



**CINNAMON
MUELLER**

BARBARA S. ESBIN
Admitted in the District of Columbia
besbin@CinnamonMueller.com

WASHINGTON, DC
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006

direct: 202-872-6811
fax: 202-683-6791

ST. LOUIS
1714 Deer Tracks Trail
Suite 215
St. Louis, MO 63131

CHICAGO
307 N. Michigan Ave
Suite 1020
Chicago, IL 60601

phone: 312-372-3930

October 7, 2014

Via ECFS

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

Re: American Cable Association Notice of Ex Parte Presentation Re: Revision of the Commission's Program Access Rules, MB Docket No. 12-68; Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, MB Docket No. 12-68; Protecting and Promoting the Open Internet, GN Docket No. 14-28; Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo To Assign and Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-57; Commission Seeks Comment on Applications of AT&T Inc. and DIRECTV To Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-90

Dear Ms. Dortch:

Matthew Polka, President and Chief Executive Office of the American Cable Association ("ACA"), engaged in a conversation on October 5, 2014 with Thomas Wheeler, Chairman, Federal Communications Commission at the COMPTTEL Fall Convention & Expo, Dallas, Texas. The following describes the nature of the discussion concerning three matters under consideration in the above-captioned proceedings. The views expressed are largely consistent with ACA's filings in each docket.¹

¹ *Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, Comments of the American Cable Association, MB Docket No. 12-68 (filed May 14, 2012) ("ACA MVPD Definition Comments"); *Protecting and Promoting the Open Internet*, Comments of the American Cable Association, GN Docket No. 14-28 (filed July 17, 2014) ("ACA Open Internet Comments"); *Protecting and Promoting the Open Internet, Reply* Comments of the American Cable Association, GN Docket No. 14-28 (filed Sept. 15, 2014) ("ACA Open Internet Reply Comments"); *Revision of the Commission's Program Access Rules, etc., Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29*, Comments of the American Cable Association (filed Dec. 17, 2012) ("ACA Program Access FNPRM Comments"); *Revision of the Commission's Program Access Rules, etc., Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29*, Reply Comments of the American Cable Association (filed Jan. 14, 2013) ("ACA Program Access FNPRM Reply Comments"); *Commission Seeks Comment on Applications of AT&T Inc. and DIRECTV To Transfer Control of FCC Licenses and Other Authorizations*, Comments of the American Cable Association, MB Docket No. 14-90 (filed Sept. 16, 2014); *Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo To Assign and Transfer Control of FCC Licenses and Other Authorizations*, Comments of the American Cable Association, MB Docket No. 14-57 (filed Aug. 25, 2014).

Mr. Polka noted reports that the Commission was studying whether the program access rules and other protections and rights afforded to multichannel video programming distributors (“MVPDs”) should cover some online video distributors (“OVDs”). Setting aside the opinion ACA expressed in direct response to the Commission’s Public Notice on this matter,² Mr. Polka urged the Chairman to not lose sight of ACA’s longstanding request that the Commission close a loophole in its program access rules that effectively denies nearly all small and medium-sized MVPDs from having the full legal protections and rights that Congress intended, and that the Commission is now considering extending to OVDs.³

There are more than 900 small and medium-sized MVPDs across the country that rely upon a single buying group, the National Cable Television Cooperative (“NCTC”), to negotiate the bulk of their programming deals. Although Congress specified that MVPDs and their buying groups were to be protected under the program access rules, the Commission defined the term “buying group” in the 1990s in a manner that today excludes NCTC.⁴ As a result, hundreds of small and medium-sized MVPDs that currently rely exclusively on the NCTC to negotiate their programming agreements are effectively left unprotected.

In response to an ACA request in 2012, the Commission initiated a rulemaking and tentatively concluded that it would redefine a “buying group” in a manner that would include the NCTC.⁵ Mr. Polka told Mr. Wheeler that small and medium-sized MVPDs have been patiently waiting two years for the Commission to bring this matter to a close. In fact, the importance of dealing with this matter has grown over this time as the level of vertical integration in the pay television industry has increased, and stands to increase further if the pending Comcast-TWC-Charter and AT&T-DirectTV deals are approved.⁶ Mr. Polka noted there is bipartisan interest in

² ACA MVPD Definition Comments at 5-17 (setting forth the view in response to the Public Notice questions that the statutory definition of an MVPD is an entity that makes available the delivery of multiple channels of video programming over last mile facilities that it owns or controls).

³ See ACA Program Access FNPRM Comments at 4-12, 21-23; ACA Program Access FNPRM Reply Comments at 3-8, 20-23.

⁴ 47 U.S.C. § 548 (b)(2)(B).

⁵ *Revision of the Commission’s Program Access Rules, etc., Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29*, 27 FCC Rcd 12605, ¶ 87 (2012) (“Based on ACA’s comments, it appears that our existing definition of “buying group” set forth in Section 76.1000(c)(1) does not reflect accepted industry practices and thus may have the unintended effect of barring some buying groups from availing themselves of the protections of the nondiscrimination provision of the program access rules, in contravention of Congress’s express intent in enacting Section 628(c)(2)(B) of the Act (footnote omitted). We tentatively conclude that we should revise Section 76.1000(c)(1) to require, as an alternative to the current liability options, that the buying group agree to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer (footnote omitted). We seek comment on this tentative conclusion.”).

