MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966

September 10, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

On behalf of the Motion Picture Association of America, Inc. ("MPAA") and its member companies,[1] I am writing in response to the July 25, 2008 filing of the Media Access Project ("MAP"),[2] which purports to provide a jurisdictional basis for the Federal Communications Commission ("Commission") to regulate the manner in which multichannel video programming is offered to distributors, through either a wholesale à la carte mandate or similar measures. As MPAA and its members have demonstrated repeatedly in this proceeding, the Commission has no broad statutory authority to dictate the terms, conditions, and prices offered by any programmer in private, free-market negotiations, and any such restrictions will harm, rather than promote, the public interest.[3]

MAP's filing reads like a player in the board game "Battleship" blindly calling out numbers (in this case, statutory provisions), hoping to guess a lucky one that will "sink" an opponent's ship.[4] Each of these attempts to find Commission jurisdiction to adopt a wholesale à

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[1] MPAA represents six of the world's largest producers and distributors of theatrical motion pictures, packaged home video material, and audiovisual programs for home reception via broadcast, cable, satellite, and the Internet. The MPAA members are: Paramount Pictures; Sony Pictures Entertainment Inc.; The Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

[2] *See* Letter from Parul Desai, Media Access Project, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-198 (July 25, 2008) ("MAP Ex Parte").

[3] *See generally* Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 07-198 ("Fox Comments"); Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket No. 07-198 (Jan. 4, 2008) ("NBCU Comments"); Comments of The Walt Disney Company, MB Docket No. 07-198 (Jan. 4, 2008) ("Disney Comments"); Comments of Time Warner Inc., MB Docket No. 07-198 (Jan. 4, 2008) ("Time Warner Comments"); Comments of Viacom Inc., MB Docket No. 07-198 (Jan. 4, 2008) ("Viacom Comments").

[4] MAP also erroneously refers to the practice of offering programming networks in a bundle as "tying." Illegal "tying" under antitrust law refers to situations where the seller has market power in the market for one product and uses that power to force the buyer to also purchase a second product in another market in order to get the first product. Given the breadth and diversity of programming networks today, and the low barriers to entry – as evidenced by the fact that there are over 500 national programming networks[4] – MPAA does not believe that any

la carte mandate or similar measures, however, misses its mark. Indeed, MAP can call out every section of the Communications Act of 1934, as amended (the "Communications Act"), and none will be successful, because Congress simply has not granted the Commission the authority to act in the manner MAP desires. The Commission's authority to regulate is limited to the authority that Congress granted it by statute: "An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."[5] Accordingly, in order to adopt any restriction on programmers' negotiations with multichannel video programming distributors ("MVPDs"), the Commission must show either that it has express statutory authority from Congress or that any exercise of ancillary jurisdiction is closely linked to an area of clear Commission authority and otherwise is appropriate.[6]

There are *no* "battleships" on this board for MAP to sink. A sustainable jurisdictional basis for Commission action in this area is not just elusive, it is non-existent. As discussed in more detail below, all of MAP's guesses miss the mark because neither the Communications Act nor any other statutory provision provides the Commission with express or ancillary authority to regulate programmers' negotiations with MVPDs generally. Moreover, any attempt to exercise jurisdiction in this area would directly contravene the preference expressed by Congress for reliance on marketplace negotiations, rather than intrusive government regulation, to foster competition in the video marketplace. The proposed regulations also would violate the First Amendment. Specifically, with respect to MAP's contentions:

Section 628: MISS! The FCC itself consistently has determined that its authority under Section 628 is narrow and thus cannot be used to regulate any programmers with respect to bundling whether vertically integrated or not.

Section 616: MISS! This section specifically references six types of regulation for the Commission to employ within a year of passage – none of which includes wholesale à la carte.

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cable network has (or could have) market power let alone that there are distinct markets for programming networks. *See* Press Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* (Nov. 27, 2007) (noting that in 2006, the Commission identified "565 satellite-delivered national programming networks, an increase of 34 networks over the 2005 total of 531 networks."). Moreover, as numerous commenters have explained, the widespread practice of programmers that offer their services in bundles is to also offer their programming services to MVPDs on a stand-alone basis. The courts have made clear that "[w]here the buyer is free to take either product by itself, there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112 (8th Cir. 1996) (citing *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 6 n. 4 (1958)). Thus, MAP's implication that programmers are engaging in tying is wrong.

