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

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

COMMENTS

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EXECUTIVE SUMMARY

ACA submits that for the last 20 years, the program access rules have played a vital role in protecting and preserving competition and diversity in the video programming market, and in 2012, that these rules continue to remain as important as ever. Instead of relaxing the protection of the rules, the Commission must take action now to address shortcomings in the program access rules that have, in effect, interfered with the protections Congress always envisioned. In particular, the exclusivity prohibition remains as vital to the preservation and protection of competition in the video distribution market today as it has in the past and therefore should be extended for an additional five-year term. Moreover, to ensure that the relief available from unfair and anticompetitive practices is available to the covered entities who purchase cable-affiliated programming, the Commission must: (i) update its rules concerning "buying groups" and (ii) close the uniform price increase loophole by prohibiting cable-affiliated programmers from charging above "fair market value" rates.

<u>Retention of the Prohibition on Exclusive Contracts.</u> In order to prevent harm to competition and diversity in the market for MVPD services, it is imperative that all MVPDs, including small and medium-sized cable operators, have continued access to programming controlled by cable-affiliated programmers. The programming, which can include both national and regional networks, is vital for MVPDs to make available to their customers in order to be considered a competitive service. Time and again, the Commission has found that vertically integrated cable programmers have the incentive and ability to favor their cable affiliates and harm rival MVPDs through unfair acts and practices. One well-recognized practice that has been shown to diminish competition and diversity, particularly in the areas served by the vertically integrated cable operators that dominant many markets, is the practice of cable operators securing programming for themselves, and withholding it from others. The protection

provided by Section 628(c)(2)(D) succeeds in addressing this problem by ensuring that cable-affiliated programming remains available to other MVPDs, including small and medium-sized cable operators.

The Commission's own data show that there have been no changes in market fundamentals since its last examination of the exclusivity sunset that warrant permitting Section 628(c)(2)(D) to expire. The cable industry remains concentrated with little change in the number of MVPD subscribers receiving their programming from the four largest vertically integrated cable operators. Moreover, cable's control of important programming also remains strong, with a handful of large vertically integrated cable operators continuing to control significant numbers of top 20 satellite cable programming networks and ever-increasing numbers of regional sports networks ("RSNs").

The Commission not only reached the conclusion that vertically integrated cable operators could harm competition and diversity in the market by withholding its programming from other MVPDs in its last sunset review in 2007, it has twice subsequently examined these same potential harms, and reached largely the same conclusions in its 2010 *Terrestrial Loophole Order* and more recently, in its 2011 *Comcast-NBCU Order*. It is *a fortiori* the case that no significant changes have occurred in the market in the even briefer interval since these last two recent decisions were made.

Nor do the remedial conditions imposed on Comcast-NBCU eliminate the need to retain the program access rules applicable to it and other vertically integrated programmers. The need for protection from the risk of exclusive behavior by cable-affiliated programmers is not limited to one vertically integrated provider it is industry-wide. Moreover, the Comcast-NBCU remedial conditions are not permanent, but rather set to expire in 2018, assuming they are not modified or eliminated earlier, whereas sunset of the statutory exclusivity rule will be permanent.

Although the level of vertically integrated programming may rise and fall over time, and the identity of the vertically integrated cable operators may change, the basic market structure wherein a very few vertically integrated cable operators control much of the most important programming has remained constant. Given the ability of vertically integrated cable operators to obtain a competitive edge in the MVPD market through ownership of national and regional programming, the Commission should anticipate that cable operators would seek to obtain more national and regional programming in the event the ban on exclusive arrangements is permitted to sunset.

<u>Modification of Program Access Rules to Ensure Buying Groups Are Adequately Protected</u>. The Commission must periodically update its rules to keep pace with marketplace developments and industry experience. The need for such updates is particularly pressing with respect to the application of the rules to buying groups, so that these groups, and the small and medium-sized cable operators who utilize them, can avail themselves of the protections in the same manner as individual MVPDs as was intended by Congress.

Buying groups play an extremely important role in today's marketplace, both for small and medium-sized MVPDs and for programmers. By negotiating standardized master agreements that its members can opt into, a buying group is generally able to obtain lower license fees for its members than these MVPDs could obtain on their own. Buying groups also lower transaction costs for programmers by allowing them to efficiently deal with one entity for their negotiations and fee collections, instead of many individual MVPDs.

Nearly all small and medium-sized cable operators purchase the vast majority of the national programming that they make available to their customers through the National Cable Television Cooperative ("NCTC") buying group. Since these MVPDs rely on a buying group to license this programming, they will only receive protection from the program access rules to the extent that their buying group is given the same protections in their dealings with vertically integrated programmers as individual MVPDs are given.

At the time that the program access rules were first enacted and implemented, Congress and the Commission recognized the valuable role of buying groups in the video distribution marketplace, and provided special provisions to permit buying groups to avail themselves of the rules' protections. However, over time problems with the Commission's rules with respect to buying groups have become apparent which as significantly limited their practical effectiveness. ACA has identified three such problems and offers three targeted proposals for addressing these shortcomings.

First, the Commission should modernize its definition of a "buying group" to reflect the level of liability a buying group agrees to assume under current industry practice. The Commission's current definition of a buying group requires the assumption of full liability (either on the part of the buying group or via joint and several liability for buying group members) for payments due to programmers under a master agreement. Yet programmers today freely negotiate with the NCTC for programming contracts without demanding such excessive liability on the part of the or their members. As a result, this condition, which has remained on the books unchanged since 1993, effectively stands as an impediment to the ability of the nation's most widely utilized buying group to secure the benefits of the Commission's program access rules on behalf of its members. The Commission once before recognized that its liability conditions were too restrictive, and agreed to add to its rules an alternative means for buying groups to provide financial assurances to programmers, but the amendment was never codified.

Accordingly, ACA recommends that in addition to the full and joint and several liability requirements presently contained in the Commission's rules, which are not utilized in practice by the NCTC, an additional alternative requirement be added that a buying group be required only to pass-through payments from its member MVPDs to programmers. This practice reflects current marketplace practices and conditions and offers reasonable protections to cable-affiliated programmers against excessive risk in contracting with a buying group in satisfaction of the Commission's general criteria for buying groups.

Second, the Commission should prohibit cable-affiliated programmers from unreasonably preventing particular members of a buying group from opting into a master agreement. Currently, the program access rules prohibit discriminatory practices, including refusals to deal, but set no explicit restraints on the ability of a cable-affiliated programmer to unreasonably prevent particular members of a buying group from participating in its master agreement with the buying group, even if the member normally purchases a substantial share of its programming from the buying group. If a cable-affiliated programmer had the right to arbitrarily exclude any member that it wished from its master agreement with a buying group, the requirement that cable-affiliated programmers must negotiate non-discriminatory agreements with buying groups could be rendered completely meaningless. Thus, to effectuate congressional intent that buying group be able to utilize the program access rules, the Commission must set limits on the ability of a cable-affiliated programmer to unreasonably prevent regularly participating members of a buying group from opting into its master agreement.

To remedy this issue, ACA recommends that the Commission adopt explicit and verifiable standards for determining when a buying group member may presumptively be allowed to participate in a cable-affiliated programmer's master agreement. Specifically, ACA recommends that the Commission: (i) establish a "safe harbor' subscriber level for individual MVPDs to participate in a buying group's master agreement with a cable-affiliated programmer, that is, MVPDs with fewer than the "safe harbor" number of subscribers are presumptively entitled to participate in the deal; (ii) specify that above the "safe harbor" level of subscribers, a buying group member would also be entitled to participate if it can demonstrate that some specified minimum share of its total expenditures on programming are incurred through the buying group; and (iii) specify that when an expiring master agreement is being renewed, members participating in the expiring agreement would have the right to participate in the renewed agreement, regardless of size. As a consequence of this safe harbor, it would be a violation of the Section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group that seeks to maintain the right of a member that regularly participates in its master agreements to opt into the deal.

Third, the Commission should clarify that the standard of comparability for a buying group with respect to volume discounts is a single MVPD serving the same number of subscribers. ACA submits that the ambiguity in the regulations can create uncertainty during negotiations which could decrease buying groups and cable-affiliated programmers reaching deals and increase the chances of them seeking relief through the program access complaint procedures. ACA suggests that the most reasonable interpretation of the program access rules should lead the Commission to adopt a standard of comparability for a buying group regarding volume discounts is to an individual MVPD providing the same number of subscribers to the programmer. Section 628(c)(2)(B)(iii) describes permissible pricing differentials, in providing programming to MVPDs and buying groups, that take account of economies of scale, cost savings, or other benefits "reasonably attributable to the number of subscribers served by the distributor." All the statutory factors that explain why a buyer with more subscribers may be able to negotiate lower license fees than a buyer with fewer subscribers apply without distinction to whether the buyer is a single MVPD or a buying group. That is, there is no distinction made with respect to the volume-related discounts available to single MVPDs and buying groups under the statute or the Commission's rules. In other words, for purposes of judging whether prices offered to a buying group are discriminatory, the buying group must be considered "similarly situated" to an individual MVPD offering the programmer the same number of subscribers.

Providing such explicit guidance will bring much-needed clarity and certainty to industry participants, thereby increasing the likelihood of deals getting done, and decreasing the number of parties that would utilize the program access rules to resolve disputes. In addition, in the instances where complaints are filed, clarity will likely reduce administrative costs involved in addressing them. More importantly, without this explicit stipulation, the non-discrimination rule will remain completely ineffectual in providing protection to buying groups.

Once the Commission has clarified the members of a buying group that are presumptively permitted to participate in a master deal with a cable-affiliated programmer, as a corollary, it must also specify that a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over a range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current membership eligible to participate in the master agreement. Under this requirement, a cable-affiliated programmer who fails or refuses to offer a non-discriminatory schedule of prices based on the number of subscribers buying group members could provide if those chose to opt into the programming deal would be in violation of the prohibition against discriminatory practices under Section 628(c)(2)(B).

<u>Closing the Uniform Price Increases Loophole</u>. The Commission has repeatedly recognized that the non-discrimination proscription in the program access rules is ineffective in addressing the significant competitive problem of uniform price increases imposed by cable-

affiliated programmers for the purpose of disadvantaging MVPDs in the marketplace. This is because the prohibition provides almost no practical limits of any sort on a cable-affiliated programmer – because the internal transfer price within a vertically integrated firm can be arbitrarily set at any level without necessarily influencing any internal decisions of the vertically integrated firm. Although MVPDs are charged the same price as the affiliated cable operator, the uniform price that is facially neutral has a disparately harmful impact in application to non-affiliated MVPDs.

