Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
RCN Telecom Services of New York, Inc.	)	
Complainant	)	
	)	
v.	)	
	)	
Cablevision Systems Corporation,	)	
Madison Square Garden Network, Inc. and	)	
Fox Sports Net-New York	)	
Defendants	)	File Nos. CSR-5404-P and CSR-5415-P
	)	
Microwave Satellite Technologies, Inc.	)	
Complainant	)	
	)	
v.	)	
	)	
Cablevision Systems Corporation,	)	
Rainbow Media Holdings, Inc.,	)	
Madison Square Garden Network Inc. and	)	
Fox Sports Net-New York	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2001 **Released: May 30, 2001**

By the Commission: Commissioner Tristani dissenting and issuing a separate statement.

I. INTRODUCTION

1. RCN Telecom Services of New York, Inc. ("RCN")[1] has filed an Application for Review, pursuant to Section 1.115 of the Commission's rules,[2] of the Cable Services Bureau's *Memorandum Opinion and Order* in the above-captioned proceeding ("*Order*").[3] Microwave Satellite Technologies, Inc. ("Microwave"), the other Complainant in the proceeding, did not file an Application for Review. In separate proceedings, RCN and Microwave each filed program access complaints against Cablevision Systems Corporation and the above-named subsidiaries or affiliates (collectively "Cablevision") alleging

[1] RCN is an open video system operator and a multichannel video program distributor ("MVPD") in New York City.

[2] 47 C.F.R. § 1.115.

[3] *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation et al.*, 14 FCC Rcd 17093 (1999) ("*Order*").

that Cablevision violated Sections 628(b) and (c) of the Communications Act of 1934, as amended ("Communications Act")[4] by engaging in discrimination and unfair practices in conjunction with the distribution of terrestrial and satellite cable programming.[5] The Bureau denied the complaints filed by both RCN and Microwave which were consolidated in the same proceeding because the complaints were based upon substantially the same facts and raised the same legal issues.

2. RCN's Application for Review asserts that the Bureau erred in its determinations with regard to Section 628, failed to use its ancillary authority to extend program access regulation to terrestrially-delivered programming, and erred by denying RCN access to discovery. Cablevision filed an opposition requesting that the Commission affirm the Bureau's *Order* and dismiss RCN's Application for Review. RCN filed a reply.[6] For the reasons discussed below, RCN's Application for Review is denied.

II. BACKGROUND

3. Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[7] to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive.[8] In enacting the program access provisions, codified in Section 628 of the Communications Act,[9] Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other multichannel video programming distributors ("MVPDs") in the sale of satellite cable and satellite broadcast programming.[10]

4. Section 628(b) of the Communications Act states that:

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage 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 multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[11]

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[4] 47 U.S.C. § 548(b), (c); *see also* 47 C.F.R. §§ 76.1001, 76.1002(a), (b), (c).

[5] *Order*, 14 FCC Rcd at 17094.

[6] RCN also filed a Motion for Expedited Consideration and Cablevision filed an Opposition. In addition, RCN filed a Motion for Consolidation and for Oral Argument seeking to consolidate this proceeding with two other Applications for Review then pending at the Commission filed by DIRECTV, Inc. and EchoStar Communications against Comcast Corporation. Cablevision and Comcast filed oppositions to RCN's Motion and RCN filed a reply. RCN's Motion was denied. *See DIRECTV, Inc. and EchoStar v. Comcast Corporation et al.*, Memorandum Opinion and Order, FCC 00-404 at n.4 (released November 20, 2000).

[7] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C.).

[8] 1992 Cable Act § 2(b)(2), 106 Stat. 1463. *See also* Communications Act § 601(6), 47 U.S.C. § 521(6) ("The purposes of this title are to . . . promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.")

[9] 47 U.S.C. § 548.

[10] 1992 Cable Act § 2(a)(5), 106 Stat. 1460-61.

[11] 47 U.S.C. § 548(b).

