incumbent providers denying rivals access to terrestrially-delivered programming, particularly regional sports networks. This inhibits competition. The bottom line is that viewers should not be unfairly forced to choose between the sports teams they love and the provider they prefer. Our new rules allow competitors to seek recourse when they have been unreasonably denied access to terrestrially delivered programming.

Today's action represents a major step toward realizing the promise of a competitive marketplace for video services -- while also supporting innovation in the video marketplace. Our new rules are structured to preserve incentives for cable operators to develop innovative programming such as local news networks. The new rules also create a fair process for the Commission to adjudicate claims.

During the course of this proceeding, we received extremely helpful input from my fellow Commissioners, and the suggestions are reflected in a strong and balanced order. I'm grateful to our Media Bureau and General Counsel's office for their excellent work in studying the law, the economics, and the facts in the marketplace -- and developing rules to promote competition and innovation, thereby benefiting consumers. And I'm grateful to my colleagues on the Commission who have improved the outcome through their active engagement in the development of this order.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198

Drilled down to its core, the purpose of this item is to minimize unfair behavior in such a way to benefit consumers through more competition. When it comes to competition and diversity in video programming distribution, it is essential for the FCC to determine how unfair behavior short-changes consumers by stifling competition. I believe the Program Access Order before us today can go a long way toward giving consumers the benefits of some additional competition.

Congress gave us more-than-adequate authority in Section 628 of the Communications Act to prohibit unfair acts by cable operators that significantly hinder or prevent competitors from providing programming to consumers. The record developed in response to the Commission's Notice of Proposed Rulemaking looked at whether to extend the program access rules to terrestrially-delivered programming. That record makes clear that lack of program access is a serious concern precisely because it limits competition. Today's action by the Commission addresses these concerns in what I believe is a balanced, consumer-friendly way.

The item deals in a significant way with the Regional Sports Networks that have been used as a wedge by companies to deny non-replicable programming to interested consumers. With the advent of HD, the sports viewing experience—and the expectations for that experience—have changed. This is must-have programming in standard definition; it is also must-have programming in high definition. Today we determine for good reason that withholding an HD feed is withholding a separate channel, even where a standard definition version of the network is available.

A more difficult issue is how to treat news programming. It will come as no surprise to anyone that I consider news to be critically-important programming. Getting it from a diversity of sources is what enhances our civic dialogue, so the scales tip, in my mind, against mandating access to one local news show and in favor incentivizing the production of diverse news programming. That's what localism and diversity are all about.

Today's Order adopts rules for complainants to pursue program access claims and addresses the fact that some players in these disputes will be larger and more powerful than others and that it is imperative to have a process that is reasonably accessible to all. For this reason I am pleased that language is included to indicate that factual evidence, and not just time-consuming and expensive analyses, can be the basis for a showing of harm by potential complainants. By the same token, the inclusion of a standstill to continue service during disputes, along with the inclusion of good faith language, should assist in preventing the process from being unduly lengthy and expensive. Protracted, expensive and unnecessary procedures too often translate into consumer harm.

I thank the Chairman and colleagues for working to more fully realize the potential of the draft Order. This item has been awaiting action for years and today, thanks to the Chairman's leadership; it's action that we get. And good action, too. Thanks also to the Media Bureau staff as well as the Office of General Counsel for their extraordinary efforts to address the challenging, and often deep-in-the-weeds, issues related to program access in a way that will undoubtedly benefit consumers.

**DISSENTING STATEMENT OF
COMMISSIONER ROBERT MCDOWELL**

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198

Sometimes life hands us moments where we would like to follow our friends and colleagues and share in the spirit of their collective actions. Yet, at other times, as much as we would like to venture with them, we know that we should not for many good reasons. This is one of those times. I respectfully dissent from this First Report and Order ("Order") based on my reading of the Commission's statutory authority under Section 628 of the Communications Act.

This does not mean that I take issue with the general policy objectives behind the Order. To the contrary, I sympathize with them – and I already am on record in supporting many FCC initiatives designed to foster greater competition in the multichannel video marketplace. More video competition ultimately spurs greater demand for, and deployment of, broadband facilities. Among the efforts I have supported over the years are the Commission's *Video Franchising Reform Order*, the *Inside Wiring Order*, the *Program Access Extension Order* and the *Multiple Dwelling Unit ("MDU") Access Order*.¹ Even more to the point, I supported merger conditions in the 2006 Adelphia transaction concerning regional sports network ("RSN") programming because I recognized that the unavailability of RSNs can impair competition in certain circumstances.² The Commission's action there, however, was based on the agency's broad merger-review authority, not its more limited power under Section 628.