[5] *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) ("*MPAA*"). The Commission's interpretation of its authority "'is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue.'" *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (quoting *MPAA*, 309 F.3d at 801). As the Supreme Court has explained, "a congressional delegation of administrative authority" is a "precondition to deference under *Chevron*." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

[6] *See American Library Ass'n*, 406 F.3d at 692, *cited in* Disney Comments at 3.

Section 303: MISS! The delegated authority necessary to rely on this section is completely absent.

Section 325: MISS! Nothing in the retransmission consent provisions or exclusivity/good faith requirements gives the Commission authority to impose a wholesale à la carte mandate.

Section 4(i): MISS! There is no statutory responsibility to which the Commission's exercise of authority would be ancillary.

MPAA demonstrates below that none of the statutory bases of authority asserted by MAP provide the Commission with the authority that MAP claims.

Section 628. MAP argues that the Commission may rely on the plain language and legislative history of Section 628(b) of the Communications Act[7] to adopt a wholesale à la carte requirement or similar restrictions.[8] As fully explained by Disney and other commenters, nothing in the text of Section 628(b), read individually or in context with other Communications Act provisions, provides the Commission with authority to preclude or otherwise regulate bundling arrangements by programmers.[9]

The plain text of the statute limits its grant of jurisdiction to the Commission to prevent unfair methods of competition or unfair or deceptive acts or practices by cable operators, satellite cable programmers in which a cable operator has an attributable ownership interest, and superstations.[10] As such, the statute by its own terms does not apply to non-vertically integrated programmers or broadcasters and the Commission cannot expand the scope of its authority in the absence of a clear directive from Congress.[11] Further, as Time Warner has demonstrated, discounted bundling is a widespread and accepted practice throughout the U.S. economy that provides significant benefits to consumers and competition alike[12] and thus is neither unfair nor deceptive and bears no relation to vertical integration. Thus, the Commission cannot rely on Section 628(b) to regulate *any* programmers in this manner, whether vertically integrated or not.

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[7] 47 U.S.C. § 628(b) ("It 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 prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers").

[8] MAP Ex Parte at 2.

[9] *See, e.g.,* Disney Comments at 10.

[10] *See* 47 U.S.C. § 628(b) ("It 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…").

[11] *See* NBCU Comments at 24.

[12] *See* Time Warner Reply Comments at 2-8.

Indeed, MAP's attempts to stretch the bounds of 628(b) is particularly lacking in its failure to provide any evidence of harm resulting from the use of bundling arrangements. On its face, Section 628(b) "applies only when the practice in question 'hinder[s] significantly or prevent[s] any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.'"[13] Accordingly, as NBCU notes, Section 628(b) "does not preclude wholesale packaging as long as it is not accomplished in an unfair, deceptive, or discriminatory manner."[14] There is no evidence in the record that any MVPD has been illegally hindered or prevented from acquiring programming on a stand-alone basis.[15] Further, MVPDs are *not* required to take any programming that they do not wish to carry.[16] In fact, programmers that sell their services in bundles "do so in order to expand distribution of their services in a cost-effective way,"[17] not to hinder such distribution. Nor is there any evidence that the sale of programming in such a manner is in any way unfair or deceptive. Thus, Section 628(b) provides no statutory authority to mandate à la carte or adopt similar restrictions on the wholesale offering of video programming.

MAP's attempt to rely more generally on the legislative history of Section 628 also fails. As a general principle, where the express language of the statute is unambiguous, as is the case here, it controls over the legislative history.[18] At any rate, using Section 628 as a basis for prohibiting packaging or bundling would be inconsistent with the purpose of Section 628 expressed in the legislative history: checking the bargaining power and leverage of cable operators, not programmers.[19] Indeed, as Fox explains, "other practices that the Commission has

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[13] Fox Comments at 34, quoting 47 U.S.C. § 628(b). Further, a complaining MVPD must initiate an adjudicatory proceeding – and the Commission must find that a violation of Section 628(b) has actually occurred – before the Commission has any authority to impose remedies. *See* 47 U.S.C. § 628(d).

[14] NBCU Comments at 24-25. Further, as Disney has explained, bundling and "tying" are unlike the conduct specified by Congress in Section 628(c) as the particular unfair or discriminatory conduct that is prohibited by subsection (b). *See* Disney Comments at 14.

[15] *See* Disney Comments at 45; Fox Comments at 21-23; NBCU Comments at 38; Viacom Comments at 9; Bruce M. Owen, *Wholesale Packaging of Video Programming* (Jan. 4, 2008) (Exhibit to Viacom Comments) ("Owen Report") at 10 ("All MVPDs are given the opportunity to purchase networks outside of any bundle on a stand-alone basis").