In Section 628(c), Congress instructed the Commission, *inter alia*, to promulgate regulations that:

> (A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor; [and][12]
>
> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDs or their agents or buying groups. . . .[13]

5. In *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order (*"Program Access Report and Order*"),[14] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c)(2)(B). While the Commission did not attempt to identify all types of non-price discrimination that could occur, the Commission stated that "one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell', or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor."[15]

6. "Satellite cable programming" is "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."[16] "Satellite broadcast programming" is broadcast programming when such programming is

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[12]Communications Act § 628(c)(2)(A), 47 U.S.C. § 548(c)(2)(A).

[13]Communications Act § 628(c)(2)(B), 47 U.S.C. § 548(c)(2)(B). Congress provided limited exceptions to this prohibition. A satellite programming vendor is not prohibited from:

> (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming; (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or (iv) entering into an exclusive contract that is permitted under subparagraph (D) [of this section].

Id.

[14]8 FCC Rcd 3359 (1993).

[15] *Id.* at 3412.

[16]47 U.S.C. § 605(d)(1).

retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.[17]

III. THE BUREAU'S ORDER

7. The Bureau's *Order* summarizes the basic facts of this case about which there is relatively little dispute between the parties. RCN operates an open video system in New York City pursuant to a certification issued by the Commission and pursuant to RCN's open video agreement with the city. RCN offers MVPD service over its system to approximately 50,000 subscribers in Manhattan, Queens, and the Bronx.[18] Cablevision is a multiple system operator ("MSO") that owns and operates cable systems in various parts of the country including New York City. Cablevision currently provides MVPD service to approximately 2.7 million subscribers in the New York metropolitan area.[19] Cablevision owns a majority interest in Rainbow Media Holdings, Inc. ("Rainbow"), a programming and entertainment company, which in turn owns a controlling interest in the entity which ultimately owns and controls Madison Square Garden Network, Inc. ("MSG") and Fox Sports Net – New York ("Fox Sports/NY").[20] MSG and Fox Sports/NY are satellite-delivered programming services operating in the New York metropolitan market which provide subscribers with telecasts of numerous New York professional major league sports contests as well as local collegiate and amateur events. [21]

8. RCN has distributed the programming services known as MSG and Fox Sports/NY in the New York area since the early 1990's.[22] Due to the large number of professional sports teams in the area, it is often the case that a number of these teams are playing simultaneously. When this has occurred in the past, Cablevision provided "overflow" games to distributors of MSG and Fox Sports/NY, including RCN, by the use of additional satellite channels.[23] On August 5, 1998, Rainbow launched a new programming service called MetroChannels. Rainbow distributes MetroChannels terrestrially using Cablevision's fiber optic transport network connecting various headends serving the New York metropolitan area. The MetroChannels consist of three services: MetroGuide, MetroLearning, and MetroTraffic and Weather.[24] In early 1999, MSG and Fox Sports/NY began to use MetroGuide as an outlet for the overflow games previously distributed on an *ad hoc* basis to the MVPDs that contracted with MSG and Fox Sports/NY.[25] After unsuccessful negotiations with Cablevision for the right to carry the overflow programming that Cablevision now distributes via the MetroChannels, RCN filed a program access complaint.[26]

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[17] 47 U.S.C. § 548(i)(3).

[18] *Order*, 14 FCC Rcd at 17096.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 17097.

[23] *Id.* Neither MSG nor Fox Sports/NY ever established a body of sports programming specifically designated as "overflow programming." Rather, the process operated in an *ad hoc* manner and depended upon when and what conflicts occurred. *Id.*

[24] *Id.*

[25] *Id.* at 17098.