My colleagues and the Commission staff have worked hard to discern a basis for the extension of authority here. Nevertheless, I am not persuaded that the language and structure of the statute adequately support the action taken. Section 628 refers to "satellite"-delivered programming 36 times throughout the length of the provision, including 14 references in the subsections most at issue here. The plain language of Section 628 bars the FCC from establishing rules governing disputes involving terrestrially delivered programming, whether we like that outcome or not. To paraphrase Justice Kennedy in a different kind of case, "The hard fact is that sometimes we must make decisions we do not like. We make them because

¹ *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2006) ("*Video Franchising Reform Order*"); *Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring; and Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, 22 FCC Rcd 10640 (2007) ("*Inside Wiring Order*"); *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 Report and Order*, 22 FCC Rcd 17791 (2007) ("*Program Access Extension Order*"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 21828 (2007) ("*MDU Access Order*").

² *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, Assignors, to Time Warner Cable, Inc Assignees; Adelphia Communications Corporation, Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc., Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee*, 21 FCC Rcd 8203 (2006).

they are right, right in the sense that the law ... as we see [it], compel[s] the result.”³

Nor am I convinced that the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *NCTA v. FCC*,⁴ which upheld the Commission’s *MDU Access Order*, supports as broad a reading of the statute as that adopted by the majority here. Although the court in *NCTA* spoke of “section 628’s broad and sweeping terms,” it also included a cautionary note about so broadly employing the provision in other settings that the action would raise “the spectre of a statutory grant without bounds.”⁵ Specifically, the D.C. Circuit warned just seven months ago that “[i]n proscribing an overbroad set of practices with the statutorily identified effect, an agency might stray so far from the paradigm case as to render its interpretation unreasonable, arbitrary, or capricious.”⁶ I am concerned that the Order here – the first Commission rulemaking action taken under Section 628 since the *NCTA* decision – does just that. In short, the FCC is not Congress. We cannot rewrite statutes.

My analysis starts, as it must, with the plain language of the provision. The main substantive basis of the Order is Section 628(b), which expressly identifies the competitive distribution of “satellite cable programming” and “satellite broadcast programming” to consumers as the key Congressional concern underlying the entire provision. Section 628(c)(2), which also is relevant here, sets forth the detailed statutory scheme for the regulatory concept known as “program access,” which requires vertically integrated cable operators and their programming affiliates to sell their content to competing multichannel video distributors such as satellite TV, cable overbuilders and, more recently, telephone companies that have entered the video arena. That section of the statute also speaks only of “satellite cable programming” and “satellite broadcast programming.” Accordingly, for nearly 18 years until today, the Commission’s program access regulations likewise have been limited to programming delivered to cable headends by satellite.

Now, to push the Commission’s authority beyond Section 628’s plain language to reach terrestrially delivered programming, the Order contends, as it must, that the meaning of the statute is ambiguous – and that a reviewing court would find it so, just as the D.C. Circuit did in *NCTA*. But is the statute ambiguous here? To me, there are critical differences between the facts the Commission addressed in the MDU Access docket and the facts in this proceeding. Those differences, in turn, undercut the contention that the Commission is entitled to *Chevron* deference⁷ in its interpretation of Section 628 here.

First, the Order here conflicts with the language of Section 628(b) in a way that the

³ *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (invalidating state ban on flag burning).

⁴ 567 F.3d 659 (D.C. Cir. 2009).

⁵ *Id.* at 664.

⁶ *Id.* at 665 (citing *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)).

⁷ Courts use the well established two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether an agency’s interpretation of a statute is entitled to judicial deference. “[E]mploying traditional tools of statutory construction,” a court first determines whether “Congress has an intention on the precise question at issue.” *Id.* at 843 n. 9. If so, “that intention is the law and must be given effect.” *Id.* If Congress has not directly spoken to the issue, the court moves to the second step – and must defer to the agency’s interpretation of the statute as long as it is reasonable and not “manifestly contrary to the statute.” *Id.* at 844-45.