The Commission acknowledges in the NPRM that the uniform price increases loophole renders the price discrimination prohibition in program access rules largely ineffective to prevent a cable-affiliated programmer from raising license fees to MVPDs, and that it has addressed this problem in specific merger orders through the imposition of a "final offer" commercial arbitration remedy. ACA suggests that the preferable course is for the Commission to address this significant competitive problem by explicitly adopting a fair market value standard for complaints brought pursuant to Section 628(c)(2)(B) alleging price discrimination. The Commission has repeatedly employed a "fair market value" standard to close the uniform price increases loophole in the remedial conditions it imposes to temper the effects of vertical integration in its transaction review orders.

ACA submits that it would be appropriate for the Commission to apply the same fair market value standard for judging discrimination with respect to all cable-affiliated programming that the Commission has previously used in reviewing in specific transactions combining distribution and programming assets. The main difference between a nondiscrimination standard and fair market value standard is that the former only compares the contract that a programmer offers to an MVPD with other contracts that the *same* programmer offers to other MVPDs, while the latter compares the contract that a programmer offers to an MVPD not only to other contracts that the *same* programmer offers to other MVPDs but also to contracts that *other* non-vertically integrated programmers offer to MVPDs for similar types of programming.

Use of a fair market value standard is the only means of guaranteeing MVPDs non-disparate treatment with respect to cable-affiliated programming. In determining fair market value, the primary evidence that would be accepted to determine fair market value would be evidence on the prices that other non-cable-affiliated programmers offer for similar types of programming. In addition, the Commission should also amend its rules to give the complainant MVPD and respondent programmer the option of agreeing to enter into final-offer arbitration based on a fair market value standard as an alternative to pursuing the complaint before the Commission. By adopting a fair market value standard, the Commission can ensure that cable-affiliated programmers do not unfairly disadvantage MVPDs through the imposition of uniform price increases for marquee programming that is not otherwise actionable under the anti-discrimination provision of Section 628(c)(2)(B).

These revisions to the program access rules are necessary to ensure that small and medium size MVPDs that purchase programming through buying groups, receive the same level of protection from the program access rules as do larger MVPDs, and to address the failure of the current program access rules to address pricing levels thus permitting cable-affiliated programmers to adopt pricing strategies that appear neutral but in fact have a disparate impact on non-affiliated MVPDs. With these carefully targeted reforms, ACA is hopeful the program access rules will operate as intended to protect all MVPDs against the harmful effects of vertical integration.

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COMMENTS

American Cable Association

I. INTRODUCTION AND BACKGROUND

The American Cable Association ("ACA") submits these comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] In the NPRM, the Commission seeks comment on whether the prohibition on exclusive contracts between

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[1] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable inc. (subsidiaries), Assignees, et. al.*, Notice of Proposed Rulemaking, 2012 FCC LEXIS 1257, MB Doc. No. 12-68, 07-18, 05-192 (released Mar. 20, 2012) ("NPRM").

vertically integrated satellite cable programming vendors and cable operators contained in Section 628(c)(2)(D) of the Communications Act of 1934, as amended ("the Act"),[2] continues to be necessary to preserve and protect competition in the distribution of video programming, and should therefore be retained, or in the alternative, permitted to sunset or be relaxed.[3] In addition, the NPRM seeks comment on potential revisions to the remaining program access rules to better address alleged violations, particularly with respect to the regulations' effectiveness in curbing rate discrimination experienced by multichannel video programming distributors ("MVPDs").[4]

ACA submits that the exclusivity prohibition remains as vital to the preservation and protection of competition in the video distribution market today as it has in the past and therefore should be extended for an additional five-year term. ACA also strongly supports the Commission's decision to address shortcomings in its program access rules that have, in effect, limited the relief available from unfair and anticompetitive practices with respect to the sale of cable-affiliated programming to rival MVPDs.[5] To ensure that the protections Congress envisioned are functioning as intended, the Commission must take action now to: (i) update its rules concerning "buying groups" and (ii) close the uniform price increase loophole by prohibiting cable-affiliated programmers from charging MVPDs above "fair market value" rates.

II. MARKET CONDITIONS CONTINUE TO WARRANT THE PROHIBITION OF EXCLUSIVE CONTRACTS BETWEEN SATELLITE CABLE PROGRAMMERS AND THEIR AFFILIATED CABLE OPERATORS

In order to prevent harm to competition and consumers in the market for MVPD services, it is imperative that all MVPDs, including small and medium-sized cable operators, have

[2] 47 U.S.C. § 548(c)(2)(D).

[3] NPRM ¶ 1.

[4] *Id.,* ¶¶ 91-103.

[5] *Id.,* ¶¶ 98-102.

continued access to the programming controlled by cable-affiliated programmers. ACA members and others rely on access to this programming for a significant amount of the programming they provide to subscribers. This includes both national programming and regional sports networks ("RSNs"). Losing access to this programming would harm competition and consumers, particularly in the areas served by the vertically integrated cable operators that dominate many markets. The protection provided by Section 628(c)(2)(D) helps address this problem by ensuring that cable-affiliated programming remains available to other MVPDs, including small and medium-sized cable operators. Without this protection, competition and diversity in the market for MVPD services would be harmed because many small and medium-sized cable operators and their customers would likely lose access to critical programming. For these reasons, and to protect the continued viability of small and medium-sized cable operators, the Commission must not permit Section 628(c)(2)(D) to sunset at the present time.

A. The Commission has Repeatedly Found that Extending Section 628(c)(2)(D) Is Necessary to Preserve and Protect Competition

The Commission has twice previously concluded that retention of the exclusivity prohibition is necessary to preserve and protect competition based on its assessment of the status of competition in the video programming and distribution markets.[6] Section 628(c)(2)(D) of the Act prohibits cable operators from entering into exclusive contracts for satellite cable programming with satellite cable programming vendors in which they have an attributable ownership interest.[7] Under Section 628(c)(5), the exclusivity ban was scheduled to sunset on

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[6] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 17 FCC Rcd 12124, ¶¶ 3, 52 (2002) ("2002 Extension Order") (extending the exclusive contract prohibition until October 5, 2007); *see Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791 (2007) ("2007 Extension Order") (extending the exclusive contract prohibition until October 5, 2012), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010) ("Cablevision I").

[7] 47 U.S.C. § 548(c)(2)(D). The provision states that the Commission's regulations shall:

October 5, 2002, unless the Commission determined that the ban "continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming."[8] The Commission made that finding in 2002 and extended the ban for five years (*i.e.*, until October 5, 2007), concluding that vertically integrated cable programmers had both the incentive and the ability to favor their cable affiliates over cable's competitors, and that a sunset of the ban on exclusivity would expose cable's competitors to an unacceptable risk that they would be denied access to programming for which no good substitute exists.[9]

In 2007, the Commission again employed economic theory, record evidence, and its own predictive judgment and once more determined that the ban on exclusive programming arrangements between cable operators and satellite cable programmers remained necessary.[10] At that time the Commission determined that cable-affiliated programmers retained the ability and incentive to harm competition by entering exclusive arrangements with their affiliated cable operators.[11] In reaching this conclusion, the Commission determined that developments over the preceding five years had not diminished the importance of cable-affiliated programming or affected their ability to favor their affiliated cable operators at the expense of competitors.[12] Among the problems it noted was the continued control by a small number of cable-affiliated programmers of the popular national programming and RSNs that are in high demand by MVPD

> (D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

[8] *Id.* § 548(c)(5).

[9] *See* 2002 Extension Order, ¶¶ 3, 52.

[10] *See* 2007 Extension Order, ¶¶ 1, 12-14.

[11] *See id.,* ¶ 29.

[12] *See id*., ¶ 37.

subscribers.[13] As a result, the Commission found that, although there had been some pro-competitive trends in the video distribution market, the ban on exclusive arrangements remained necessary and extended the exclusive contract prohibition for five more years.[14] The D.C. Circuit Court of Appeals upheld the Commission's predictive judgments about the likely harms associated with lifting the ban exclusive cable-affiliated programming agreements, noting that the Commission's "predictive judgment and technical analysis are just the type of conclusions that warrant deference from this Court."[15] The current extension of Section 628(c)(2)(D), based on the Commission's findings in the 2007 Extension Order, is set to expire on October 5, 2012, absent action by the Commission in the instant proceeding.[16]

B. The Commission's Data Show There Have Been No Changes in the Market That Warrant Allowing Section 628(c)(2)(D) to Expire

The fundamental facts underlying the Commission's previous conclusions that retention of the exclusivity prohibition was necessary remain operative today: access to cable-affiliated programming networks is essential for competition in the video distribution market to survive and thrive. Specifically, the competitive advantage afforded by this programming gives vertically integrated programmers both the ability and the incentive to maintain or obtain market power by withholding programming from MVPD competitors. Consequently, permitting Section 628(c)(2)(D) to sunset will drive cable-affiliated programmers to execute exclusive contracts with their affiliated cable operators, damaging competition and diversity in the distribution on video programming.

ACA concurs with the NPRM's assessment that it is appropriate to consider data similar to that examined in previous sunset orders to determine whether the exclusive contract

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[13] *Id.*

[14] *See id.,* ¶¶ 1, 16, 81.

[15] NPRM, ¶ 15; Cablevision I, 597 F.3d at 1314.

[16] *Id.*, ¶ 1.

prohibition remains necessary today.[17] Moreover, the data provided in the NPRM shows that little has changed since the last time the Commission addressed this issue. In the *2007 Extension Order*, the Commission found that:

> While there has been a decrease since 2002 in the percentage of the most popular programming networks that are vertically integrated, we find that the four largest cable MSOs (Comcast, Time Warner, Cox, and Cablevision) still have an interest in six of the Top 20 satellite-delivered networks as ranked by subscribership, seven of the Top 20 satellite-delivered networks as ranked by prime time ratings, [and] almost half of all RSNs . . . . [Moreover,] the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs has increased from 34 percent to between 54 and 56.75 percent.[18]

The data provided in the NPRM indicate that little has changed in the market for cable programming since 2007 with respect to these key indicators. The current data demonstrates that four of the five top cable operators in terms of subscribers hold ownership interest in satellite delivered national programming networks.[19] This is little changed since 2007 when the four largest cable operators controlled satellite delivered national networks.[20] The data further shows that in 2011, vertically integrated cable operators had an interest in 7 of the top 20 satellite delivered national programming networks (as ranked by subscribership).[21] This represents an increase in the number of top 20 satellite delivered national programming networks affiliated with cable operators since 2007.