[26] *Id.*

9. In its complaint, RCN alleged that Cablevision's refusal to negotiate carriage of the overflow programming constituted an impermissible refusal to sell prohibited by Section 628(c)(2)(B).[27] RCN also alleged that Cablevision's refusal to separately negotiate for carriage of the overflow programming while offering it to other MVPDs as part of the MetroChannels constituted an unfair practice under Section 628(b).[28] RCN also argued that Cablevision's movement of the overflow programming and refusal to license RCN to carry the programming constituted the imposition of an exclusivity agreement against RCN in violation of Section 628(c)(2)(D).[29]

10. Cablevision responded that the MetroChannels, and the overflow programming now incorporated therein, fall outside the scope of the program access rules because the programming is terrestrially-delivered and cannot be considered satellite cable programming.[30] Cablevision maintained that its motivation for terrestrial delivery of the MetroChannels was a rational and legitimate business decision based on a determination that terrestrial distribution was significantly less expensive than satellite distribution and better suited for the type of programming that would be included.[31] Lastly, Cablevision argued that its conduct did not violate the restrictions on exclusive contracts because this rule applies only to contracts for programming delivered *via* satellite and not to terrestrially-delivered programming.[32]

11. The Bureau held that Cablevision's movement of overflow programming from satellite to terrestrial delivery did not violate Section 628(c)(2)(B). The Bureau found that Cablevision provided convincing evidence that its decision to move the sports programming previously distributed on an overflow basis *via* MSG and Fox Sports/NY to the MetroChannels, as well as the decision to distribute the MetroChannels terrestrially, were decisions based upon legitimate business and marketing considerations.[33] Regarding the allegations of a violation of Section 628(b), the Bureau held that Cablevision's decision to deliver the overflow programming terrestrially *via* the MetroChannels and its decision to deny that programming to RCN did not violate Section 628(b).[34]

12. The Bureau also denied RCN's Section 628(c)(2)(D) claim that Cablevision's conduct constituted the imposition of an exclusive agreement for which Cablevision had not obtained the prior approval and public interest determination required under Section 628(c)(2)(D). The Bureau found no merit in RCN's claim that Cablevision's conduct violated the exclusivity provision of the program access rules because the provision only applies to satellite-delivered programming and not to terrestrially-delivered programming.[35]

IV. DISCUSSION

13. RCN offers three arguments in its Application for Review for reversing the Bureau's

[27] *Id.*; 47 U.S.C. § 548(c)(2)(B).

[28] *Id.* at 17099; 47 U.S.C. § 548(b).

[29] *Id.* at 17100; 47 U.S.C. § 548(c)(2)(D).

[30] *Id.* at 17100.

[31] *Id.* at 17101.

[32] *Id.* at 17103.

[33] *Id.* at 17104.

[34] *Id.* at 17106.

[35] *Id.*

decision to deny its complaint. First, RCN argues that the Bureau erred by determining that the requirements of Section 628 are inapplicable to the terrestrially-delivered programming sought by RCN.[36] Second, RCN contends that the Bureau erred when it held that it did not have ancillary authority under other provisions of the Communications Act to apply the program access rules to the migration of programming from satellite-delivery to terrestrial-delivery.[37] Finally, RCN argues that the Bureau erred by denying RCN access to discovery and by concluding that, based on the "totality of circumstances," no evasion of the program access rules had been demonstrated by RCN.[38]

14. After reviewing the record, we find no basis for overturning the Bureau's *Order*. The Bureau determined that the MetroChannels service was terrestrially-delivered, rather than satellite-delivered, and so outside of the direct coverage of Section 628(c). The language of Section 628(c) of the Communications Act expressly applies to "satellite cable programming and satellite broadcast programming."[39] Considering the statutory limitation, we believe the Bureau properly found that Section 628(c) had not been violated given Cablevision's decision to terrestrially deliver the MetroChannels and the overflow programming incorporated therein.

15. RCN further argues that the Bureau erred in not finding Cablevision's actions to be an unfair act under Section 628(b).[40] RCN argues that Section 628(b) has a broader scope than Section 628(c), requiring a separate evaluation regarding the refusal to sell terrestrial programming.[41] RCN contends that the Bureau erroneously concluded that Cablevision did not engage in unfair acts or practices simply because Section 628 does not apply when programming is delivered terrestrially. According to RCN, in order to find a violation of Section 628(b), all that is required is that the "purpose or effect" of the alleged conduct (*i.e.*, shifting programming from satellite to terrestrial transmission) significantly hinders or prevents an MVPD from providing satellite cable programming.[42] RCN raises essentially the same arguments here as in its program access complaint. We have reviewed the Bureau's disposition of the complaint and find that its ruling was correct and that no basis exists to warrant reversal. As stated in *DIRECTV, Inc. and EchoStar v. Comcast Corporation et al.*, there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming.[43] However, we agree with the Bureau that the facts alleged are not sufficient to constitute such a violation here.

