

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |                      |
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| In the Matter of  | ) |                      |
|   | ) |                      |
| Revision of the Commission's Program<br>Carriage Rules  | ) | MB Docket No. 11-131 |
|   | ) |                      |
| Leased Commercial Access: Development<br>of Competition and Diversity in Video<br>Programming Distribution and Carriage | ) | WT Docket No. 07-42  |
|   | ) |                      |

**COMMENTS**



Matthew M. Polka  
President and Chief Executive Officer  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220  
(412) 922-8300

Ross J. Lieberman  
Vice President of Government Affairs  
American Cable Association  
2415 39<sup>th</sup> Place, NW  
Washington, DC 20007  
(202) 494-5661

Barbara S. Esbin  
James N. Moskowitz  
Cinnamon Mueller  
1333 New Hampshire Ave, N.W.  
2<sup>nd</sup> Floor  
Washington, DC 20036  
(202) 872-6881

Attorneys for the American Cable  
Association

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## I. INTRODUCTION.

The American Cable Association<sup>1</sup> (“ACA”) offers the following comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned matter.<sup>2</sup> Among other things, the NPRM asks whether the Commission should interpret Section 613 as prohibiting “cable operators as a whole,” which presumably includes non-vertically cable operators, from favoring programmers affiliated with other cable operators.<sup>3</sup> The answer, in ACA’s view, is emphatically no.

ACA’s members and their customers benefit from a competitive and diverse video programming market, and have been significant and long-standing supporters of independent video programmers -- particularly smaller ones. Through the National Cable Television Cooperative, Inc.<sup>4</sup> (“NCTC”), ACA members are often important initial customers for newly launched smaller independent programmers, and are a significant source of distribution for many of them.

ACA focuses its comments on addressing the question raised in the NPRM of whether the 1992 Cable Act is best interpreted as preventing discrimination by *all* cable operators (including both vertically and non-vertically integrated) against any programmer not affiliated with an MVPD.<sup>5</sup> A review of the legislative history of the 1992 Cable Act makes it evident that Section 616(a)(3) should

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<sup>1</sup> ACA represents nearly 900 independent MVPDs that serve about 7.6 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in 49 states and many U.S. territories. ACA’s members range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. More than half of ACA’s members serve fewer than 2,000 subscribers. Most ACA members provide video, voice, and data services, as part of a triple-play offering, delivering these critical services to smaller-market and rural subscribers across the nation.

<sup>2</sup> *In the Matter of Revision of the Commission’s Program Carriage Rules, Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Doc. No. 11-131, MB Doc. No. 07-42, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, FCC-119 (rel. Aug. 1, 2011) (“NPRM”).

<sup>3</sup> NPRM at ¶ 76.

<sup>4</sup> NCTC is a Kansas not-for-profit corporation that operates as a programming and hardware purchasing organization for its 950 member companies who own and operate cable systems throughout the United States and its territories. Nearly all of ACA’s members are also members of NCTC.

<sup>5</sup> NPRM at ¶ 76.

not be interpreted as applying to all cable operators, but rather applies only to those that are affiliated with video programmers.

### **III. ACA MEMBERS ARE LONG-TIME SUPPORTERS OF INDEPENDENT VIDEO PROGRAMMERS.**

ACA members, the vast majority of whom have no affiliation with any programming vendors, as well as their customers, benefit from a competitive and diverse video programming market. For MVPDs, such a market provides more choices and can reduce programming costs, which are benefits distributors can pass along to their customers.

Smaller MVPDs are significant and long-standing supporters of independent video programmers, especially smaller ones, and are often important initial customers for these networks. Smaller independent programmers offer a number of advantages for smaller MVPDs: they help these distributors target specialty audiences that are demographically important to the MVPD, and help the smaller MVPDs differentiate themselves in their local market from larger national MVPDs. Moreover, these smaller independent programmers provide an important competitive alternative to programming owned by media conglomerates.<sup>6</sup>