The data regarding RSNs also shows an increase in the number affiliated with cable

[17] *Id.*, ¶ 22. Specifically, the Commission has examined data relating to (i) the number of MVPD subscribers nationwide and in regional markets attributable to each category of MPVD, including cable operators, as well as the extent of regional clustering by cable operators; (ii) the number of satellite-delivered, national programming networks and the percentage of such networks that are cable-affiliated; and (iii) the number of regional programming networks and the percentage of such networks that are cable-affiliated. *Id.*

[18] 2007 Extension Order, ¶ 37.

[19] NPRM, Appendix A, n. 21; Appendix B, Table 2 (Comcast, Time Warner Cable, Cox and Cablevision).

[20] 2007 Extension Order, ¶ 37.

[21] NPRM, Appendix B, Table 1, Table 2.

operators since 2007. In 2007, 46 percent of RSNs were cable-affiliated, while in 2011 the number was up to 52.3 percent -- a 6.3 percent increase since 2007, with a majority of these being affiliated with the same four operators.[22] Moreover, the percent of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable multi-system operators has only slightly decreased from 47.18 percent in 1994 to 42.7 percent in 2011.[23] This is a change of less than 5% over a 17 year period.

These data clearly demonstrate that there has been little overall change in the level of programming controlled by cable-affiliated programmers since the Commission last found, and the courts upheld, that retention of the Section 628(c)(2)(D) exclusivity prohibition was necessary to protect competition and diversity in the market for MVPD services in 2007. Accordingly, there is no basis to depart from the Commission's findings in its *2007 Extension Order* regarding the importance of prohibiting vertically integrated cable programmers from granting exclusive access to their affiliated cable operators for must-have programming. Vertically integrated cable operators controlling this programming still have overwhelming market power, and allowing these providers to withhold access to this critical programming threatens competition in the market for MVPD services.

C. The Commission Recently Found that Allowing a Vertically Integrated Programmer to Withhold Programming from Competitors Posed a Risk to Competition

The Commission has twice reviewed the potential harms that would flow from allowing vertically integrated programmers to withhold programming from competitors since 2007. Specifically, and most recently, in its 2011 *Comcast-NBCU Order*, the Commission determined that Comcast-NBCU's control over national cable programming and RSNs would give it the

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[22] *Id.*, Appendix C, Cable-Affiliated, Regional Sports Networks, Tables 1 and 2.

[23] *Id.*, Appendix A (Row labeled "%of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs.").

ability to disadvantage some or all of its distribution rivals by withholding access to, or raising the costs of, vertically integrated programming.[24] The Commission found that withholding Comcast-NBCU national cable programming and RSNs, for which there are no good substitutes, would cause competitors to lose significant numbers of subscribers, and harm competition by allowing the accumulation and maintenance of market power.[25] Moreover, the Commission found that excluding competitors from access to this programming would often be profitable for the company.[26] Indeed, the Commission found that the market power provided by control of vertically integrated programming was not only a risk to MVPD competitors within Comcast's distribution markets, but outside them as well.[27] For this reason, the Commission required Comcast-NBCU to make its programming available to MVPDs nationally – even outside Comcast's cable footprint.[28]

In addition to its review of the Comcast-NBCU transaction, the Commission also found in its 2010 *Terrestrial Loophole Order* that cable operators have the ability and incentive to withhold terrestrially delivered RSN programming from competitors.[29] In reaching this conclusion, the Commission noted that the national market share of cable operators was sufficient to make it profitable for cable-affiliated programmers to withhold local and regional programming from MVPD competitors.[30] The Commission further reasoned that 77 percent of cable subscribers are served by systems that are parts of regional clusters, which enhances the

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[24] Comcast-NBCU Order, ¶¶ 36-37.

[25] *Id.*, ¶¶ 36-37, 39.

[26] *Id.*, ¶ 44.

[27] *Id.*, ¶ 55.

[28] *Id*.

[29] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Doc. No. 07-198, First Report and Order, 25 FCC Rcd 746 , ¶¶ 27-28, 60 (rel. Jan. 20, 2010) ("Terrestrial Loophole Order"), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) ("Cablevision II").

[30] Terrestrial Loophole Order, ¶ 27.

potential profitability of withholding regional programming.[31] The Commission also demonstrated that these concerns were not merely hypothetical, and it was able to identify no fewer than seven separate instances where cable-affiliated programming was withheld from competing MVPDs.[32] For these reasons, the Commission established, and sustained in the face of a court challenge, rules addressing a number of harmful activities concerning cable-affiliated, terrestrially delivered programming, including exclusive contracts, to ensure that competitors have the access to programming they need to compete in the video delivery market.[33]

These decisions clearly demonstrate that in very recent reviews of the MVPD programming market, the Commission has twice found that conditions require Commission action to prevent harm to competition and consumers that would flow from permitting cable-affiliated programmers to disadvantage non-affiliated MVPDs in the delivery of programming. As the data reported in the NPRM demonstrates, no substantial changes in the market in the brief interval since the last review of the exclusive contract prohibition in 2007. It is *a fortiori* the case that no significant changes have occurred in the market in the even briefer interval since these last two recent decisions were made.

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[31] *Id.*, ¶ 28.

[32] *Id.*, ¶ 30.

[33] *Id.*, ¶ 1; Cablevision II, 649 F.3d 695 (upholding Commission's findings that cable remains dominant in MVPD marketplace and continues to control significant cable programming assets on both a national and regional basis, as well as most of the Commission's regulations but vacating and remanding to the Commission the ruling that Section 628(c)(2)-like conduct involving terrestrially delivered programming is "categorically unfair;" reasoning that the Commission may not, without more, assume that apparent congressional judgments with respect to satellite programming necessarily apply in precisely the same way to terrestrial programming, while expressing view that the Commission could make the unfairness determination on a case-by-case basis or through a public interest exception like that applicable to exclusive contracts under Section 628(c)(2)(D), (c)(4)).

D. The Conditions Placed on Comcast-NBCU Do Not Alter the Conclusion that Section 628(c)(2)(D) Remains Necessary to Protect Competition and Diversity in the MVPD Market

The NPRM asks whether the fact that the Commission adopted conditions applicable to Comcast-NBCU eliminates the need to retain the program access rules applicable to it and other vertically integrated cable operators.[34] The answer is "no." The conditions applied to the Comcast-NBCU transaction are not relevant to the present inquiry. As an initial matter, the conditions are not permanent but rather are set to expire in 2018, assuming that they are not eliminated or modified earlier.[35] However, the sunset of the ban on exclusive arrangements contained in Section 628(c)(2)(D) will be permanent.[36] Once the ban on exclusive programming contracts involving vertically integrated programming is no longer in effect, the Commission and competitors will not be able to prevent the recognized competitive harms arising from the vertical integration of Comcast and NBCU through use of exclusive arrangements after the 2018 expiration of the license transfer conditions.

In addition, the NPRM reflects the fact that although the level of vertically integrated programming has risen and fallen over time, and the identity of the vertically integrated cable operators may change, the basic market structure wherein a very few vertically integrated cable operators control much of the most important programming has remained constant.[37] Today, there are 41 RSNs that are vertically integrated with five large cable operators other than

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[34] *See* NPRM, ¶ 81 (seeking comment on the effect that the sunset of the conditions adopted in the Comcast-NBCU Order should have on the Commission's analysis).

[35] *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, Appendix A, Condition XX (2011) ("Comcast-NBCU Order") (conditions to remain in effect for seven years (until January 2018), but the Commission will consider a petition for modification under certain conditions).

[36] *See* Section 628(c)(5) (providing no authority for Commission to reinstate Section 628(c)(2)(D) once it has sunset).

[37] *See* NPRM, Appendix B, Table 2 (7 of top 20 satellite delivered national programming networks, as ranked by average prime time ratings, were cable-affiliated in 2002, 2007, and 2011).

Comcast, all of which have the same ability and incentive to harm competition through the use of exclusive arrangements.[38] Given the clear competitive advantage enjoyed by vertically integrated cable operators with national programming and RSNs, the Commission should anticipate that further transactions and mergers would occur to lock-up national and RSN programming in the event the ban on exclusive arrangements is permitted to sunset. The Commission should exercise its predictive judgment to avoid this outcome and keep the ban on exclusive arrangements contained in Section 628(c)(2)(D) in place.[39] This will prevent unfettered vertical integration between satellite delivered national programming networks and large cable operators.

In sum, the need for protection from the risk of exclusive behavior by cable-affiliated programmers is not limited to one vertically integrated provider. The risk of harm to competition and diversity in the market for video programming distribution is presented by any similarly situated provider and warrants the Commission retaining the protections provided by Section 628(c)(2)(D). For these reasons, the ban on exclusive arrangements contained in Section 628(c)(2)(D) remains necessary and it is imperative that the Commission not permit this restriction to sunset.

III. THE COMMISSION SHOULD MODIFY THE PROGRAM ACCESS RULES TO ENSURE THAT BUYING GROUPS UTILIZED BY SMALL AND MEDIUM SIZED MVPDs CAN AVAIL THEMSELVES OF THE PROGRAM ACCESS RULES

The NPRM notes that the program access rules adopted by the Commission in 1993 have remained largely unchanged since that time, and seeks comment on how the rules can be improved, especially in light of marketplace developments and industry experience with the

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[38] *See Id.* at Appendix C, Table 1 (demonstrating that there are 41 RSNs that are affiliated with cable operators other than Comcast (*i.e.*, Bright House, Cablevision, Cox, Time Warner, and Charter (via joint venture with Comcast).

[39] *See, e.g.,* Cablevision I, 587 F.3d at 1314 (commission predictive calculations permitted so long as not counter to the evidence, implausible or irrational).

rules over the past two decades.[40] ACA agrees that the Commission must periodically update its rules to keep pace with marketplace development and industry experience. The need for such updates is particularly pressing with respect to the application of the rules to buying groups, and the small and medium-sized cable operators who utilize them, so that these groups can avail themselves of the protections intended by the program access rules in the same manner as individual MVPDs.

Buying groups play an extremely important role in today's marketplace, both for small and medium-sized MVPDs and for programmers. By negotiating standardized master agreements that its members can opt into, a buying group such as the National Cable Television Cooperative ("NCTC") is generally able to obtain significantly lower license fees for its members than these MVPDs could obtain through direct deals with programmers.[41] Buying groups also lower transaction costs for programmers by allowing them to efficiently deal with one entity for their negotiations and fee collections, instead of many individual MVPDs. A buying group like the NCTC is the primary means by which the vast majority of small and medium-sized cable operators purchase their satellite cable programming. Since small and medium sized MVPDs rely on a buying group to license programming, they will only receive protection from the program access rules to the extent that buying groups are given the same protections in their dealings with vertically integrated programmers as individual MVPDs are

[40] NPRM, ¶ 96.