16. RCN also reiterates its argument that Cablevision's carriage of the programming constitutes an unlawfully implemented exclusive contract subject to the program access rules.[44] Again, RCN presents no new arguments regarding this allegation. The Bureau properly denied RCN's Section

[36] Application for Review at 7; Reply at 1.

[37] Application for Review at 16; Reply at 4.

[38] Application for Review at 21; Reply at 5.

[39] 47 U.S.C. § 548(c).

[40] Application for Review at 7.

[41] *Id.*

[42] *Id.* at 9.

[43] Memorandum Opinion and Order, FCC 00-404 at 6 (released November 20, 2000).

[44] *Id.* at 11.

628(c)(2)(D) claim. The Bureau stated that RCN's prohibited exclusive contract argument "presupposes that Defendants' movement of the overflow games from satellite delivery to terrestrial delivery constitutes improper conduct requiring the treatment of the programming at issue as satellite delivered programming subject to the program access rules."[45] The Bureau found that "[t]o the contrary . . . the record supports a conclusion that Defendants have not engaged in unfair or deceptive acts in transferring the overflow programming to the MetroChannels."[46] The Bureau correctly concluded that RCN's exclusive contract claim should be denied because the terrestrially-delivered programming at issue does not constitute satellite cable programming subject to the program access exclusivity provisions.[47]

17. We also reject RCN's argument that the legislative history of Section 628 supports its applicability to terrestrially-delivered programming.[48] RCN contends that the Commission must not rely only on the language of the 1992 Cable Act, but also on the underlying policy objectives, in order to support Congressional intent to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[49] According to RCN, it is illogical to conclude that terrestrially distributed programming is not encompassed by the statute because the policy purposes set forth in Section 628 are in no way irrelevant to, or dissipated by, terrestrial distribution.[50] The Bureau's *Order* correctly noted that both the statutory language and the legislative history of the program access provisions weighed against RCN's views concerning the scope of Section 628. Accordingly, the Bureau's *Order* stated:

> We believe that the correct reading of Section 628(c) is that the provisions in question apply to satellite cable programming, not programming that was "previously" satellite-delivered, or the "equivalent" of satellite cable programming, or programming that would qualify as satellite cable programming, but for its terrestrial delivery. The statute defines "satellite cable programming" as that which *is* transmitted via satellite. This reading is consistent with the legislative history of Section 628 which indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not. This indicates a specific intention to limit the scope of the provision to satellite services.[51]

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[45] *Order* at 17106.

[46] *Id.*

[47] *Id.*

[48] Application for Review at 13.

[49] *Id.* at 14, citing 1992 Cable Act, § 2(b)(5).

[50] *Id.* at 14.

[51] *Order* at 17106, citing *DIRECTV v. Comcast*, 13 FCC Rcd 21822, 21834 (1998) and *EchoStar v. Comcast*, 14 FCC Rcd 2089, 2099 (1999). (These cases addressed issues similar to those presented in this proceeding). RCN also argues that the Bureau ignored certain precedent regarding whether the definition of "satellite cable programming" as defined by Section 705 of the Communications Act [47 U.S.C. § 605] covers terrestrially-delivered signals. Application for Review at 10. We agree with Cablevision, that there is no merit to RCN's assertions that case law construing Section 705 in the theft of service context supports the application of the program access rules to programming delivered solely over terrestrial facilities. Cablevision Opposition at 11, citing, *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, 129-31 & n.5 (2nd Cir. 1996); *United States v. Norris*, (continued…)

RCN has submitted nothing to cause us to question the Bureau's analysis of this issue.