ACA's members carry most national cable programming networks by opting into agreements negotiated by the NCTC. In addition to its deals with the large media conglomerates, the cooperative has agreements with a significant number of smaller independent video programmers, and many of these agreements are popular with NCTC's members. In fact, NCTC, through contracts entered into by small MVPDs, is a significant source of distribution for some of the most successful smaller independent programmers, such

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<sup>6</sup> Indeed, one reason why ACA members do not carry more independent programming is because of the wholesale bundling practices of a small group of media conglomerates. These large programmers, who have significant market power over smaller MVPDs, coerce independent operators to purchase popular networks bundled with less popular networks, and distribute them on widely-subscribed tiers. These practices significantly diminish the budgets and channel capacity of many smaller MVPDs which have a bearing on their wherewithal to purchase additional independent programming. *See also Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Doc. No. 07-198, Comments of American Cable Association (filed Jan. 3, 2008).

as Hallmark Channel, HD-Net, the Outdoor Channel, Tennis Channel, Retirement Living, and Wealth TV, to name a few. Taking into account small independent video programmers that have been acquired by large programmers over the years, the number of these networks that have been supported by NCTC and smaller MVPDs is even greater.<sup>7</sup>

For example, smaller MVPDs are strong supporters of the Outdoor Channel, which carries content that is virtually tailor-made for the subscribers of many of ACA's small rural operator members. The station is carried by over 830 NCTC Members, which represents more than 85% of all its members. Moreover, NCTC members in the aggregate represent about 22% of Outdoor Channel's total subscribers – making NCTC one of the network's largest channels of distribution today. There are many other examples.<sup>8</sup>

In support of smaller independent programmers, this year NCTC branded its annual marketing initiative: "The Year of the Independent." The cooperative's campaign included quarterly marketing promotions and certain consideration was made available to NCTC members that did promotional tie-ins for independent programmers, such as cross-channel placements and print and radio advertising. The independent programmers promoted this year were HD-Net, Halogen, Retirement Living, and Hallmark Channel. The factual record is clear: smaller MVPDs have a long and successful history of providing important carriage opportunities for small and independent programmers.

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<sup>7</sup> Examples include: Great American Country (now owned by Scripps), OLN (now Versus owned by Comcast), Speed Channel (now Speed owned by Fox), Classic Sports Network (now ESPN Classic owned by ESPN), Family Channel (now ABC Family owned by ABC), Golf Channel (now owned by Comcast) and Travel Channel (now owned by Discovery).

<sup>8</sup> NCTC has had an agreement with Hallmark Channel since its inception in 2001, and the network is carried by around 90% of NCTC Members. NCTC was one of HD-Net's first customers in 2001. Today, over one third of NCTC members currently distribute HD-NET and HD-NET Movies, with NCTC in the aggregate being one of their largest distributors. Similarly, Wealth-TV and NCTC reached an agreement very close in time to Wealth-TV's initial debut.

## II. THERE IS NO BASIS FOR INTERPRETING SECTION 616(a) AS APPLYING TO NON-VERTICALLY INTEGRATED MVPDS.

Among other things in this proceeding, the Commission asks whether it should interpret Section 616(a)(3) of the 1992 Cable Act as precluding vertically integrated MVPDs from discriminating against programming vendors *because they are not affiliated with another MVPD*.<sup>9</sup> This is in contrast to the current rules, which prohibit vertically integrated MVPDs from discriminating in favor of their own affiliated programming, but do not prevent discrimination that favors programmers affiliated with other MVPDs.<sup>10</sup>

In discussing this larger issue, the Commission noted that one of the stated findings of the 1992 Cable Act is that “cable operators have the incentive and ability to favor *their* affiliated programmers. This could make it more difficult for non-affiliated programmers to secure carriage on cable systems.”<sup>11</sup> The Commission observed that “[t]his language [from the legislative history of the 1992 Cable Act] is unclear as to whether Congress was referring to the incentives of individual cable operators to favor their own affiliated programmers, or whether Congress was referring to the incentives of cable operators as a whole to favor cable-affiliated programmers, both their own affiliates and those affiliated with other cable operators.”<sup>12</sup>

A review of the entirety of the section quoted in the NPRM makes clear that, whatever else the Commission might believe this passage refers to, Congress in the Senate Report was discussing the incentives of *vertically integrated cable operators* to engage in discriminatory behavior, not all operators regardless of their affiliation with programmers. Specifically, the entire section excerpted in the NPRM reads as follows:

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<sup>9</sup> NPRM at ¶ 75.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 76 (*quoting* 1992 Cable Act §2(a)(5)(emphasis in NPRM).

