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

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[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).

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 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

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[3] *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (invaliding 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).

contention that the Commission is entitled to *Chevron* deference[7] in its interpretation of Section 628 here.

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

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[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.

[8] *NCTA*, 567 F.3d at 666.

[9] *Id*. at 664.

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 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

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[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.

[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)).

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 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.

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[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").

[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).

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.