[41] As discussed in more detail in Section III.A.1, below, the NCTC is organized as a buying group for its 910 small and medium-sized MVPD member companies for the purpose, inter alia, of negotiating master agreements with video programmers that buying group members can opt into. NCTC then acts as an interface between its members and the programmer so that the programmer is able to deal with a single entity for purposes of contract negotiations, determining technical standards, billing and collection, and like functions. *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc, Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner cable Inc. (subsidiaries), Assignees, et al.*, Declaration of Frank Hughes, Senior Vice President of Member Services for National Cable Television Cooperative, Inc., MB Doc. Nos. 12-68, 07-18, 05-192, ¶¶ 3-4 (filed June 22, 2012) ("NCTC Declaration").

given.

Both Congress and the Commission have recognized this fact and provided special protections to buying groups through program access rules and regulations.[42] For example, Section 628(c)(2)(B) expressly prohibits discrimination by a vertically integrated satellite cable programming vendor "among or between cable systems, cable operators, or other multichannel video programming distributors, *or their agents or buying groups* . . . ."[43] The legislative history

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[42] 47 U.S.C. § 548(c)(2)(B)(explicitly extending non-discrimination protections to buying groups); *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶6, n.3 (1993) ("1993 Program Access Order"). (including buying groups under the definition of "MVPDs" for program access purposes); 47 C.F.R. § 76.1000(c) (defining "buying group or agent" "for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section" as "an entity representing the interests of more than one entity distributing multichannel video programming . . . ."); 47 C.F.R. § 76.1000(e) (defining "multichannel video programming distributor" to include "buying groups or agents of all such entities.");*see also* S. Rep. No. 102-92, at 24-28 (1991) (discussing problems of access to vertically integrated programming for competitive MVPDs; requirement that "vertically integrated, national cable programmers to make their programming available to all cable operators and their buying agents on similar prices, terms and conditions;" *id*. at 64 (Summary of Major Provisions – Access to Programming/Programming Distribution – "National and regional programmers that are affiliated with cable operators . . . [h]ave an affirmative duty to deal with purchasing groups, such as cable cooperatives, on terms similar to those given to cable systems, but can consider certain factors such as credit worthiness); 1998 Ameritech Order, ¶¶ 76-78 (providing buying groups with an alternative financial assurances method to joint and several liability); 1993 Program Access Order, ¶115 ("[A] programming vendor can, of course, legitimately apply any of the statutorily permissible justification […] to buying groups in the same manner as they would be applied to individual MVPDs on a non-discriminatory basis");*see also* Comcast-NBCU Order, ¶¶ 49-50(protecting especially vulnerable small and medium-sized MVPDs by obligating Comcast-NBCU to negotiate with their buying groups and extending to buying groups the right to seek baseball-style arbitration if negotiations reach an impasse); *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶¶ 156-162, Appendix B (2006) ("Adelphia Order")(protecting small MVPDs by giving them a right to use a bargaining agent to bargain collectively on their behalf, including the right to submit to baseball-style arbitration, for affiliated regional sports network programming); *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 176 (protecting small and medium-sized MVPDs by obligating News Corp to negotiate with their buying groups and giving buying groups the right to seek baseball-style arbitration if negotiations reach an impasse) (2004) (News Corp.-Hughes Order).

[43] 47 U.S.C. § 548(c)(2)(B) (emphasis supplied).

reveals Congress' recognition of the critical role played by buying groups in securing access to satellite cable programming for smaller and rural cable systems.[44]

Consistent with Congress' intent that the program access provisions benefit individual MVPDs and as well as their buying groups, the Commission adopted program access rules that would explicitly apply to buying groups in its first implementation order.[45] The mechanism by which it did so was to bring buying groups within the definition of MVPDs who may avail themselves of all of the rights and protections afforded under the program access rules.[46] As the Commission observed, it was widely held among industry participants "that buying groups performed a useful function and should receive the benefits of discounts based on subscriber volume.[47]

From the outset, the Commission has sought to make the program access rules useful to buying groups while offering adequate protections against excessive financial risk to programmers.[48] In this way, the Commission has sought to ensure that buying groups can take advantage of its complaint procedures in similar ways to individual MVPDs. Although the program access rules explicitly state that these protections should be provided to buying groups

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[44] S. Rpt. No. 102-92,at 25 (1991) (citing testimony of John Malone, TCI, "A number of small cable operators in the Midwest have banded together in a cooperative to try to gain some of the same economies of scale in their joint purchase of cable programming. The cooperative has enjoyed success with some programmers, but not with others. I fully support their efforts, and I see no reason why all programmers should not accord the cooperative and others like it the benefits of whatever scale economies they can offer."); *see also* Conf. Rpt. No. 102-862, at 91 (1992) ("The Senate bill [requires]. . . [n]ational and regional programmers affiliated with cable operators . . . to offer their programming to buying groups on terms similar to those offered to cable operators. However, reasonable cost-related conditions and certain other reasonable requirements can be imposed.").

[45] 1993 Program Access Order. ¶¶ 114-15.

[46] 47 C.F.R. § 76.1000(e).

[47] 1993 Program Access Order ¶ 89.

[48] *Id.,* ¶¶ 98, 114-15*In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, ¶¶ 98-103 (1994) ("1994 Recon Order"); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822, ¶¶ 72-78 (1998) ("1998 Ameritech Order").

as well as individual MVPDs, the rules essentially provide no protection at all to buying groups. As part of its current review of the program access rules, it is appropriate for the Commission to act to ensure that the program access protections Congress intended apply to small and medium sized MVPDs who purchase cable-affiliated programming through buying groups are rendered fully usable, particularly by an established buying group like the NCTC.

ACA submits that there are three specific ways in which the Commission should amend its rules to ensure that the small and medium sized MVPDs who license programming through buying groups receive the full benefit of the protections against vertical effects intended by the program access rules. As discussed below, the Commission should (i) modernize the definition of "buying group" to reflect the liability requirements sought by programmers in the current marketplace; (ii) restrict the ability of a cable-affiliated programmer to unreasonably prevent members who regularly participate in their group's master agreements from participating in an agreement between that programmer and the buying group; and (iii) clarify the standard of comparability for buying groups in assessing the application of volume discounts.

A. The Commission Should Modernize its Definition of a "Buying Group" to Reflect the Level of Liability a Buying Group Agrees to Assume Under Current Industry Practice.

In the nearly two decades since the Commission implemented the program access rules, the role of buying groups in the market has changed markedly, yet the Commission's rules have not kept pace.[49] The Commission's current definition of a buying group today effectively stands as an impediment to the ability of the nation's most widely utilized buying group, the NCTC, to secure the benefits of the Commission's program access rules and procedures to enforce the Act's program access mandates. This occurs because the Commission still defines a "buying

[49] As discussed in more detail in Section III.A.2, *infra*, the Commission's agreement in its 1998 Ameritech Order to amend this rule to relax the buying group liability requirements in response to requests by ACA's predecessor group, the Small Cable Business Association was never codified in the Code Federal Regulations.

group" as an entity that agrees to assume full liability for payments under the master agreements it negotiates with a programmer.[50] These are conditions that do not match current established industry and marketplace practices, particularly with regard to the NCTC and its members. Now is the time to remedy these defects, and ensure that buying groups are protected under the program access rules as Congress intended.

1. Programmers Today Negotiate with Buying Groups for Programming Contracts Without Demanding Excessive Liability on the Part of the Buying Groups or their Members for Payments Due Under Master Agreements.

As discussed above, a buying group negotiates master agreements with video programmers that its MVPD members can opt into and then acts as an interface between its members and the programmer so that the programmer is able to deal with a single entity. Thus, from an economic perspective, buying groups dramatically reduce the transaction costs for a programmer of separately dealing with a large number of small and medium sized MVPDs by allowing the programmer to deal instead with a single entity to negotiate and administer contracts.[51] Programmers benefit economically from reduced transaction costs and some of these benefits are passed along to participating MVPDs in the form of lower rates.[52] Small and medium-sized MVPDs, in turn, are generally able to obtain better terms through participating in a buying group than they would be able to obtain through directly dealing with the programmers

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[50] 47 C.F.R. § 76.1000(c)(1) ("The term "buying group" or "agent" for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity that (1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming . . . contract which it signs as a contracting party as a representative of its members, or whose members, as contracting parties, agree to joint and several liability. . . .").

[51] In preparation of its comments, ACA commissioned Professor William P. Rogerson to prepare a paper addressing the potential competitive harms posed by cable-affiliated programmers, attached hereto as Appendix A. *See* Appendix A, William P. Rogerson, "*Proposed Revisions To Program Access Rules To Better Address The Potential Competitive Harms Created By Cable-Affiliated Programmers,*" ("Rogerson") at 9. Professor Rogerson is a Professor of Economics at Northwestern University, and served as the Commission's Chief Economist from 1998-99.

[52] Rogerson at 9.

themselves.[53]

Most small and medium-sized cable operators obtain a substantial share of the video programming they distribute through the NCTC, a buying group organized in 1984 by a dozen small and medium-sized MVPDs for this purpose.[54] Today, the NCTC has approximately 910 member companies.[55] Of NCTC's 910 members, just over 100 member companies serve more than 10,000 subscribers, with more than half of NCTC's members serving 1,000 or fewer subscribers.[56] NCTC has master agreements with almost all of the Kagan Top-50 networks; all of the Top-25 networks (with the exception of Lifetime, which is ranked 15th); and with 21 of the next 25 Top-50 networks.[57] NCTC reports that its four largest members do not currently license substantial amounts of programming through the buying group.[58] However the remaining members within the group of the largest 25 members do license substantial amounts of programming through the NCTC.[59] On average, NCTC members outside its 25 largest members generally rely even more heavily on NCTC to secure their programming.[60]

In addition to negotiating the rates, terms and conditions of master agreements with programmers, the NCTC acts as an interface for all billing and collection activities between its own member companies and the programmer.[61] At the end of each month, each member reports to NCTC its total number of subscribers receiving each programming service.[62] NCTC

[53] NCTC Declaration, ¶ 3; Rogerson at 9.

[54] NCTC Declaration ,¶ 3.

[55] *Id.*,¶ 5.

[56] *Id.*

[57] Rogerson at 25, Table 1.

[58] NCTC Declaration, ¶ 5.

[59] *Id.*

[60] *Id.*

[61] *Id.*, ¶ 6.