[16] *See, e.g.*, Fox Comments at 34 ("Merely offering a package of networks does not prevent an MVPD from providing any programming; the choice remains with the MVPD, and … the ability to obtain packages at a discount provides MVPDs with additional options that can only enhance their ability to offer programming to their subscribers."); *see also* Owen Report at 12-15.

[17] Time Warner Comments at 7.

[18] *See United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."). *See also Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1551-52 (2007) ("'We begin, as always, with the language of the statute,' and replete with the affirmation that, when '[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 172 (2001) and *Gonzales*, 520 U.S. at 6)).

[19] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming, Distribution, and Carriage*, 10 FCC Rcd 3105, 3126 (1994) ("The legislative history of Section 628 specifically, and of the 1992 Cable Act in general, reveals that

previously prohibited under Section 628 – such as the refusal to offer affiliated programming to competitors or the negotiation of exclusive contracts with apartment buildings – were practices that by definition precluded other MVPDs from offering programming in competition with the cable operator."[20] Moreover, Congress consistently has expressed its preference for marketplace negotiations, rather than regulation, to ensure competition in the market for video programming.[21]

In light of the statutory text and the clear legislative history recognizing the primacy of private negotiations in this area, the Commission itself consistently has determined that its authority under Section 628(b) is narrow. For example, in 1998, 2000, 2002, and 2004, the Commission refused to extend the scope of the protections of Section 628 to terrestrially-delivered programming primarily because it interpreted its authority under Section 628 narrowly.[22] Accordingly, the record in this proceeding amply demonstrates that there is no basis in Section 628 –on its face, in the legislative history, or in Commission precedent – to support Commission adoption of a wholesale à la carte mandate or similar restrictions.

Section 616. Next, MAP purports to find authority in the Congressional directive of Section 616 to "establish regulations governing program carriage agreements and related practices …."[23] According to MAP, the use of the term "related practices" must mean that Congress intended to provide the Commission with the authority to adopt any rule related to carriage.[24] Contrary to this sweeping interpretation of the provision, Viacom explains that Section 616(a) specifically references six types of regulations that the Commission had authority to promulgate within a year of the enactment of Section 616, none of which include wholesale à

Congress was concerned with market power abuses exercised by cable operators and their affiliated programming suppliers that would deny programming to non-cable technologies …."); Disney Comments at 12.

[20] Fox Comments at 35.

[21] *See id.* (citing the Statement of Policy included by Congress as part of the 1992 Cable Act, which "confirms that '[i]t is the policy of Congress in this Act to … rely on the marketplace, to the maximum extent feasible, to achieve' the 'availability to the public of a diversity of views and information through cable television ….").

[22] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech new Media, Inc. Regarding Development of Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, para. 71 (1998) (refusing to address disputes regarding terrestrially-delivered programming because of doubts regarding jurisdiction over such programming); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, paras. 71-74 (2002); *Gen. Motors Corp. & Hughes Electronics Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 473, para. 291 (2004) (finding that expansion of exclusivity provision would directly contradict Congress' intent).

[23] 47 U.S.C. § 616 (directing the Commission, within one year of the date of enactment of this section, to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors").

[24] MAP Ex Parte at 6.

la carte or similar mandates.[25] Moreover, all six provide protections *for* video programming vendors *against* abuses by MVPDs.

The plain text of the statute confirms that the statute is intended solely to grant Commission jurisdiction to impose limits on MVPDs; the three substantive directives of the statute compel the Commission to implement regulations that are designed to accomplish one of three goals:

i) "to prevent a cable operator or other [MVPD] from requiring …."

ii) "to prohibit a cable operator of other [MVPD] from coercing … and from retaliating …."; or

iii) "to prevent a [MVPD] from engaging …."