Commission's *MDU Access Order* did not. As I have noted, Section 628(b) is the critical subsection for this Order. It expressly prohibits unfair methods of competition or unfair acts or practices that, at a minimum, significantly hinder a competing MVPD "from providing *satellite* cable programming or *satellite* broadcast programming" to would-be subscribers (emphasis added). The Order relies on the court's *NCTA* opinion for the proposition that this language covers terrestrially delivered programming as well, in any or all contexts. It is true that in upholding the Commission's authority to prohibit cable operators from enforcing building exclusivity clauses in their contracts with MDU owners, the D.C. Circuit did not let the potential co-mingling of terrestrially delivered programming with satellite delivered programming in one multichannel package stymie the legal analysis. But it also is true that terrestrial delivery of programming was not a significant matter of contention in that proceeding. Instead, the focus in *NCTA* was on the multichannel package as a whole, and no party disputed that satellites were used in transmitting "most programming" in that package.⁸ By contrast, the Order here affects only terrestrially delivered programming – and it concedes that consumers suffer no lack of access to the satellite cable programming or satellite broadcast programming that Section 628(b) expressly concerns.

Second, the Order glosses over a conflict between Section 628(b) and Section 628(c)(2) that was not directly implicated in the Commission's MDU Access proceeding. I supported the *MDU Access Order* in part because the factual scenario addressed in that case – building exclusivity clauses – was not specifically contemplated by any other subsection of the statute. Here, however, Section 628(c)(2) speaks directly to the "the primary evil that Congress had in mind,"⁹ namely competing multichannel distributors' access to the popular programming of vertically integrated cable operators, and it expressly limits the statute's reach to programming delivered to cable headends by satellite. I find arguments for a more expansive reading of the statute based on the title of Subsection C, "Minimum Contents of Regulations," to be unpersuasive. While I agree that the language and structure of Section 628 supports Commission action in "a broader field" in areas beyond those enumerated in Subsection (c), I cannot find that Section 628(b) allows the Commission to take action in conflict with the "paradigm case" established by Section 628(c)(2).¹⁰ That the objective is meritorious as a policy matter cannot trump the statutory constraints on the FCC's authority, no matter how earnestly we may wish to be a "roving commission to go about doing good."¹¹

In addition, I find it perplexing that the analysis in the Order finds some, but not all, of the terminology of Section 628(c)(2) to be relevant in interpreting key phrases within Section 628(b). In particular, the Order finds that the withholding of programming by a vertically integrated cable operator

⁸ *NCTA*, 567 F.3d at 666.

⁹ *Id.* at 664.

¹⁰ The *expressio unius* canon of statutory construction may not prevail in every instance when it is invoked, but the Supreme Court has explained that it remains relevant when (1) Congress specifies a number of related items in a provision, (2) an item very closely associated with those items is left off of the list, and (3) it can be shown that Congress also considered the item that was left off. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168-69 (2003). Here, as the Order notes, Congress considered and rejected broader language for what became Section 628(c)(2). Order at ¶ 20.

¹¹ Transcript of Oral Argument at 46, *Comcast Corp. v. FCC*, Docket No. 08-1291 (D.C. Cir.) (argued Jan. 8, 2010). The Order also signals the Commission's willingness to entertain arguments that it has power to enact a broad *per se* ban on unfair acts involving terrestrially delivered programming, without regard to any showing of harm to competition on a case-by-case basis. Order at n. 139. I would find such an outcome manifestly contrary to the statute, and I therefore wonder why the Order even raises this possibility.

or its programming affiliate is an “unfair act” *per se* under the general terms of Subsection (b) because Congress already has determined that such withholding is an unfair act *per se* under the more explicit terms of Subsection (c)(2).¹² Yet the latter, of course, includes the limiting adjective of “satellite” in describing the prohibited acts. Why then doesn’t that adjective also matter under Subsection (b)?

All of these points, to me, indicate that the Order oversteps the language and structure of Section 628, as well as the intent of Congress behind the provision. But even assuming, *arguendo*, that the meaning of Section 628 is ambiguous in the context of terrestrially delivered programming, the matter is such a close case that the better approach would be to seek explicit direction from Congress before taking further action. Ambiguity alone is not a sufficient reason to justify new extension of government regulation. The action still must be reasonable, and I am not convinced that this Order is.¹³

The conduct of Congress and the Commission since Section 628 was enacted as part of the Cable Television Consumer Protection and Competition Act of 1992 supports my call for further guidance from lawmakers. Controversy over the so-called “terrestrial loophole” or “terrestrial exemption” is not, to put it mildly, new. The Order details how the Commission has, until recently, repeatedly declined to extend its program access authority to terrestrially delivered programming absent further statutory direction. And in the years since 1992, various members of Congress have attempted – on a bipartisan basis – to make the very changes to the law that are at issue here.¹⁴ This history suggests that, at least until the D.C. Circuit issued its *NCTA* opinion, there was broad consensus that a fundamental expansion of the program access regime to encompass terrestrially delivered programming required Congressional action. In short, the court’s opinion does not give the Commission the authority to rewrite a statute.