[62] *Id.*

collects the subscriber counts, calculates each individual member's monthly balance for each programmer, bills the members, collects payments from them and remits a single aggregate payment to the programmer.[63]

The principal legal liability that the NCTC assumes as part of the master agreement it signs with the programmer is to forward any payments that are due and actually received from members on to the programmer.[64] NCTC reports, however, that programmers never require the NCTC to assume liability to make all future payments over the life of the agreement on behalf of a reneging MVPD.[65] Additionally, over the years, NCTC has developed practices for dealing with delinquent members. It is NCTC's practice to terminate the membership, and thus all the master agreements, of a delinquent NCTC member when the member either cannot or will not make a monthly programming payment due under a master agreement.[66] The NCTC and programmers have been using the NCTC's current business model, including the reduced level of liability that NCTC assumes under a master agreement, for over 14 years, and it has been widely accepted among the programming community.[67]

The basic rights and responsibilities due under a direct contract between an MVPD and a programmer are essentially the same according to Peter C. Smith, Vice President-Programming of Wide Open West Finance, LLC ("WOW!").[68] Mr. Smith explains WOW!

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[63] *Id.*

[64] *Id.*, ¶ 7.

[65] *Id.*

[66] NCTC Declaration, ¶ 9. As NCTC's Mr. Hughes notes, "Since most of its members enter into multiple master agreements with the NCTC, the penalty for breaching a master agreement with a single programmer is generally quite severe." *Id*.

[67] Rogerson at 12-13.

[68] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner cable Inc. (subsidiaries), Assignees, et al.*, Declaration of Peter C. Smith, Vice President- Programming for WideOpenWest Finance, LLC, MB Doc. Nos. 12-68, 07-18, 05-192, ¶¶ 3-5 (filed June 22, 2012) ("WOW!

generally receives a bill within 30 days of obtaining the programming and is obligated to remit payment to the programmer within 45 days of airing the programming.[69] In the event a monthly programming bill of WOW! goes unpaid, the programmer has the legal right to require the MVPD to continue to make payments over the life of the contract, or simply cease delivering the programming thereby removing it from the delinquent MVPD's channel line-up. Furthermore the lag time over which a programmer becomes aware that an MVPD is not paying its bills is about the same length.[70]

2. The Commission Once Before Agreed to Greatly Reduce the Liability Required of Buying Groups as Specified in its Rules in an Effort to Improve their Usefulness

As discussed above, industry participants and the Commission have long held that buying groups perform a useful function in the market and should not be treated unfairly by cable-affiliated programmers.[71] The only serious debate concerning buying groups since the inception of the program access rules appears to have been during the initial implementation phase concerning the amount of liability buying groups should assume in order to receive the benefits of the rules. Some programmers suggested that the Commission "adopt requirements mandating agreements for joint and several liability by all members, guarantees for the technical performance and signal security of each member, and joint marketing strategies."[72] The Commission resolved this issue by adopting regulations that included, among other things, requirements that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party.[73] As

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Declaration").

[69] WOW! Declaration, ¶ 4.

[70] WOW! Declaration, ¶ 5; Rogerson at 12.

[71] 1993 Program Access Order, ¶ 89.

[72] *Id*.

[73] *Id.*, ¶ 114.

an alternative to financial responsibility assumed by the buying group, if individual members are the contracting parties, the Commission required that "they must agree to joint and several liability for commitments of the group."[74] Group members were also required to agree to uniform billing and standardized contract provisions, and programming vendors were given the right to require "reasonable technical standards" to the group or its individual members and apply requirements like creditworthiness to the groups if it also applies to individual MVPDs.[75] By so doing, the Commission attempted to "balance the interests of programming vendors in the assurance of prompt payment and adequate technical quality for their services and those of MVPD members of buying groups in receiving any available benefits from large subscriber numbers."[76]

Accordingly, the Commission in 1993 included within its definition of a "buying group" in section 76.1000 of its rules the following conditions:

> (c) The term "buying group" or "agent" for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:
>
> (1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming or terrestrial cable programming contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and
>
> (2) Agrees to uniform billing and standardized contract provisions for individual members; and
>
> (3) Agrees either collectively or individually on reasonable quality standards for the individual members of the group.[77]

[74] *Id.*, ¶ 115.

[75] *Id.*

[76] *Id.*, ¶ 114.

[77] 47 C.F.R. § 76.1000(c).

On reconsideration in 1994, the Commission again rebuffed the efforts of programmers to impose even more stringent liability requirements on buying groups, including a request to "require individual members to agree to joint and several liability for the entire commitment of the group," stating that such a requirement would prevent small MVPDs from establishing buying groups.[78] NCTC reports that the joint and several liability requirements also interfered with some members' loan covenants as to debt and resulted in fewer MVPDs being able to participate in buying groups.[79]

In 1998, the Commission again reviewed the buying group provision and considered replacing the joint and several liability obligation with a requirement that a buying group simply maintain sufficient financial reserves to ensure its ability to pay programmers.[80] The Commission stated that a majority of those commenting on the issue "favored the elimination of joint and several liability for buying groups that provide adequate financial assurances to safeguard programming providers," with commenters differing only what requirements the Commission should impose in lieu of the joint and several liability requirement.[81] The Commission noted that

> the reason smaller MVPDs enter into buying groups is to obtain programming at a discount resulting from the group's aggregate purchasing power. In return for this discount, programming providers are entitled to protection in dealing with such groups will not be exposed to excessive financial risk or excessive expense such as having to routinely collect delinquent programming fees from individual buying group members."[82]

To ensure against such excessive financial risk in dealing with a buying group as

[78] 1994 Recon Order, ¶ 103. Instead, the Commission clarified that when a programmer has "reasonable doubts about the financial stability and responsibility of the buying group, it may insist upon appropriate assurances of creditworthiness." Id.

[79] NCTC Declaration, ¶ 7.

[80] 1998 Ameritech Order. ¶ 72.

[81] *Id.*, ¶ 73.

[82] *Id*.

opposed to an individual MVPD, the Commission adopted, as an alternative to joint and several liability, the condition of a buying group (i) maintaining liquid cash or credit reserves equal to the cost of one month of programming fees for all buying group members and (ii) each member of the buying group remaining liable for its pro-rata share.[83]

The Commission explained that its new approach provided an alternative financial assurances method to all buying groups, regardless of size, while protecting programmers against excessive risk.

> At the same time, programming providers are adequately protected from the catastrophic default by multiple members of a buying group. If multiple members of a particular buying group default on their obligations to the buying group, and the buying group is unable to meet its obligations with existing resources, the programming provider is ensured payment for all programming thus far provided. At such point, the programming provider would have the option of terminating its contract with the buying group, retaining the one month's programming fees, and contracting with buying group members on terms negotiated between the programmers and the individual MVPDs. Alternatively, the programming provider could retain only the portion of the one month's programming fees that were actually defaulted upon, continue providing programming to the buying group, and look to the individual member for the balance of its pro-rata share of the buying groups contractual obligations.[84]

The Commission reiterated that groups not meeting this alternative requirement may still provide joint and several liability or negotiate separate financial assurances with programmers.[85]

Despite the Commission's adoption of this modification to its buying group rules, corresponding changes to Section 76.1000(c) of the Commission's rules were not included in the text of the 1998 Report and Order. Subsequently, the Cable Services Bureau issued an Erratum, noting the omission and proposing appropriate changes to Section 76.1000(c) of the

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[83] *Id.*, ¶ 78.

[84] *Id*.

[85] *Id*.

Commission's rules to conform it to the text of the Report and Order, stating that the "Erratum shall become effective upon publication in the Federal Register.[86] Due either to error or oversight, the Erratum was never published in the Federal Register nor the amended rule codified into the Code of Federal Regulations.

3. The Current Definition of a Buying Group in the Commission's Rules Remains Too Restrictive and Should Be Updated Now to Reflect Current Industry Practice

Although the definition of a "buying group" in the Commission's rules contains a requirement that a buying group agree to financial liability for the fees due under a contract signed on behalf of its member companies, as demonstrated above in Section III.A.1, in accepted practice today, a buying group such as the NCTC never assumes full liability for the contractual commitment that each of its member companies makes when it opts into a master agreement in the event a member company becomes unwilling or unable to make its monthly payments to the programmer.[87] Rather, for example, NCTC's obligation is limited to passing through payments received from its members to the programmer and in notifying the programmer of default on the part of one its member companies under a master agreement. As such, NCTC functions as an intermediary or billing and collection interface between the programmer and the member company, rather than as a principal liable for the payments.[88]

Accordingly, under the terms of the existing definition, NCTC as currently constituted and accepted by the vast majority of programming vendors, is barred from bringing a program access complaint concerning a master agreement on behalf of its member companies. These

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[86] *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Erratum, 14 FCC Rcd 18611 (1999).

[87] As used herein, "full liability" refers to the condition in Section 76.1000(c)(1) that the buying group either agrees to be financially liable for any fees due pursuant to programming contract it signs on behalf of its members, or that its members, as contracting parties, agree to joint and several liability. *See* Rogerson at 3.

[88] NCTC Declaration, ¶¶ 7-8.

companies, in turn, therefore lack any of the protections Congress intended them to receive under the program access rules when it included buying groups under the coverage of the statute. It is therefore evident that the current rules require buying groups to meet a condition that is not required in the marketplace and that would likely be uneconomic for a buying group to attempt to satisfy in practice.[89]

ACA recommends that the Commission remedy the problem by amending the manner in which it defines a "buying group" eligible to avail itself of program access rights and protections. To this end, the Commission should add to the current liability condition a new condition that reflects the common relationship between NCTC and programmers today, that is, a requirement that the buying group assume liability to forward all payments due and received from its members for payments under master agreements to the appropriate programmer.[90] A programmer could still seek to defend a higher price based upon a specific and demonstrable showing that the risk of default for all or most members of a buying group was significantly higher than the risk of default for a single large MVPD.

Commission precedent supports adoption of ACA's recommended amendment to the buying group definition.[91] In his paper, Professor Rogerson observes the Commission determined once before that the current liability condition could be significantly relaxed by adding an alternative liquid cash reserves requirement equivalent to the cost of one month's programming under the master agreement.[92] Given that most programmers in the marketplace today have accepted instead a payment pass-through requirement, there is no reason why the

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[89] Rogerson at 14.

[90] *Id.*

[91] *Id.* at 11.

[92] *Id.* at 14.