18. We decline RCN's invitation to provide the relief sought by RCN pursuant to ancillary authority granted in Sections 4(i) and 303(r).[52] The Bureau declined to address RCN's arguments regarding ancillary authority because it determined that, after a review of the totality of circumstances, Cablevision had not violated Section 628 by moving its programming from satellite to terrestrial delivery.[53] We agree with Cablevision that, given that 628 does not by its terms apply to terrestrially-delivered programming, it is not appropriate for the Commission to exercise ancillary jurisdiction to extend, in the context of a complaint proceeding, program access regulation to terrestrially-delivered programming.[54]

19. Based upon a thorough examination of the record in this proceeding, the Bureau also properly denied RCN's request for discovery. RCN contends that the Bureau erred because it accepted Cablevision's assertions that based on cost savings and operational advantages, terrestrial distribution, as opposed to satellite delivery, was determined to be the preferred method of program distribution for the MetroChannels.[55] Cablevision argues that RCN never rebutted the information provided in its pleadings and sworn declarations regarding program distribution decisions and the resources committed to developing the MetroChannels and did not counter Cablevision's assertions with any evidence of its own.[56] Based upon the pleadings and supporting affidavits submitted in the proceeding, Cablevision argues that the Bureau properly found no need to supplement the record.[57]

20. We agree with Cablevision in this regard. The Bureau found that Cablevision invested substantial resources in developing the MetroChannels as a new "hyper-local" service, which offers a range of original news, entertainment, and sports content.[58] The Bureau noted that the sports programming at issue is only a small part of the programming offered on the MetroChannels and that a majority of this sports programming remains available to RCN *via* MSG, Fox Sports/NY and other outlets.[59] The Bureau also found substantial evidence that terrestrial distribution of the MetroChannels, as opposed to satellite distribution, was a less expensive and more technically appropriate method of distribution for this type of locally-oriented service.[60] Based on the record before it, the Bureau properly denied RCN's request for discovery.[61]

(…continued from previous page)
833 F. Supp. 1392, 1398-99 (N.D. Ind. 1993) *aff'd*, 34 F.3d 530, 532 (7th Cir. 1994).

[52] Application for Review at 16; 47 U.S.C. §§ 154(i) and 303(r).

[53] *Order* at 17104.

[54] Cablevision Opposition at 22.

[55] Application for Review at 21.

[56] Cablevision Opposition at 15.

[57] *Id.* at 16.

[58] *Order* at 17104.

[59] *Id.*

[60] *Id.* at 17105.

[61] *Id.* at 17106.

V. ORDERING CLAUSE

21. Accordingly, **IT IS ORDERED** that the Application for Review filed by RCN Telecom Services of New York, Inc. **IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Dissenting Statement of Commissioner Gloria Tristani

RCN TELECOM SERVICES OF NEW YORK INC. V. CABLEVISION SYSTEMS CORPORATION ET AL.

This is a complaint for unfair practices under 47 U.S.C. §628. The complainant seeks Commission review arguing *inter alia,* that the Bureau erred by denying leave to undertake discovery and

concluding that, based on the "totality of circumstances," no evasion of the program access rules had been demonstrated.[62]

Because the majority affirms the Bureau's decision to deny complainant's discovery request and in so doing denies complainant a full and fair opportunity to litigate its claim, I respectfully dissent. I write separately because the Commission's reluctance to authorize appropriate discovery in these cases undermines the confidence in the ultimate decisions, frustrates the competition intended by Congress, and conflicts with well-settled litigation principles.

I. Program Access Complaints Require the Complainant to Establish the Respondent's State of Mind and Complete Discovery is Critical to a Party's Ability to Carry its Burden of Proof.

The statute and Commission's program access rules were adopted to promote diversity and competition.[63] Commenters to the program access dockets have repeatedly alleged providers can circumvent the provisions of Section 628 and frustrate congressional intent by changing their delivery of programming from satellite to terrestrial distribution.[64]

In resolving two prior complaints brought pursuant to 47 U.S.C. §628 the Commission has expressly left open the possibility that a change from satellite delivery to terrestrial distribution may constitute an unfair practice under Section 628 stating:[65]

> We acknowledge that there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable

[62] RCN Application for Review at 21; Reply at 5.