I also am troubled by a tension in the Order concerning the duration of the new rules. I find it impossible to square the unlimited duration for the new “terrestrial program access” regime under Section 628(b) with the express, time-limited sunset provision applicable to the exclusivity ban in the “original” satellite-oriented program access rules under Subsection (c)(2). There is no indication in this record that terrestrially delivered programming is *more* important to competition than satellite-delivered programming – which, as the D.C. Circuit in *NCTA* noted, constitutes most of the programming at issue in this arena. The explicit sunset provision concerning exclusive deals for satellite-delivered programming requires the Commission to review the marketplace periodically and rejustify any extensions based on current competitive conditions. It is difficult to comprehend how the Commission can reasonably ignore the implications of this Congressional balancing act concerning exclusive arrangements for satellite-delivered programming, “the primary evil that Congress had in mind,” when fashioning new restrictions for the lesser, correlative concern here of terrestrially delivered programming.

Finally, this Order illustrates a point that I have made several times in recent months: Offering the proposed text of a new rule for public comment before adoption of the regulation would help to better

¹² Order at ¶ 43.

¹³ “[W]hen statutory language is ambiguous it is not a foregone conclusion that an agency’s interpretation is a reasonable one to which the court must defer.” *AFL-CIO*, 409 F.3d at 384 (citing, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 480 (2001)).

¹⁴ See, e.g., H.R. 4352, Video Competition and Consumer Choice Act of 1998, 105th Cong. 2d Sess. (co-sponsored by Reps. Tauzin and Markey and proposing new Subsection (c)(2) without the term “satellite”); S.1504, Broadband Investment and Consumer Choice Act, 109th Cong., 1st Sess. (co-sponsored by Sen. Ensign and McCain and proposing new Subsection (c)(2) without the term “satellite”).

inform our deliberations.¹⁵ One example of the value of adhering to such a practice is the new “standstill” provision, which applies to program access negotiations concerning either terrestrial or satellite-delivered programming. Under it, parties seeking extension of existing carriage agreements may seek a Commission order requiring interim carriage while negotiations continue. Although the general concept of a standstill provision was discussed, along with many others, in the 2007 NPRM, specific language concerning the new rule first appeared in a draft that circulated just 24 hours before our Sunshine Agenda rules cut off significant public debate. Some contend that establishing regular procedures for standstill orders will substantially, and unfairly, alter the bargaining leverage that Congress generally left to private parties in program access negotiations. The time left to us to explore this concern was inadequate. Rather than moving directly to an order, I would have preferred that the Commission issued a Further Notice with the proposed mechanics of the new rules and sought further comment on them.

I thank the staff for their efforts on the Order and their willingness to engage in open and frank conversation with me about the legal analysis. I look forward to considering future proposals to advance competition and spur broadband deployment that, in my estimation, stand on firmer legal ground.

¹⁵ The U.S. Government Accountability Office (“GAO”) very recently made the same point. See U.S. Government Accountability Office, *FCC Management: Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning* 27-31 (December 2009) (rel. Jan. 19, 2010).

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198

Today's Order is a very positive development for American consumers. In enacting Section 628 of the Act, Congress sought to, among other things, "increase[] competition and diversity in the multichannel video programming market," and to "spur the development of communications technologies." By developing a mechanism through which competitors can gain access to programming that has been unfairly withheld, we hopefully will put an end to a practice that undermines our congressional mandate.

It makes little sense in today's market to have two wholly distinct rules for satellite- and terrestrially-delivered programming. There is nothing inherent in either mode of delivery that ensures that there will be adequate competition in the MVPD market. Indeed, most consumers likely have no idea by what means any given network is delivered; what they do understand, however, is which providers actually carry the programming they most desire. The result, therefore, is that those operators who do not have access to critical programming may fail to produce the meaningful competition and diversity envisioned by Congress.