As NBCU notes, this plain language simply cannot be "twisted" to allow the Commission to impose burdens on programmers, the parties the statutory provision is intended to protect.[26]

Section 303. MAP next attempts to rely on the Commission's general public interest authority under Section 303 of the Communications Act.[27] The courts have concluded, however, that the Commission "cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue … The FCC must act pursuant to *delegated authority* before any 'public interest' inquiry is made under 303(r)."[28] The record in the instant proceeding demonstrates that such delegated authority "is completely absent here."[29] In addition, as discussed in detail in the Disney Comments, neither the retransmission consent system codified in 1992, nor the exclusivity/good faith obligation added in 1999, gives the Commission jurisdiction under Section 325 of the Communications Act to preclude bundling or

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[25] Congress directed the Commission to promulgate regulations that were designed to: (1) prevent an MVPD from "requiring a financial interest in a program service as a condition for carriage;" (2) prohibit an MVPD from "coercing a video programming vendor to provider … exclusive rights … as a condition of carriage;" (3) prevent an MVPD from discriminating against unaffiliated programmers; (4) provide for expedited review of program carriage complaints; (5) provide for penalties for violations of Section 616; and (6) provide for penalties for abuse of the complaint process. *See* Viacom Comments at 30, quoting 47 U.S.C. § 616(a).

[26] NBCU Comments at 29.

[27] MAP Ex Parte at 8. *See* 47 U.S.C. § 303 (granting the Commission authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions … as may be necessary to carry out the provisions of this Act ….").

[28] *MPAA*, 309 F.3d at 805 (emphasis in original). In *MPAA*, the U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") found that video description rules adopted by the Commission were not authorized by any provision of the Communications Act. The arguments proffered by MAP in support of Commission action in the instant case are strikingly similar to those on which the Commission unsuccessfully attempted to justify its video description rules. And, as was the case with the video description rules, these asserted jurisdictional bases must fail.

[29] *See* NBCU Comments at 27.

packaging arrangements by broadcasters.[30] Indeed, the legislative history of the 1992 Cable Act demonstrates that it was the intention of Congress "to establish a marketplace for the disposition of the rights to retransmit broadcast signals … not …to dictate the outcome of the ensuing marketplace negotiations."[31] In fact, Congress specifically anticipated that broadcasters could seek "the right to program an additional channel on a cable system" in addition to other types of compensation.[32]

Ancillary Jurisdiction. MAP, having failed to establish any express authority under any provision of the Communications Act, claims that the Commission has ancillary authority to mandate wholesale à la carte or adopt similar restrictions.[33] Contrary to MAP's assertion, however, Congress did not grant the Commission general authority over any and all issues relating to video programming.[34] As explained by numerous commenters, it is clear that the Commission cannot rely on its ancillary authority in this case.[35]

As an initial matter, reliance upon ancillary jurisdiction in this proceeding would be misplaced because the Commission must have express jurisdiction in order to regulate program content. Section 624(f) makes clear that "[a]ny Federal agency … may not impose requirements regarding the provision or content of cable services, except as *expressly* provided in this title."[36] Indeed, the courts have reinforced this point.[37] Like the video description rules at issue in *MPAA*, a wholesale à la carte mandate unquestionably would "significantly implicate program content."[38] And, as in the video description case, it is "an entirely untenable position" that the

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[30] *See* Disney Comments at 4-8.

[31] S. Rep. No. 102-92 (1991) at 35-36.

[32] *Id.*

[33] MAP Ex Parte at 6.

[34] *See* MAP Ex Parte at 7.

[35] *See, e.g.*, Fox Comments at 38; Viacom Comments at 29; NBCU Comments at 25.

[36] 47 U.S.C. § 544(f) (emphasis added). For full discussion, see Disney Comments at 17.

[37] *MPAA*, 309 F.3d at 805 ("To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content. Rather, Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content.").

[38] *Id.* at 807 ("Section 1 does not furnish the authority sought, because the regulations significantly implicate program content and the FCC can cite no authority in which a court has upheld agency action under § 1 where program content was at the core of the regulations at issue. And it does not matter that the disputed rules here are arguably "content-neutral." The point is that the rules are about program content and therefore can find no authorization in § 1."). As the Commission itself recently noted, *MPAA* stands for the proposition that "section 1 does not encompass regulation of program content" and thus cannot be relied upon as a basis for the exercise of ancillary authority. *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press, et al., for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for Reasonable Network Management*, File No. EB-08-IH-1518, WC Docket No. 07-52 (rel. Aug. 20, 2008).

adoption of wholesale à la carte rules "is permissible because Congress did not expressly foreclose the possibility."[39] Indeed, despite many rules relating to the operations of broadcast stations, the Commission appropriately has avoided direct regulation of broadcast programming sources, including broadcast networks, absent clear and express Congressional authority.[40]

Even assuming that use of ancillary jurisdiction were legitimate in this proceeding, the provisions cited by MAP cannot support the extension of such authority to adopt a wholesale à la carte mandate or similar restrictions. Title I of the Communications Act,[41] the source of the Commission's ancillary authority, is not an independent basis of authority and cannot be read in isolation.[42] Rather, the exercise of authority under Title I must be ancillary to "the Commission's effective performance of its statutorily mandated responsibilities."[43] In this case, there is no statutory responsibility to which the exercise of jurisdiction would be ancillary, and MAP's reliance on Sections 601(4), 601(6), 612(g), 303, and 309(a) is misplaced.