Commission's rules defining a buying group should require more.[93]

Nor would adoption of ACA's proposed revision prejudice cable-affiliated programmers or leave them subject to excessive financial risk when contracting with a buying group than they would assume when contracting with an individual large MVPD, a concern of the Commission's from the outset.[94] As Professor Rogerson's analysis demonstrates, the marketplace has accepted the level of liability assumed by a buying group such as the NCTC, suggesting that in practice, a programmer is put at no more financial risk in dealing with a buying group than with a single large MVPD in terms of the risk of non-payment for delivered programming.[95] That is, if an MVPD that has opted into a master agreement refuses to or becomes unable to make further payments for programming, programmers may protect themselves by ceasing delivery of the programming to the MVPD once they become aware the MVPD is not paying its bills, rather than attempting to require the MVPD to continue to make payments over the life of the agreement.[96] This is true regardless of whether the defaulting MVPD has purchased service on an individual or group basis through a buying group. A buying group member that is delinquent in its payments under a master agreement will generally receive between 30 and 60 days of "free" programming before the programmer becomes aware that the MVPD has ceased paying its bills and is able to cut-off programming. As Professor Rogerson explains,

> This is essentially the same arrangement that programmer has with an MVPD that it contracts with directly. . . The lag with which a programmer becomes aware that an MVPD has ceased making payments is generally about the same length regardless of whether the programmer contracts directly with the MVPD or contracts with the MVPD through the NCTC. Thus, in either case, if an MVPD ceases paying its bills, it will generally be able to receive between 30 and 60 days of "free" programming before the

[93] *Id.* at 12-14.

[94] 1993 Program Access Order, ¶¶ 114-15; 1994 Recon Order, ¶ 103; 1998 Ameritech Order, ¶ 76.

[95] Rogerson at 12-14.

[96] *Id.* at 11-12.

> programmer becomes aware of the problem and is able to cut-off programming.[97]

These are exactly the same set of risks, rights and responsibilities that a buyer and seller have with respect to programming sold to an individual MVPD through the NCTC. As Professor Rogerson notes, the main economic function that the NCTC is performing for programmers is to save them the transactions costs of dealing with multiple MVPDs. As such, "there is no good economic reason to expect that the NCTC in addition would be a natural entity to provide programmers with 'extra insurance' against the possibility that an individual MVPD might become delinquent in its payments."[98]

However, additional repercussions for a delinquent MVPD and protections for the programmer exist under the NCTC model. Professor Rogerson explains that accordingly there is at least one respect in which a buying group may actually reduce the risk of delinquency. Citing NCTC's practice of terminating membership and thus, all the master agreements of a delinquent NCTC member when the member either cannot or will not make a monthly programming payment, Professor Rogerson observes that this provides an added incentive for the MVPD not to fall delinquent, a protection the programmer lacks when dealing with an individual MVPD outside the structure of a buying group. "That is, when an MVPD reneges on a programming agreement it has with one programmer there is no similar repercussion with regard to contract termination and loss of services from other programmers." In the words of Professor Rogerson, in this respect, "a buying group may actually reduce the risk of delinquency."[99]

The reduced level of liability that NCTC has agreed to accept under master agreements

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[97] *Id.* at 14.

[98] *Id.* at 14.

[99] *Id.* at 13.

appears to be both widely accepted by programmers and economically efficient. As Professor Rogerson observes, programmers and the NCTC today freely enter into the programming deals that they sign, and there is no impediment on their agreeing that NCTC should assume greater levels of liability on behalf of its members if that made sense from an economic perspective. That is, "if the value to programmers of having the NCTC assume greater liability on behalf of its members generally exceeded the costs to the NCTC of doing so, we would have expected such contractual arrangements to emerge in practice. Thus it seems reasonable to conclude that having the NCTC assume greater liability on behalf of its members would not be an efficient economic arrangement."[100]

Accordingly, ACA recommends that in addition to the full and joint and several liability requirements presently contained in the Commission's rules, which are not utilized in practice by long-established buying groups such as the NCTC, an alternative requirement be added stating that a buying group is only required to pass-through payments from its member MVPDs to programmers. This practice reflects current marketplace practices and conditions and offers reasonable protections to cable-affiliated programmers against excessive risk in contracting with a buying group in satisfaction of the Commission's general criteria for buying groups.

B. The Commission Should Prohibit Cable-Affiliated Programmers from Unreasonably Preventing Particular Members of a Buying Group from Opting Into a Master Agreement

Currently, the program access rules prohibit unfair methods of competition and discriminatory practices, including refusals to deal,[101] but set no explicit restraints on the ability

[100] *Id.* at 13.

[101] 47 U.S.C. § 548(b) & (c); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074, ¶6 (2001) (articulating the Commission considers any "arrangement" that excludes willing buyers to be a violation of Section 628(c)(2)(D)); *see Small Entity Compliance Guide*, DA 90-4849, 2007 FCC LEXIS 9015, at *3-4 (rel. Nov. 30, 2007) ("b]ecause of the exclusive contract prohibition, any affiliated programming network *must be made available for purchase and carriage by all* multichannel video programming distributors (MVPDs), which include cable operators, Direct Broadcast Satellite (DBS) operators, and other entities that offer

of a cable-affiliated programmer to unreasonably prevent particular members of a buying group from participating in a master agreement between the programmer and the buying group, even if the member normally purchases a substantial share of its programming from the buying group. According to Professor Rogerson, "if a cable-affiliated programmer had the right to arbitrarily exclude any member that it wished from any master agreement that it signed with a buying group, the requirement that cable-affiliated programmers must negotiate non-discriminatory agreements with buying groups could be rendered completely meaningless."[102] Thus, to effectuate congressional intent that buying group be able to utilize the program access rules, the Commission must set limits on the ability of a programmer to unreasonably prevent regularly participating members of a buying group from opting into a master agreement.

To remedy this problem, ACA recommends that the Commission adopt explicit and verifiable standards for determining when a buying group member may presumptively be allowed to participate in a master agreement with a cable-affiliated programmer. The goal of these standards is to guarantee that an MVPD that generally purchases a reasonably substantial share of its programming through a buying group is presumed to be entitled to participate in a master agreement between a cable-affiliated programmer and its buying group.

According to Professor Rogerson:

> The simplest and most easily verifiable standard for determining when there is a presumption that a member of buying group has a right to participate in master agreements between the buying group and cable-affiliated MVPDs would be to base the standard on the number of subscribers belonging to the MVPD.[103]

Professor Rogerson therefore recommends that the Commission establish "that there is a 'safe harbor' subscriber level for individual MVPDs to participate "in the sense that MVPDs with no

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multiple channels of video programming.").

[102] Rogerson at 15.

[103] *Id.* at 15.

more than the ‘safe harbor’ number of subscribers are presumptively entitled to participate in master agreements between the programmer and the buying group.”[104] Above the ‘safe harbor’ level of subscribers, a buying group member would also be entitled to participate if it can demonstrate that some specified minimum share of its total expenditures on programming are incurred through the buying group. Further, when an expiring master agreement is being renewed, members participating in the expiring agreement would have the right to participate in the renewed agreement.

As a consequence of this safe harbor, it would be a violation of the Section 628(c)(2)(B) prohibition on discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group member that regularly participates in a master agreement.[105] ACA submits that the Commission can best protect the interests of buying group members and their subscribers by creating a safe harbor subscriber level[106] for individual MVPDs wishing to participate in a programming master agreement and deeming it a violation of the prohibition against discriminatory practices for a cable-affiliated programmer to refuse to deal with a buying group that includes individual MVPDs falling within the safe harbor.

C. The Commission Should Clarify that the Most Practical Standard of Comparability for a Buying Group With Respect to Volume Discounts is a Single MVPD Serving the Same Number of Subscribers

The NPRM asks whether the Commission’s rules and procedures prevent or discourage

[104] *Id.* at 15-16.

[105] ACA notes that creating a safe harbor based for buying group participation based on subscribership levels and usual and customary participation in buying groups for MVPDs purchasing a specified share of their programming through the buying group is precisely the standard adopted by the Commission in establishing its remedial conditions for the Comcast-NBCU transaction. Comcast-NBCU Order, ¶ 58.

[106] As noted, the safe harbor would include protection both for individual MVPDs under the subscribership cut-off level as well as those above cut-off who nonetheless demonstrate that some specified minimum share of their total programming expenditures are made through the buying group. See Rogerson at 16.

the filing of complaints pertaining to discriminatory pricing.[107] ACA submits that the utility of the program access rules has been dramatically undercut for buying groups because the Commission has never established a clear standard upon which a buying group is to be compared for purposes of determining whether it is being discriminated against by a cable-affiliated programmer. ACA proposes that the most practical standard for determining volume-discounts would be that a buying group should generally be compared to an MVPD providing the same number of subscribers.

Section 628(c)(2)(B)(iii) describes permissible pricing differentials in providing programming to MVPDs and buying groups that take account of economies of scale, cost savings, or other benefits "reasonably attributable to the number of subscribers served by the distributor."[108] All the statutory factors that explain why a buyer with more subscribers may be able to negotiate lower license fees than a buyer with fewer subscribers apply without distinction to whether the buyer is a single MVPD or a buying group. That is, there is no distinction made with respect to the volume-related discounts available to single MVPDs and buying groups under the statute or the Commission's rules.[109]

ACA recommends that the Commission should amend its rules on volume-related justifications for the purpose of establishing the standard upon which buying groups shall be compared in determining whether they are being discriminated against. Specifically, the

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[107] NPRM, ¶ 100.

[108] 47 U.S.C. § 548(c)(2)(B)(iii). The Commission's rules similarly describe the volume-related justifications that may be advanced to support price differentials among MVPDs. *See* 47 C.F.R. § 76.1002(b)(3) & Note. For this purpose, the Commission's rules define MVPDs to include buying groups. 47 C.F.R. § 76.1000(e) (the "term 'multichannel video programming distributor' means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.")

[109] *See* 47 U.S.C. § 548(c)(2)(B)(prohibiting discrimination against, inter alia, "buying groups"); 47 C.F.R. § 76.1000(e) (treating buying groups as MVPDs).

standard to be applied should be the same as that applied to an individual multichannel video programming distributor providing the same number of subscribers to the programmer. In other words, for purposes of judging whether prices offered to a buying group are discriminatory, the buying group shall be considered "similarly situated" to an individual MVPD offering the programmer the same number of subscribers.

In its first examination of the role of buying groups in offering economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute, the Commission observed: "Vendors can extend the same volume discounts based on number of subscribers that they would ordinarily extend to single entities of comparable size provided that such discounts are offered in a non-discriminatory fashion."[110] This suggests that a buying group should be considered similarly situated to an individual MVPD offering the programmer the same number of subscribers, but additional clarity on this point would vastly increase the utility of the program access rules by explicitly setting this as the standard of comparison.