As the Order itself notes, the best example of the problem we address today is the practice of withholding access to Regional Sports Networks. There is no secret why vertically-integrated operators would choose to withhold such programming . . . it is a make-or-break proposition for many consumers. They simply would not switch to a competitor who does not offer that programming. In my view, not only do these actions severely limit competition, including the opportunities of new entrants, but also they can serve as a way in which an MVPD can gain a stranglehold on the market without having to innovate in other ways that meet consumer demands. So, instead of lowering prices, improving customer service, or generating new and diverse programming due to competitive pressure, an operator can simply withhold access to important programming it owns in some form or fashion, and watch its competitors scramble to stay afloat.

The bottom line is that under our prior regime, consumers were caught in the crosshairs and have been the ultimate losers in an unfortunate battle among MVPD competitors. Section 628 aims to eliminate such a result, and I am pleased that we have developed a thoughtful approach to this chronic problem.

I thank both the Media Bureau and the Office of General Counsel for their fantastic work on this item. You approached the item with an open mind and therefore were able to make some important improvements to it as the process unfolded. Your work has been exemplary and the end product is a reflection of your expertise and your commitment to ensuring competition that will benefit the American people. Thank you.

**STATEMENT OF
COMMISSIONER MEREDITH A. BAKER**

Re: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198

I would like to thank each of my fellow Commissioners, the Media Bureau and the Office of General Counsel for their hard work on this item. These issues have troubled consumers and multichannel video programming distributors ("MVPDs") alike for years, so I'm very pleased to support a well-reasoned, legally sound and narrowly tailored Order that effectively considers both legal precedent and policy concerns.

At the outset, I would like to reiterate my belief that a competitive marketplace serves the public interest. The issue before the Commission, framed by the purpose of section 628, stems from Congressional intent to "promote the public interest, convenience and necessity by increasing competition and diversity in the video programming market. . . ."¹ That clear purpose guided me towards an outcome that maximizes the potential for innovation-driven competition.

Regulation must, however, be accomplished with statutory authority, and rules of general applicability must be adopted via rulemaking.

I am pleased that we are addressing this issue in a rulemaking proceeding rather than through the narrow lens of a specific adjudication, such as a merger. Equally important is our decision to limit this rulemaking to vertically integrated video providers. Our action today demonstrates the value of collaboration to create judicious, balanced, enforceable regulation.

I appreciate concerns regarding statutory construction and do not take them lightly. Section 628 prohibits certain conduct regarding satellite-delivered programming but does not specifically address terrestrially delivered programming.² Some have argued that this disparity accounts for, and justifies, the so-called terrestrial exemption, but I read the statute in a different light. Section 628 provides authority to promulgate rules beyond those "minimum contents of regulation" specified in section 628(c)(2).³

This is consistent with the Commission's position in the *MDU Order*⁴ and the D.C. Circuit Court in its decision to uphold that order.⁵ The Circuit Court stated that 628(b) should be given "broad, sweeping application,"⁶ thus affirming our authority to adopt rules prohibiting conduct not expressly

¹ See 47 U.S.C. § 548(a).

² See 47 U.S.C. § 548.

³ See 47 U.S.C. § 548(c)(2).

⁴ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20249, ¶ 27 (2007) ("*MDU Order*"), *aff'd*, *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

⁵ *NCTA*, 567 F.3d 659.

⁶ *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).

mentioned within section 628 when such regulation is consistent with the intention of the statute.

Important policy considerations merit the action in this Order. Terrestrial means have been increasingly relied upon to deliver programming. Although not necessarily undertaken for anticompetitive reasons, terrestrial distribution has in some cases limited the ability of MVPDs and consumers to access popular, non-replicable programming.

It is particularly significant to me that this Order is narrowly tailored. As the Order explains, “the record contains no evidence” to suggest that most terrestrially delivered programming has the “purpose or effect of significantly hindering or preventing MVPDs from providing satellite cable programming or satellite broadcast programming.”⁷ As the Order points out, terrestrial distribution of local news and similar local programming is unlikely to qualify as proscribed conduct under section 628.⁸ We have adopted specific standstill procedures that only apply to program access complaints. These determinations, along with our effort to distinguish replicable and non-replicable programming, serve to encourage innovation, investment and competition generally.

Our decision to utilize a case-by-case approach and an extended Answer period allows for balanced adjudications. I am optimistic that these procedures will provide for consideration of nuanced, particularized scenarios that exist or may develop. The 1992 Program Access Rules were designed to foster competition, a force that, in my mind, best regulates the marketplace. It is my hope and expectation that this Order will complement those rules to enhance competition and better serve consumers.

⁷ First Report and Order, MB Docket 07-198, in the Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, Paragraph 51.

⁸ See 47 U.S.C. § 548.