For example, Sections 601(4) and 601(6) fall under the "General Provisions" of Title VI, which only sets forth the "purposes of th[at] title,"[44] not mandated responsibilities of the Commission.[45] Given the lack of any statutorily-mandated responsibilities in these provisions, ancillary authority cannot flow from them.

While Section 612(g) grants the Commission authority to "promulgate any additional rules necessary to provide diversity of information sources" *in relation to leased access*,[46] this authority bears no relation to the wholesale offering of video programming and, thus, cannot serve as a predicate for ancillary jurisdiction to adopt a wholesale à la carte mandate or similar requirements. Further, the Commission's authority under Section 612(g) is triggered only "at such times as cable systems with 36 or more activated channels are available to 70 percent of [U.S.] households … and are subscribed to by 70 percent of th[ose] households."[47] The Commission concluded just last November that the so-called "70/70" test has not been met, thus foreclosing the exercise of any ancillary authority under this provision.

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[39] *MPAA*, 309 F.3d at 805.

[40] *See, e.g.*, 47 C.F.R. § 79.1(b) (regulating video programming distributors, rather than programming sources).

[41] 47 U.S.C. § 154(i).

[42] *See MPAA*, 309 F.3d at 806; NBCU Comments at 25-26.

[43] *American Library Ass'n*, 406 F.3d at 700 (D.C. Cir. 2005).

[44] 47 U.S.C. § 521.

[45] In fact, in enacting Section 601, Congress expressly stated that "[i]t is the Policy of Congress in this Act to … rely on the marketplace, to the maximum extent feasible," a goal in stark contrast to the regulation of bundled offerings. Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463.

[46] 47 U.S.C. § 532(g).

[47] *Id.*

MAP's invocation of Sections 303 and 309(a) is equally unavailing. As discussed above, Section 303 contains a broad array of mandates,[48] but a prohibition on bundling or similar wholesale restrictions is not reasonably ancillary to any of them. Section 309 requires the Commission to ensure that the public interest will be served by the grant of a license to a broadcaster.[49] The Commission's authority under Section 309(a), however, ends once an application is granted. Thus, restrictions on how broadcasters bargain for retransmission of their programming cannot be reasonably ancillary to the Commission's statutorily-mandated responsibility in Section 309 because that responsibility already has been discharged before a broadcaster even begins retransmission consent negotiations.

Nor can the Commission derive ancillary authority from Section 628(b) of the Communications Act. As discussed above, Congress expressly limited the scope of the Commission's mandate in Section 628(b) to certain unfair or deceptive practices by cable operators and vertically integrated programmers. Bundling is neither unfair nor deceptive, and bears no relation to vertical integration. Thus, this section cannot support ancillary authority to adopt a wholesale à la carte mandate or similar restrictions on any programmers, whether vertically integrated or not.

First Amendment. Finally, contrary to MAP's assertions,[50] the Commission cannot restrict the wholesale packaging or bundling of programming without violating the First Amendment. Notwithstanding MAP's implication that programmers are not entitled to constitutional protections,[51] it is incontrovertible that broadcast-affiliated, cable-affiliated, and independent programmers all engage in the exercise of speech when they produce and package programming.[52] Any rules that regulate programmers, "and, specifically, rules promulgated under Section 628 – are subject, at the very least, to intermediate First Amendment scrutiny,

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[48] *See, e.g.*, 47 § U.S.C. 303(a) (mandate to "[c]lassify radio stations"), 303(b) (mandate to "[p]rescribe the nature of the service to be rendered by each class of licensed station"), 303(d) (mandate to "[d]etermine the location of classes of stations or individual stations").

[49] *See* 47 § U.S.C. 309(a).

[50] MAP Ex Parte at 13.

[51] *Id.* ("An economically-based rule requiring the offering of channels on a stand-alone basis, which may impact, but not prohibit, tying arrangements, does not implicate constitutional rights because it does not impact a programmer's right to expressive content."). First, if MAP seeks only to ensure that channels are offered on a stand-alone basis, no regulatory action is needed: the record demonstrates that this already is the case. Second, if MAP seeks to force the stand-alone offering of channels without alternative options, it does not make sense that this would "not prohibit" packaging or bundling arrangements.