As Professor Rogerson suggests, although this is likely to be the standard Commission staff or an administrative law judge would apply to resolve program access complaint in the absence of more explicit guidance, providing such explicit guidance will bring much-needed clarity and certainty to industry participants, thereby increasing the likelihood of deals getting done, and decreasing the number of parties that would utilize the program access rules to resolve disputes.[111] In addition, in the instances where complaints are filed, clarity will likely reduce administrative costs involved in addressing them. More importantly, without this explicit

[110] 1993 Program Access Order, ¶ 114.

[111] Comcast-NBCU Order, ¶ 59 ("Our arbitration condition is intended to push the parties towards agreement prior to a breakdown in negotiations. Final offer arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'"); Adelphia Order, ¶ 160 ("While the conditions are intended to remedy the potential harms from uniform price increases, these conditions will also provide protection, if necessary, against "stealth discrimination," permanent foreclosure, and temporary foreclosure."); News Corp.-Hughes Order, ¶ 174 ("Our arbitration condition is also intended to push the parties towards agreement prior to a complete breakdown in negotiations.").

stipulation, the non-discrimination rule will remain completely ineffectual in providing protection to buying groups.

A corollary revision necessary to protect the right of buying groups to use the program access rules is a requirement that cable-affiliated programmers provide buying groups with rates applicable to requested subscribership levels, so long as it is possible that the buying group could provide this number of subscribers from its current membership eligible to participate in the master agreement. With respect to the manner in which a buying group such as the NCTC negotiates its master agreements, this is practical and appropriate. Under the current NCTC model, the buying group negotiates the deal, and its members may opt into the deal by agreeing to participate in the master agreement with the programmer.[112] Thus, at the time of the negotiation, neither the buying group nor the programmer knows precisely how many MVPDs will take their programming through the NCTC. However, once the Commission has clarified the members of a buying group that are presumptively permitted to participate in a master deal with a cable-affiliated programmer, it must also specify that a cable-affiliated programmer cannot refuse to offer a master agreement to a buying group that specifies a schedule of non-discriminatory license fees over a range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribers from its current membership eligible to participate in the master agreement.[113] According to Professor Rogerson, this “will solve the ‘chicken and egg’ problem that might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high even though the license fees would go down if the members decided

[112] NCTC Declaration, ¶¶ 3-4; Rogerson at 2-3.

[113] Obviously, buying group business models have evolved over time and can be expected to continue to do so. For this reason, the Commission should periodically assess whether its rules have kept pace with industry practice.

to opt in."[114]

Under this requirement, a cable-affiliated programmer who fails or refuses to offer a non-discriminatory schedule of prices based on the number of subscribers buying group members could provide if they chose to opt into the programming deal would be in violation of the prohibition against discriminatory practices under Section 628(c)(2)(B). Accordingly, the Commission should also declare that a cable-affiliated programmer that refuses to offer a schedule of license fees over a reasonable range of subscribership levels requested by a buying group would be deemed a violation of the Section 628(c)(2)(B) prohibition on discriminatory practices.

Finally, it is important to note that the non-discrimination requirement in the program access rules prohibits discrimination in all terms and conditions and not simply in price.[115] Just as larger MVPDs are able to negotiate lower prices, it seems plausible that they may also be able to negotiate more advantageous terms along other dimensions. For example, larger MVPDs may be able to negotiate more advantageous bundling arrangements or better access to related on-line content. Therefore, consistent with Section 628(c)(2)(B)'s prohibition on discrimination with respect to "prices, terms and conditions," the Commission should clearly state in its rules that the standard of comparability for a buying group is an MVPD providing the same number of customers for purposes of evaluating all terms and conditions of carriage agreements, and not just price. That is, a buying group should be entitled to all of the terms and conditions that an MVPD providing the same number of subscribers would receive and not simply the price that the MVPD would receive.

[114] Rogerson at 18.

[115] 47 U.S.C. § 548(c)(2)(B) ("prohibit[s] discrimination. . . in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups").

IV. THE COMMISSION SHOULD CLOSE THE UNIFORM PRICE INCREASES LOOPHOLE BY REQUIRING THAT CABLE-AFFILIATED PROGRAMMERS OFFER PROGRAMMING TO MVPDs AT FAIR MARKET VALUE

In the preceding section, ACA focused on recommendations for ensuring that buying groups can utilize the program access rules to protect small and medium-sized MVPDs from unfair methods of competition by cable-affiliated programmers. In this section, ACA offers proposals for closing the uniform price increases loophole the Commission has recognized[116] so as to prevent cable-affiliated programmers pricing programming at levels that disadvantage MVPDs in the marketplace.

Uniform Price Increases Loophole. Section 628(c)(2)(B) of the Act prohibits "discrimination . . . in the prices, terms and conditions of the sale or delivery" of satellite cable programming.[117] The primary aim of this rule is to limit the ability of cable-affiliated programmers to charge higher license fees than they would have the incentive or ability to charge if they were not vertically integrated. Professor Rogerson explains that, "[o]n an economic level the non-discrimination requirement places two types of constraints on the prices that a cable-affiliated programmer can offer to an unaffiliated MVPD."[118] That is, (i) the prices must be no higher than the prices that the programmer charges to its affiliated cable operator; and (ii) the prices must be no higher than the prices that the programmer charges to other unaffiliated cable operators.[119]

As the NPRM notes, and Professor Rogerson explains, the Commission has repeatedly observed that this constraint (i) places almost no practical limits of any sort on a cable-affiliated

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[116] NPRM, ¶ 101; Comcast-NBCU Order, ¶ 49; Adelphia Order, ¶ 119; *see also* News/Hughes Order, ¶¶ 78, 82-83.

[117] 47 U.S.C. § 548(c)(2)(B). See also 47 C.F.R. § 76.1002(b), prohibiting, as an unfair practice, "discrimination in prices, terms and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors."

[118] Rogerson at 19.

[119] *Id.* at 19.

programmer – because the internal transfer price within a vertically integrated firm can be arbitrarily set at any level without necessarily influencing any internal decisions of the vertically integrated firm.[120] Specifically, for the purpose of raising rivals' costs, a vertically integrated programmer may disadvantage its competitors in the video distribution market by raising the price of a network to all distributors (including itself) to a level greater than that which would be charged by a non-vertically integrated supplier.[121] As the NPRM explains:

> Because rival MVPDs would have to pay more for the programming, they would likely respond by either raising their prices to subscribers, not purchasing the programming, or reducing marketing activities. The vertically integrated programmer could then enjoy a competitive advantage, because the higher price for the programming that it would pay would be an internal transfer that it could disregard when it sets its own prices. By forcing its competitors either to pay more for the programming and increase retail rates, or forgo purchasing the programming, the vertically integrated cable operator could raise its prices to some extent without losing subscribers.[122]

Because the programmer is apparently imposing a uniform price increase on both itself and its competitors that is not facially discriminatory, the Commission has referred to this as the "uniform price increases" loophole.[123]

In the Comcast-NBCU transaction review, the Commission utilized the bargaining model theory as the basis for its calculation of the magnitude of the likely vertical effects of the joint venture and fashioned its public interest remedies accordingly.[124] The upshot of this analysis is

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[120] NPRM, ¶ 101; Rogerson at 19.

[121] NPRM, ¶ 101; Comcast-NBCU Order, ¶ 49; Adelphia Order, ¶ 119; *see also* News/Hughes Order, ¶¶ 84, 107.

[122] NPRM, ¶ 101.

[123] *Id.*, ¶¶ 101-102 (describing failure of program access rules to reach problem of disparate impacts of internal transfer prices on vertically integrated cable operator and its rival MVPDs).

[124] See Comcast-NBCU Order, ¶ 37 ("the integrated firm will take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast as reaching a higher price would raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for

clear: a vertically integrated programming network will always cost more to a rival MVPD than a non-vertically integrated programming network to account for the opportunity cost of selling the programming to a rival. Furthermore, the Commission concluded that the program access rules will not protect against this public interest harm, and established alternative program access remedies.[125]

Significantly, the NPRM notes that the Commission has repeatedly recognized that "this strategy of uniform price increases does not necessarily violate the anti-discrimination provision of the program access rules because the price increases would be applied to all distributors equally and thus not involve discriminatory conduct" and has sought to address the harmful conduct in the context of transaction reviews by adopting a base-ball style arbitration remedy.[126] That is, from an economic perspective, as Professor Rogerson explains, the Commission has found that the non-discrimination requirement likely places almost no practical constraint at all on a cable-affiliated programmer, because the internal transfer price within a vertically integrated firm can be arbitrarily set at any level without necessarily influencing any internal decisions of the vertically integrated firm.

> Thus a cable-affiliated programmer that wishes to disadvantage its competitors by charging them high prices for programming can satisfy the non-discrimination requirement (i) simply by raising its own internal transfer price to the same high level and thus

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Comcast's video distribution rivals."); Technical Appendix B, ¶ 39 (discussing use of the Nash Bargaining Model suggested by ACA and DirecTV to calculate the magnitude of vertical post-transaction price changes); Adelphia Order, ¶¶ 122-129 & 140-154 (describing the analytical basis for the conclusion that "the transactions will increase the Applicants' incentive and ability to adopt a uniform price increase strategy for RSN programming and that the program access rules not likely deter such conduct"); *id.* at Appendix D, ¶ 24 ("Throughout our analysis we adopt a standard solution to bargaining games by assuming that the parties will split the gains from the trade"); *In the Matter of the Regional Sports Network Marketplace*, Comments of the American Cable Association, MB Doc. No. 11-128, at 4-6 (filed Sept. 9, 2011) (discussing application of this analysis to vertically integrated RSNs).

[125] The economic theory underlying the bargaining model is explained by ACA's economic expert, Professor William P. Rogerson, in Exhibit A of ACA's Comcast-NBCU Comments. *See* ACA Comments, William P. Rogerson, *Economic Analysis of the Competitive Harms of the Proposed Comcast NBCU Transaction* (June 21, 2010), attached to ACA Comments at Exhibit A ("Rogerson") at 5-6.

[126] NPRM, ¶ 101.

> apparently imposing a uniform price increase on both itself and its competitors. However, because the price it charges itself is only an internal transfer price, it can ignore this price when it makes its own programming decisions and instead directly make programming decisions that maximize the total profit of the vertically integrated firm. Because the cable-affiliated programmer is apparently imposing a uniform price increase on both itself and its competitors, the Commission refers to this as the "uniform price increases" loophole.[127]

In the NPRM, the Commission acknowledges that the uniform price increases loophole renders the price discrimination prohibition in program access rules largely ineffective to prevent a cable-affiliated programmer from raising license fees to competing MVPDs, and that it has addressed this problem in specific merger orders through the imposition of a baseball-style arbitration remedy.[128] Pursuant to these procedures, each party to a program access dispute submits a "final offer" to an arbitrator for carriage of the programming and the arbitrator is charged with choosing "the final offer that most closely approximates the fair market value of the programming carriage rights at issue."[129] Through this process, the Commission has sought to maintain the pre-integration balance of bargaining power between vertically integrated programming networks and other MVPDs so that other MVPDs are able to continue purchasing important cable-affiliated programming free of vertical effects.