⁶ Matthew M. Polka, *Vertical integration stifles competition*, Congress Blog, The Hill (Feb. 12, 2014), available at <http://thehill.com/blogs/ballot-box/198250-vertical-integration-stifles-competition>.

ACA's position in Congress, and support of the Small Business Administration and dozens of smaller MVPDs who publicly urged action despite the risk of programmer retaliation.⁷

Mr. Polka explained that fairness counsels that before the Commission spends time and resources expanding the scope of the program access rules in an unprecedented manner, it should take action to ensure that entities Congress explicitly intended to use the rules are in fact able to do so. ACA believes it is imperative for the Commission to conclude its long-pending program access rulemaking and ensure buying groups for smaller MVPDs have the legal protections Congress wanted for them.

In the context of the Comcast-Time Warner Cable-Charter and AT&T-DirectTV transaction reviews pending before the Commission, Mr. Polka explained that the deals would, if approved, increase the incentive and ability of the merged firms to disadvantage MVPDs by forcing them to pay higher prices for their programming.⁸ He emphasized that adopting the conditions the Commission imposed on Comcast in the Comcast-NBCU transaction isn't enough because they had design flaws that left smaller MVPDs and their bargaining agents under protected. To shield these entities fully, these defects must be corrected.

Finally, with respect to the Open Internet proceeding, Mr. Polka noted that ACA had urged the Commission to take a balanced approach to open Internet rules that protects the consumer Internet experience against the likely threats of all actors who play a role in the multi-sided Internet market. Mr. Polka explained that the Commission would not protect and promote the open Internet if it subjects only broadband ISPs to "no blocking" and "commercial reasonableness" rules while leaving edge providers free to block or discriminate in ways equally or more harmful to the openness.⁹ Mr. Polka mentioned congressional interest in this matter as well.¹⁰

⁷ *Revision of the Commission's Program Access Rules, etc., Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29, Letter to FCC Chairman Thomas Wheeler from Colleen Abdoulah et al., MB Docket No. 12-68 (filed Feb. 25, 2014) (letter was signed by representatives from 53 small and medium sized MVPDs); Revision of the Commission's Program Access Rules, etc., Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29, Ex Parte Letter, United States Small Business Administration Office of Advocacy, MB Docket No. 12-68 (filed Apr. 2, 2014); Letter to FCC Chairman Thomas Wheeler from Chairman Greg Walden (R-OR), et al. (Feb. 11, 2014) (includes questions related to the FCC's program access buying group reforms from Rep. Henry Waxman (D-CA), Rep. Bob Latta (R-OH), and Rep. Brett Guthrie (R-KY), available at <http://docs.house.gov/meetings/IF/IF16/20131212/101585/HHRG-113-IF16-Wstate-WheelerT-20131212-SD002.pdf>; Rep. Terry (R-NE) Questions FCC re Program Access/Buying Group Issue, YouTube.com (Sept. 8, 2014), available at <http://www.youtube.com/watch?v=UxKcF39diGY>.*

⁸ Due to the fact that many rival MVPDs of the merged firms obtain their programming through the NCTC, Comcast-TWC will have an incentive to raise the prices that it charges to this buying group, and these price increases will harm all MVPDs that obtain their programming through the group.

⁹ ACA Open Internet Comments at 15-22; ACA Open Internet Reply Comments at 28-33.

¹⁰ John Eggerton, *Wheeler Concerned About Online Retrans Blackouts*, Broadcasting and Cable (May 20, 2014) (describing FCC Chairman Thomas Wheeler's response to Rep. Peter Welsh's question regarding online programming blackouts), available at <http://www.broadcastingcable.com/news/washington/wheeler-concerned-about-online-retrans-blackouts/131292?nopaging=1>; Rep. Welch (D-VT) Asks FCC Chairman Wheeler If the Cable-ization of the Internet is Beginning, YouTube.com (May 20, 2014), available at http://www.youtube.com/watch?v=VHEN0_H5dkY; Katy Bachman, *House Hearing on Video Marketplace Turns Into Retrans Debate*, Adweek (Sept. 11, 2014) ("Both [Rep.] Eshoo and Rep. Doyle were also distressed that CBS blocked their online content in the [retransmission consent] standoff with Time Warner Cable, evidence, Eshoo said that the [retransmission consent] issue is 'metastasizing.'"), available at <http://www.adweek.com/news/television/house-hearing-video-marketplace-turns-retrans-hearing-152367>.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,



Barbara Esbin
Counsel to the American Cable Association

Cc: Maria Kirby
Gigi Sohn
Jonathan Sallet
Stephanie Weiner
William Lake
Hillary Burchuk
Hillary DiNigro
Jamillia Ferris