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 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

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[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)).

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.