

September 18, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Revision of the Commission's Program Access Rules, MB Docket No. 12-68

Dear Ms. Dortch:

On September 16, 2015, Margaret Tobey, Vice President of Regulatory Affairs, NBCUniversal Media, LLC ("NBCUniversal"), and the undersigned met with Michelle Carey, Mary Beth Murphy, Nancy Murphy, Steven Broeckaert, and Kathy Berthot from the Media Bureau to discuss the above-captioned proceeding. At the Bureau's initiative, our discussion mainly focused on the change to the definition of "buying group" that the Commission adopted in a 1998 order and related rule amendments that were specified in an erratum issued by the Media Bureau.

We noted that the 1998 language is ambiguous and that the practical implications and legal consequences of those ambiguities have never been fully explored because no group has sought to avail itself of the new option that was created in 1998. We suggested that any effort to clarify or amend that language must preserve the bedrock principle articulated by the Commission that – even in the event of defaults by multiple members of a buying group – the "programming provider is ensured payment [for] all programming thus far provided."¹ We explained that there is typically a lag of more than a month between when programming is delivered and when payments for that programming are due, so curtailing the requirement that a buying group maintain cash or liquid reserves sufficient to cover the one-month cost of all of the programming purchased by the buying group would increase the risk that the buying group would not be able to ensure full payment to programming providers for all of the programming that was provided to its members.

We expressed the willingness of NBCUniversal to engage constructively with the Bureau in evaluating any specific proposal to clarify or amend the 1998 formulation, when and if such a specific proposal is

¹ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, Erratum, 14 FCC Rcd. 18611, app. A, note to 47 C.F.R. § 76.1000(c)(1) (1999).

tendered. More generally, we expressed NBCUniversal's agreement with the observation by Chairman Wheeler that "the record in the proceeding indicates that a rule change is not necessary for NCTC to qualify as a buying group . . . and that past and recent filings have not demonstrated that it is burdensome to satisfy these requirements, should NCTC choose to do so."² And we reiterated the overarching point that there is less reason than ever to expand program access regulation, given that (among other reasons) the percentage of vertically integrated programming has declined so substantially, the theoretical incentive of cable-affiliated programmers to impede MVPD access to programming does not even apply to the vast majority of ACA's members, there is no record evidence that small MVPDs are experiencing greater difficulty in accessing cable-affiliated programming than non-cable-affiliated programming, and the differentials between the prices paid by small and large MVPDs for programming are diminishing.³ And we reminded the Bureau staff of the incongruity between ACA's and Cox's effort in this proceeding to allow MVPDs with millions of subscribers to participate in a buying group and NCTC's representations to the Justice Department that "NCTC member systems range in size from fewer than 100 subscribers to almost 190,000 [and t]he average size of the members' systems is approximately 2,000 subscribers, and the median is 350."⁴ (We also noted that ACA had recently supported a Commission order in CS Docket No. 98-120 which used 1,500 subscribers as the cut-off for deciding which cable systems were "small" and therefore subject to an HD carriage exemption.)

Finally, we briefly reiterated our arguments against the "rate schedule" proposal in the Further Notice of Proposed Rulemaking, emphasizing that, whether dealing with large MVPDs or buying groups, there is materially more value to a programmer in having firm commitments as to the number of households to which its programming will be delivered and that negotiations are far more individualized than can be reflected in a rate schedule approach.

With respect to the points discussed in the prior two paragraphs, the discussion drew significantly on the comments and reply comments filed by Comcast Corporation and NBCUniversal on December 14,

² See Letter from Tom Wheeler, Chairman, FCC, to Kevin Cramer, U.S. House of Representatives (May 11, 2015).

³ Between 2010-2013, Comcast was the largest MVPD, but its per-subscriber programming costs increased by 29.0%, while the per-subscriber programming costs of Time Warner Cable, Charter, and DirecTV increased by 21.4%, 21.5%, and 26.7% respectively over the same period. See Declaration of Gregory L. Rosston & Michael D. Topper, MB Docket No. 14-57 ¶ 194 (Apr. 8, 2014) (citing 10-Ks of the respective companies). Reducing pricing differentials makes sense to programmers because a programmer that creates too much differential between one MVPD's prices and another's in the same market risks driving subscribers to switch to the MVPD with lower wholesale pricing, which would result in less revenue for the programmer. See Reply Declaration of Gregory L. Rosston & Michael D. Topper, MB Docket No. 14-57 ¶ 56 (Sept. 20, 2014). It's also noteworthy that ACA is no longer making claims like it did several years ago about massive disparities in per-subscriber fees. See, e.g., Reply Comments of ACA, MB Docket No. 07-198, at 7, 8, 9 (Feb. 12, 2008) (claiming that small and medium-sized cable companies face "per-subscriber fees many times higher than what larger MVPDs pay" for retransmission consent, and asserting that the differential is "four to seven times higher," or even "ten to twenty times higher," and is "growing geometrically").

⁴ See Letter from R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Robert E. Marsh, Corporate Counsel Group, L.L.P. (Oct. 17, 2003).

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2012, and January 14, 2013, respectively, especially pp. 3-5 and 17-24 of the former and pp. 1-3 and 7-9 of the latter, as well as the detailed ex parte report we filed on July 3, 2013.

Please let us know if you have any questions.

Sincerely,

/s/ James L. Casserly

James L. Casserly

Counsel for NBCUniversal Media, LLC

cc: Michelle Carey
Mary Beth Murphy
Nancy Murphy
Steven Broeckaert
Kathy Berthot