



June 5, 2009

Chairman Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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

Dear Chairman Copps, Commissioner Adelstein, and Commissioner McDowell:

In this proceeding, the Coalition for Competitive Access to Content (CA2C)¹ has urged the Commission to close the terrestrial loophole in the program access rules so that this artifice can no longer be used by major vertically integrated cable companies to withhold "must have" programming from competing multichannel video programming distributors (MVPDs). Assuring competitive access to programming is a public policy issue that is essential to both preserve and expand desired video competition and consumer choice. Effective video competition is also essential to the expansion of broadband services provided on the same networks. There are national broadband strategy issues that the diverse members of the CA2C may not agree on. However, all CA2C members agree that access to "must have" programming is essential to achieve our national broadband goals. A recent decision by the D.C. Circuit confirms that the Commission has jurisdiction to take this step – and the record in this proceeding demonstrates that doing so is long overdue.

Section 628(b) of the Communications Act broadly prohibits cable-affiliated programmers from engaging in unfair methods of competition or unfair or deceptive acts or practices the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.² Section 628(c) lists the "[m]inimum content of regulations" to be promulgated to effectuate Section 628(b).

¹ CA2C Members: AT&T, Cincinnati Bell, DIRECTV, Hiawatha Broadband, ITTA, Knology, MAP, OPASTCO, RCN, SureWest, USTelecom, WOW.

² 47 U.S.C. § 548(b).

Major incumbent cable interests have argued that the Commission does not have jurisdiction to prohibit exclusive arrangements for terrestrially-delivered programming because that is not one of the unfair acts or practices specifically prohibited under Section 628(c). CA2C and others have cited Commission precedent and the structure of the statute to show that such a cramped jurisdictional view is erroneous. Nothing on the face of Section 628(b) limits the unfair methods of competition or unfair acts or practices within its ambit to conduct involving satellite-delivered programming. Indeed, as the Commission found in the *MDU Exclusivity Report and Order*, conduct that may not be directly related to programming at all – such as an exclusive service agreement with the owner of a multiple dwelling unit (MDU) – can form the basis of a potential violation of Section 628(b) if it has the prescribed purpose or effect.³

Recently, the D.C. Circuit affirmed the Commission’s decision in the *MDU Exclusivity Report and Order* and conclusively reaffirmed the broad scope of the Commission’s authority to address anticompetitive activities by cable-affiliated programmers.⁴ On appeal, cable interests challenged the Commission’s reliance upon Section 628(b)’s general prohibition on unfair acts and practices as statutory authority to ban exclusive MDU access agreements. There, as here, they asserted that the “text, structure, and history [of the statute] demonstrate that it was addressed to a different evil altogether,” and that extending the statute to reach beyond negotiations over “satellite cable programming” and “satellite broadcast programming” would “read these well-defined terms out of the statute.”⁵ The D.C. Circuit emphatically rejected each of these arguments.

The court began its evaluation of the jurisdictional issue “[m]indful that ‘statutes written in broad, sweeping language should be given broad, sweeping application.’”⁶ Looking first at the language of the statute, the court found cable’s argument that the specific illustrations in Section 628(c) trump the broader grant of authority in Section 628(b) to be implausible. “[W]hile the specificity of section 628’s references to satellite cable and satellite broadcast programming may reveal the primary evil that Congress had in mind, nothing in the statute unambiguously limits the Commission to regulating anti-competitive practices in the delivery of those kinds of programming by methods addressed to that narrow concern alone.”⁷

³ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and FNPRM, 22 FCC Rcd. 20235, 20246-47 (2007) (*MDU Exclusivity Report and Order*).

⁴ *National Cable & Telecommunications Association v. FCC*, No. 08-1016 (D.C. Cir., May 26, 2009) (“NCTA”).

⁵ *Id.* at 6.

⁶ NCTA at 8 (citing *Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).

⁷ *Id.*

Turning to cable’s structural argument, the court found it to be a double-edged sword because Section 628(c) describes only the “[m]inimum contents of regulations” and (as the Commission noted) “Congress’s enumeration of specific, required regulations in subsection (c) actually suggests that Congress intended subsection (b)’s generic language to cover a broader field.”⁸ The court conclude that “[u]ltimately, then, our view of section 628’s structure mirrors our view of its text: Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission’s power solely to that version of the problem.”⁹ Thus, the fact that exclusive contracts for satellite-delivered programming were specifically called out for regulation in Section 628(c)(2)(c) does not mean that the Commission cannot address related anticompetitive acts or practices under the broader grant of Section 628(b).

Lastly, the court found that cable’s legislative history argument suffered the same deficiency. While there may be evidence to show that Congress was specifically concerned about certain specific types of unfair dealing, the court found “no evidence from the legislative record to show that Congress chose its language so as to limit the Commission solely to that particular abuse of market power.”¹⁰ Clearly, Section 628(c) provides an illustrative starting point for exercise of Commission authority in this area, not a constraint upon it.

With this jurisdictional issue resolved by the court, the only remaining question is whether withholding high-value terrestrially-delivered programming – particularly regional sports networks – has the purpose or effect of hindering significantly an MVPD from providing satellite cable programming. But the Commission has already resolved this question as well. In the *Further Notice*, the Commission cited numerous instances in which terrestrially delivered programming, and specifically found that “there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market.”¹¹ Indeed, the Commission’s own analysis has shown that when terrestrially delivered cable-affiliated programming is withheld from DBS operators, DBS market share is thirty to forty percent lower than it would be expected to be had the programming been made available.¹² The Commission has already determined that this hinders significantly DBS’s ability to provide satellite cable programming to its viewers.¹³ The statute requires no more to establish Commission authority in this area –

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ *Id.* at 9-10.

¹¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791, ¶¶ 39, 49 (2007) (*Further Notice*).

¹² *Id.*, ¶ 39; see also *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶¶ 146-149 (2006) (same).

¹³ *Further Notice*, ¶ 40 (finding that “withholding can have a significant impact on subscribership to the rival MVPDs” and that this, “in turn, predictably harm[s] competition and diversity in the distribution of video programming to the detriment of consumers”).

and the Commission should need no more to conclude that corrective action is clearly warranted.

The D.C. Circuit's decision authoritatively confirms that the Commission has the power to address anticompetitive acts by cable-affiliated programmers that do not relate specifically to negotiations over carriage of satellite-delivered programming. And the record in this proceeding just as authoritatively demonstrates that the Commission should exercise that power to close the terrestrial loophole. CA2C once again urges the Commission to do so as expeditiously as possible so that this anticompetitive practice will no longer deny consumers highly valued programming and the freedom to choose their preferred MVPD.

Respectfully submitted,

John Goodman, President
CA2C
1601 K Street, N.W.
Washington, DC 20006
202-661-3945

cc: Rick Chessen
Rudy Brioché
Angela Giancarlo
Robert Ratcliffe
Rosemary Harold
Marlene H. Dortch