[52] *See, e.g.*, NBCU Comments at 32 ("[T]he programmers in this proceeding are content creators, not simply conduits for content created by others. Thus, their editorial decision to 'bundle' programs and channels is constitutionally protected speech indistinguishable from newspapers' bundling of sections and authors' bundling of essays or short stories."); Disney Comments at 72 ("Under settled precedent, it is clear that the proposed regulations would violate the First Amendment because they would directly and seriously impair the ability of programmers to express their chosen messages.").

which is 'applicable to content-neutral restrictions that impose an incidental burden on speech.'"[53]

Because there is no record to support a claim of anti-competitive tying practices by programmers,[54] it is "highly dubious that the Commission could find a substantial governmental interest to advance in regulating the wholesale programming market."[55] Indeed, "[n]o good reason is offered for such a radical departure from existing practice or controlling precedent,"[56] and thus it is impossible to see how the Commission could demonstrate *any*, let alone a substantial, government interest. Certainly, the Commission cannot sustain a wholesale à la carte or similar content-based requirement based on a desire to protect competition. It lacks any evidence that competition is being harmed by bundling – especially given that all publicly available information indicates that competition is thriving[57] – or that a wholesale à la carte or similar mandate would improve competition.[58]

Even if the FCC could find a substantial interest, prohibiting packaging or bundling would impose a far greater burden on speech than would be necessary to protect consumers.[59] The Commission has not shown any corresponding benefit that would justify such a burden.

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[53] Time Warner Comments at 9, quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner*"). Arguably, the proposed regulations should be subject to strict scrutiny because they are content-based and would discriminate between types of cable television content. *See* Disney Comments at 75. There is no plausible argument that such regulation could survive strict scrutiny. *See id.* at 78.

[54] *See, e.g.*, Viacom Comments at 32; NBCU Comments at 31 ("[A] governmental interest in prohibiting wholesale packaging cannot be compelling because it is inconsistent with congressional intent, which expressly allows such transactions. … [W]hile a governmental interest in prohibiting 'tying' may be compelling, the Commission has failed to demonstrate that such interest is implicated here."). As NBCU further notes, "[T]he Commission's failure to even attempt to make out a case of 'tying' with the rigor required by the relevant antitrust laws 'undermines the likelihood of a genuine [governmental] interest in preventing' tying. Because the Commission lacks a 'genuine' interest, the regulations … cannot be said to 'serve' or advance the Commission's purported interest. Moreover, the means selected by the Commission here are more restrictive than necessary to serve its purported interest in preventing 'tying' because, among other failings, the Commission makes no attempt to limit its regulatory reach to behavior that constitutes 'tying' under the antitrust laws and includes perfectly legal conduct within its regulatory scope. For example, the Commission has not, and could not, establish any of the elements, such as market power, required to establish a violation of the antitrust laws." *Id.*

[55] Viacom Comments at 32. *See also* Disney Comments at 79.

[56] NBCU Reply Comments at 25.

[57] *See* Time Warner Comments at 11-12 (demonstrating that DBS market share has grown dramatically, new competitors, including Verizon and AT&T, have entered the marketplace, and cable's market share is at its lowest point since 1990).

[58] *Turner*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured …. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.").

[59] *See* Disney Comments at 82.

MAP cannot sink any battleship here, no matter how many statutory provisions it lists as purported bases for Commission authority in this area. Its filing represents misfire upon misfire and is itself blown out of the water by the strength of the record against it. No statutory provision provides the Commission with express authority to broadly regulate programmers' negotiations with MVPDs, and the Commission has no basis to exercise ancillary jurisdiction in this case. In addition, Congress consistently has expressed its preference for marketplace negotiations, not regulation, to ensure competition in the video marketplace. Accordingly, irrespective of whether there exists any policy basis on which to mandate wholesale à la carte (which there does not), the Commission lacks general authority to regulate the competitive marketplace for the sale of video programming networks. Moreover, the Commission cannot do so here without violating the First Amendment.

This letter is filed pursuant to Section 1.1206 of the Commission's rules. Please direct any questions to the undersigned.

Respectfully submitted,

/s/ Fritz Attaway

Fritz Attaway
Executive Vice President and Special Policy Advisor
Motion Picture Association of America
1600 Eye Street, NW
Washington, DC 20006

cc: Chairman Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Elizabeth Andrion
Rick Chessen
Rudy Brioché
Amy Blankenship
Rosemary Harold