<sup>12</sup> *Id.*

(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators often have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.<sup>13</sup>

This passage from the Senate Report is not unclear, as characterized in the NPRM, and certainly does not invite the Commission to apply its program carriage rules to non-vertically integrated cable operators.<sup>14</sup> The use of the term “cable operators” in the second sentence only makes sense if it is understood to refer to the “vertically integrated” cable operators discussed in the preceding sentence. Any other interpretation fails because it does not follow logically or grammatically that “as a result” of the cable industry becoming vertically integrated, “all” cable operators often have an incentive to favor “their” affiliated programmers. Rather, this passage is best understood as conveying that “as a result” of the cable industry becoming vertically integrated, “cable operators and cable programmers that have common ownership . . . often have an incentive and ability to favor their affiliated programmers.”<sup>15</sup> Further, the second sentence cannot be read to refer to “all” cable operators because only vertically integrated cable operators have “the incentive and ability to favor their affiliated programmers.”<sup>16</sup> Non-vertically integrated cable operators, by definition, do not have affiliated programmers. As a result, regardless of how the Commission seeks to use this passage from the legislative history, one thing is clear: Congress intended that the program carriage rules apply to vertically integrated operators, not to all cable operators regardless of affiliation with programming vendors.

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<sup>13</sup> Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat.1460-1461, §2(a)(5) (1992).

<sup>14</sup> NPRM at ¶ 76.

<sup>15</sup> Put another way, it is likely that the author of this sentence simply declined to repeat the entire cumbersome phrase “cable operators and cable programmers that have common ownership” in the second sentence because it had already been stated in the first, and because doing so was unnecessary because the two sentences were linked through the use of the phrase “as a result.”

<sup>16</sup> *Id.*, see also NPRM at ¶ 76.

This interpretation is further bolstered by the fact that nowhere in the Senate or House Reports is there any other indication that Congress was concerned about discrimination by non-vertically integrated cable operators against unaffiliated programmers. In contrast, there are other statements in the legislative history where Congress explicitly expresses its concern about discrimination by vertically integrated cable operators.<sup>17</sup> In addition, Congress made clear that the Commission was to “rely on the marketplace, to the maximum extent feasible.”<sup>18</sup> Where, as here, it is clear that the problem being addressed by the statute is limited to situations involving vertically integrated cable operators, Congress’ stated policy of relying on the marketplace to the maximum extent possible militates strongly against the Commission imposing significant burdens on cable operators that are not vertically integrated under the guise of the program carriage rules.

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<sup>17</sup> See, e.g., H. R. Rep. No. 102-862 (1992) at 91 (“[T]he Senate bill bars national and regional cable programmers who are affiliated with cable operators from (1) unreasonably refusing to deal with any multichannel video programming distributor; and (2) discriminating in the price, terms, and conditions in the sale of their programming to multichannel video distributors if such action would impede retail competition.”).

<sup>18</sup> 1992 Cable Act, § (2)(b)(2) (statement of policy).

**IV. CONCLUSION.**

For the reasons set forth herein, ACA believes that there is no basis for interpreting Section 616 of the 1992 Cable Act as subjecting independent cable operators to complaints under the Commission's program carriage rules and the Commission must avoid any outcome in this proceeding that would do so.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**



By: \_\_\_\_\_

Barbara S. Esbin  
James N. Moskowitz  
Cinnamon Mueller  
1333 New Hampshire Ave,  
2<sup>nd</sup> Floor  
Washington, DC 20036

Matthew M. Polka  
President and CEO  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220

(412) 922-8300

(202) 872-6881

Ross J. Lieberman  
Vice President of Government Affairs  
American Cable Association  
2415 39<sup>th</sup> Place, NW  
Washington, DC 20007

Attorneys for American Cable Association

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