STATEMENT OF COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, AND CONCURRING IN PART

Re: In the Matter of 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 and Order and Notice of Proposed Rulemaking

The program access rules are one of the true success stories of the 1992 Cable Act. It is no exaggeration to say that without these rules, the DBS industry as we know it would not exist. Cable operators still have the incentive and ability to discriminate against their competitors regarding access to affiliated programming. Access to cable-affiliated programming was—and continues to be—vital for the growth of a competitive marketplace. New entrants unanimously remind us of this and today the Commission once again unanimously so concludes.

The Commission will look at the exclusivity ban in another five years. I cannot say with certainty what the marketplace will look like in 2012 and whether the exclusivity ban can safely be sunset. I do know it cannot be permitted to do so in 2007. In this regard, I would not have raised the possibility of shortening the term of extension in markets where new entrants are gaining a foothold. It seems to me that this is ***precisely*** the time that an incumbent's incentive to unfairly deny programming to a competitor is most acute.

On the "tying" issue, I would make two points. First, this is primarily about the imbalance in bargaining power when a small MVPD negotiates with large media programming conglomerates. But what this issue is really tied to, like so many other broadcast and cable issues, is media consolidation, and if we fail to view it as such we do serious injustice to the future of our nation's all-important media. There are huge imbalances in the media industry brought on by consolidation, and this Commission needs to understand these imbalances and interconnections and deal with them broadly and effectively. Second, I do not want to broadly inhibit broadcast stations from negotiating for carriage of their multicast signals in exchange for carriage of their main digital signal. Perhaps one day the industry and the Commission will get serious about the public interest obligations of DTV broadcasters and we can be talking about program that really serves the interests of localism, diversity and competition, but precluding negotiations about multicast programming that could ultimately serve the public interest may foreclose options that we may not really want to foreclose.

Finally, while I am generally in favor of ensuring that complainants at the Commission have the information they need to prove their case, I believe that the discovery procedures adopted in this item go too far, and, paradoxically, not far enough. They go too far in establishing a bare "relevance and control" standard for discovery

requests with no apparent limits on requests that are duplicative or unduly burdensome. I fear that these rules will embroil the Commission in an endless stream of discovery disputes as the parties vie for competitive advantage. On the other hand, I believe the decision does not go far enough because if we are going to liberalize our discovery rules, it ought to apply to contexts beyond program access – such as cases dealing with petitions to deny broadcast station license renewals and transfers. I hope that parties in other disputes file waivers with the Commission asking for liberalized discovery. If sunshine is the best disinfectant, we ought to let the sun shine into every nook and cranny of the Commission.