[63] *See* 47 U.S.C. §548(a); *see also In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage.* First Report and Order, 8 FCC Rcd. 3359, 3360 (1993) ("Program Access Report")

[64] In 1994 commenters predicted that if the 1992 Cable Act only applied to satellite-delivered programming there would be future problems, "because vertically integrated programming vendors will have the incentive to modify the distribution of their programming . . . in order to evade application of the program access requirements." *See In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442 at ¶181. Later the Commission agreed to, "monitor industry conduct involving programming services that are not delivered via satellite transmission." *Id.* at ¶181.

In 1996 the Commission again recognized the potential for evasion of the program access rules, finding however, no clear trend had occurred. *See, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd. 4358 (1996) In early 1998, the Commission issued its Fourth Annual Report again recognizing the problem and finding that improved technology has made evasion a more likely and viable option. *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd. 1034 (1998).

[65] *In the Matter of: DirecTV, Inc., v. Comcast Corp; Echostar Communications Corp. v. Comcast Corp.,* Memorandum Opinion and Order, 2000 WL 1720534, (2000)("Order").

programming.[66]

Here complainant RCN alleged, *inter alia*, respondent Cablevision unfairly shifted its programming from satellite to terrestrial delivery in contravention of 628(b).[67] The Bureau accepted Cablevision's assertions that it had legitimate business reasons, based on cost savings and operational advantages, to switch from satellite delivery to terrestrial distribution for its new programming service, MetroChannels.[68] Therefore no violation of the program access rules or the statute was found.

The majority affirms this result by briefly restating Cablevision's evidentiary submission and concluding, "Based on the record before it, the Bureau properly denied RCN's request for discovery."[69] The majority missed the point of RCN's argument. RCN contended that it could not rebut the information provided by Cablevision regarding program distribution decisions and the resources committed to developing the MetroChannels, without further discovery. It is meaningless for the majority to say a party cannot undertake discovery because they have failed to make a record that requires they produce evidence that is in possession of the party against whom discovery is sought. The majority's rationale is circular and smacks of substandard due process.

Pursuant to the program access rules, discovery is not a matter of right in a Section 628 proceeding and Commission-controlled discovery is used.[70] I recognize that the extent of discovery here is primarily determined by our rules and the liberalized standards prevailing in the Federal Rules of Civil Procedure are not controlling.[71] The Administrative Procedure Act fails to provide expressly for discovery; and we need not observe all the rules and formalities applicable to courtroom proceedings.[72] However, we are obligated to ensure our procedures meet due process minima.[73] Therefore, discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny due process.[74] Here the refusal to permit fuller discovery denied due process and improperly foreclosed RCN from carrying its burden of proof. This conclusion is bolstered by a prior case where the Bureau ordered further discovery and the

[66] *Order* at ¶13.

[67] RCN Application for Review at 7.

[68] *Majority Opinion and Order* at ¶19.

[69] *See Majority Opinion and Order* at ¶20.

[70] *See* 47 C.F.R. 76.1003(g)

[71] *See e.g. Title Guarantee Co. v. NLRB*, 534 F.2d 484, 487 (2d Cir. 1976)("Neither the liberal provisions of the Federal Rules of Civil Procedure pertaining to pretrial discovery nor the liberalized rules of the Federal Rules of Criminal Procedure have any bearing on (National Labor Relations) Board discovery procedures.").

[72] *See, e.g., Dixon v. Love*, 431 U.S. 105, 115 (1977); *but see* 16 C.F.R. §§3.31-3.37 (1978)(The Federal Trade Commission provides discovery rights pursuant to regulations similar to the discovery rules of the Federal Rules of Civil Procedure.).

[73] *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

[74] *NLRB v. Valley Mold Co.*, 530 F.2d 693 (6th Cir. 1976), *cert. denied*, 429 U.S. 824 (1976); *J.H. Rutter Rex Manufacturing Co. v. NLRB*, 473 F.2d 223 (5th Cir.*), cert. denied*, 414 U.S. 822 (1973); *Electronic Design & Development Co. v. NLRB*, 409 F.2d 631 (9th Cir. 1969).

results proved useful.[75]

In the *DirectTV/Echostar* case the Commission affirmed Bureau level decisions that relied upon a "totality of the circumstances" test to determine whether the record "demonstrated an intent [by the party] to evade the program access rules."[76] Evaluation of the intent of a party using a totality of the circumstances test is a well-known standard for answering a question of fact.[77] The D.C. Circuit has said, "[I]n almost any claim involving motive, a [civil] defendant's state of mind is typically established by circumstantial evidence because of the difficulty in obtaining direct evidence of motive."[78] The ultimate question of whether or not respondent here *unfairly intended to evade* the pro-competition standards set forth by Congress in Section 628 could not be determined in the absence of fuller discovery than was allowed. A discovery request tailored to allow a party to carry its burden must be considered and weighed by the Commission against well-settled legal principles and the policies underlying the program access statute. This, the Bureau and majority failed to do.

Conclusion

In order for RCN to establish that Cablevision had an impermissible motive in switching the programming at issue from satellite to terrestrial delivery that rose to the level of a violation of the statute or our rules, discovery was required to provide RCN with an opportunity to carry its

[75] *See In the Matter of Turner Vision, Inc., Satellite Receivers, LTD., v. Cable News Networks, Inc.*, 13 FCC Rcd. 12,610 (1998)(where Bureau, after issuing a Letter of Inquiry, found a Section 628 violation).

[76] *See supra., n.4 citing In the Matter of: DirecTV, Inc., v. Comcast Corp; Echostar Communications Corp. v. Comcast Corp,* at ¶9.

[77] *See e.g. Schneckloth v. Bustamonte*, 412 U.S. 218, 248-24(1973)(4th amendment question).

[78] *Kimberlin v. Quinlan*, 6 F.3d 789, 808 (D.C. Cir. 1993); *see also United States v. Jackson*, 513 F.2d 456, 461 (D.C.Cir.1975) (footnotes omitted); *see also United States v. Bank of New England, N.A.*, 821 F.2d 844, 854 (1st Cir. 1987) ("Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts."), *cert. denied*, 484 U.S. 943 (1987); *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir.1984) ("Because intent is formed in the mind in secrecy and silence ..., a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case. Circumstantial evidence of this subjective fact is therefore indispensable."); *United States v. Pope*, 739 F.2d 289, 291-92 (7th Cir.1984) ("Proof of the requisite state of mind need not be by direct evidence; it may be inferred from the surrounding facts and circumstances."); *United States v. Hudson*, 717 F.2d 1211, 1213 (8th Cir.1983) ("Willfulness, intent and guilty knowledge may also be proven by circumstantial evidence and frequently cannot be proven in any other way."); *United States v. Childs*, 463 F.2d 390, 392 (4th Cir.) ("Intent is not susceptible of direct proof; it must be proved by circumstances.") (footnote omitted), *cert. denied*, 409 U.S. 966, 93 S.Ct. 271, 34 L.Ed.2d 232 (1972); 2 Charles A. Wright, FEDERAL PRACTICE AND PROCEDURE § 411 (2d ed. 1982) ("Though circumstantial evidence is used in virtually every criminal case, there are certain kinds of cases and issues on which it is almost indispensable, because it is so unlikely that direct evidence will be available. These include such matters as the existence of a conspiracy, criminal intent, or other issues involving state of mind.") (footnotes omitted); 2 John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §§ 242, 244, 245 (Chadbourn rev. 1979) (intent, knowledge, belief, and state of mind may be evidenced by external circumstances and the defendant's conduct).

evidentiary burden.[79] Appropriate discovery permits the full nature and scope of the controversy to be identified and enables a party to obtain the information needed to respond to dispositive motions and prepare for hearing. For the reasons stated, I respectfully dissent.

[79] Complainants can establish an improper motive through circumstantial evidence and inferences drawn therefrom as direct evidence is difficult to obtain. *See Kimberlin v. v. Quinlan*, 6 F.3d 789, 808 (D.C. Cir. 1993)