The NPRM seeks comment on two approaches to addressing this problem on an industry-wide basis in the instant rulemaking: (i) interpreting the anti-discrimination provision in

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[127] Rogerson at 19.

[128] NPRM, ¶ 101.

[129] *Id.*, ¶ 101; Comcast-NBCU Order, ¶ 50; ; *In the Matter of News Corporation and The DIRECTV Group, Inc, Transferors, and Liberty media Corporation, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order,, 23 FCC Rcd at 3265, ¶ 90 (2008)(" Liberty Media Order"); Adelphia Order, 21 FCC Rcd at 8274, ¶ 156; News-Corp-Hughes Order , ¶¶ 173-75. In this baseball-style arbitration, each party submits a "final offer" for carriage of the programming at issue. *See* Comcast-NBCU Order, Condition VII.A; *Liberty Media Order*, 23 FCC Rcd at 3346-47, Condition IV.A; *Adelphia Order*, 21 FCC Rcd at 8337, Condition B.2; News-Corp-Hughes Order, ¶ 177. An arbitrator then chooses the final offer that "most closely approximates the fair market value of the programming carriage rights at issue." Comcast-NBCU Order, Condition VII.B.4; Liberty Media Order, Condition IV.B.3; Adelphia Order, Condition B.3.c; News-Corp-Hughes Order, ¶ 177.

Section 628(c)(2)(B) to reach practices that are facially neutral but that have a disparate impact in application or (ii) addressing uniform prices increases as an "unfair act" on a case-by-case basis under Section 628(b).[130] To the extent that a uniform price increase is deemed actionable under either provision, the NPRM seeks comment on how the Commission can distinguish an anticompetitive uniform price increase intended to raise rivals' costs from a price increase dictated by the market.[131] Section 628(b) generally prohibits unfair methods of competition that are a significant hindrance to competing MVPDs. Accordingly, to be actionable under Section 628(b) a practice must be demonstrably unfair and also meet the significant hindrance standard, a burden not imposed on MVPDs seeking relief from the practices of vertically integrated programmers under Section 628(c)(2)(B).

ACA acknowledges that the Commission could proceed to address the uniform price increases loophole under either subsection of the statute. ACA suggests that the preferable course is for the Commission to address this significant competitive problem by explicitly adopting a fair market value standard for complaints brought pursuant to Section 628(c)(2)(B) alleging price discrimination.[132] As the NPRM recognizes, the Commission has authority to adopt such regulations under its Section 628(c)(2)(B) authority based on the rationale that "while a uniform price increase appears facially neutral in that it applies to all MVPDs equally, it has a disparate impact on MVPDs that are not affiliated with the cable-affiliated programmer because the price increase is not merely a transfer for unaffiliated MVPDs."[133]

Most recently, for purposes of the remedial conditions adopted in its 2011 *Comcast-*

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[130] NPRM, ¶ 102.

[131] *Id.*

[132] See Comcast-NBCU Order, ¶ 36 (the transaction would give the combined entity 'to advantage some or all of its video distribution rivals by exclusion, causing them to become less effective competitors, causing them to become less effective competitors.").

[133] NPRM, ¶ 102; *see Ricci v. DeStefano,* 129 S.C. 2658, 2672-74 (2009); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

NBCU Order, the Commission subjected national cable programming networks sold either individually or as a block of programming for the first time to remedial program access conditions. Based on record evidence concerning the likelihood of post-vertical integration price increases for the combined entity's national programming networks, the Commission established a baseball-style commercial arbitration remedy using a fair market value standard in which any aggrieved MVPD could submit a programming dispute over any Comcast-NBCU affiliated programming, including its suite of highly valued national cable programming networks.[134]

ACA submits that it would be appropriate for the Commission to apply the same fair market value standard for judging discrimination with respect to all cable-affiliated programming that the Commission has previously used in reviewing in specific transactions combining distribution and programming assets. By adopting a fair market value standard for judging programming pricing, the Commission can ensure that cable-affiliated programmers do not unfairly disadvantage other MVPDs through the imposition of uniform price increases for marquee programming that is not otherwise actionable under the anti-discrimination provision of Section 628(c)(2)(B).

<u>Fair Market Value Standard</u>. As discussed above, the Commission has repeatedly employed a "fair market value" standard to close the uniform price increases loophole in the remedial conditions it imposes to temper the effects of vertical integration in its transaction review orders. Professor Rogerson explains that

> The main difference between a nondiscrimination standard and fair market value standard is that the former compares the contract that a programmer offers to an MVPD with other contracts that the *same* programmer offers for the *same* programming, while the latter additionally compares the contract that a programmer offers to an MVPD with contracts that *other* programmers offer for

[134] Comcast-NBCU Order, ¶¶ 46-48 (harms), 49-59 (remedial conditions).

similar programming.[135]

Accordingly, to ensure fair treatment of non-affiliated MVPDs by cable-affiliated programmers, Professor Rogerson suggests that the "obvious solution to more generally closing the uniform price increases loophole in program access rules is to directly require that cable-affiliated programmers make their programming available to unaffiliated MPVDs at fair market value."[136] According to Professor Rogerson, this is the only means of guaranteeing MVPDs non-disparate treatment with respect to cable-affiliated programming.[137]

Professor Rogerson states that such regulations should state that a cable-affiliated programmer must be willing to offer the programming at a price equal to fair market value. As a corollary, the rules should state that it is a violation of Section 628(c)(2)(B) for a cable-affiliated programmer to offer programming at a price higher than fair market value. Further, the primary evidence that would be accepted to determine fair market value would be evidence on the prices that other non-cable-affiliated programmers offer for similar types of programming.[138] Additionally, the Commission should specify that evidence on prices that the cable-affiliated programmer charges its own affiliated cable operator or unaffiliated MVPDs for the same programming will not be considered as evidence for determining fair market value for the disputed programming.[139]

<u>Evidence Relevant to Fair Market Value</u>. ACA submits that adoption of this widely accepted standard for resolving pricing disputes for cable-affiliated programming will better

[135] Rogerson at 20.

[136] *Id.*

[137] *Id.* at 20-21.

[138] *Id*. Professor Rogerson suggests additional economic evidence and analysis to be included in a fair market value determination. *See Id.* at 21.

[139] *Id.* at 21.

ensure that the program access rules achieve their intended goal of protecting competing MVPDs from anticompetitive pricing by cable-affiliated satellite programmers. Adoption of a fair market value standard also addresses the persistent problem of knowledge asymmetries between vertically integrated programmers and MVPDs. As Professor Rogerson explains

> For a price discrimination complaint, the primary relevant evidence is the prices that the cable- affiliated programmer charges other MVPDs for the same programming. The MVPD will generally not have access to this information. For a fair market value complaint, the relevant evidence includes the prices that the MVPD itself pays for other similar sorts of programming. Obviously the MVPD has access to this information.[140]

Moreover, the problem with finding relevant evidence to support a price discrimination complaint for smaller MVPDs is compounded by the problems created by volume discounts because of the small MVPD's inability to find sufficient comparables to make its case.[141] The problem is less severe with respect to a fair market value evaluation, because in that case, the MVPD may use its own experiences for comparative purposes so the prices that the MVPD itself pays for all other similar programming will always be in the set of relevant evidence. Professor Rogerson explains that shifting from the price discrimination standard to the fair market value standard will therefore particularly ease the evidentiary problems faced by very small MVPDs.[142]

Remedies. The liability determination for discrimination based on a fair market value standard under Section 628(c)(2)(B) will necessarily require that Commission staff, an administrative law judge or the full Commission has arrived at its own best estimate of fair market value for the disputed programming. Once a finding is made that the current price offered by a cable-affiliated programmer exceeds the fair market value of the programming at

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[140] *Id.* at 21-22.

[141] *Id.* at 22.

[142] *Id.* at 22.

issue, and that discrimination has occurred, the question arises of appropriate remedies. Professor Rogerson suggests that where Commission staff or an administrative law judge have made a finding the price being offered by the affiliated programmer exceeds fair market value, "the most natural remedy would be to require the programmer to begin charging a price equal to fair market value,"[143] but other remedies should also be made available.

Specific Procedures. The Commission should also amend its rules to give the complainant MVPD and respondent programmer the option of agreeing to enter into final-offer arbitration based on a fair market value standard as an alternative to pursuing a complaint before the Commission.[144] ACA notes that the Commission has proposed a similar approach to improve its processes for resolution of program carriage complaints,[145] and that industry commenters in that proceeding are largely supportive of the alternative of such private dispute resolution in the appropriate case.[146] The Commission has frequently cited the benefits of a

[143] *Id.* at 22.

[144] *Id.* at 23.

[145] *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*, Notice of Proposed Rulemaking, 26 FCC Rcd 11494, ¶ 54 (2011) ("Program Carriage NPRM").

[146] *In the Matter of Revision of the Commission's Program Carriage Rules*, MB Doc. No. 11-131, 07-42, Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, at 30 (filed Nov. 28, 2011) ("Requiring adjudicators to impose a remedy derived from the submitted final offers of the parties would increase the predictability of the program-carriage dispute resolution process. For an independent vendor like MASN, this predictability is essential."); *In the Matter of Revision of the Commission's Program Carriage Rules*, MB Doc. No. 11-131, 07-42, Comments of Comcast, at 79-80 filed Nov. 28, 2011) ("Comcast can tentatively support such a proposal, so long as any remedial phase calling for the submission of final offers is fully separated from the adjudication on the merits, and so long as the adjudicator is required to select one of the offers in its entirety."); *In the Matter of Revision of the Commission's Program Carriage Rules*, MB Doc. No. 11-131, 07-42, Comments of Crown Media Holdings, Inc., at 13 (filed Nov. 28, 2011) ("Crown Media supports the Commission's proposal that the program carriage complaint adjudicator (either the Media Bureau or an administrative law judge) have discretion to order each party to submit its "final offer" for the rates, terms, and conditions for the video programming at issue."); *In the Matter of Revision of the Commission's Program Carriage Rules*, MB Doc. No. 11-131, 07-42, Comments of Cablevision, at 23 (filed Nov. 28, 2011) ("The Commission should not require the submission of final offers in program carriage disputes, but rather should allow the parties to a dispute to mutually determine when such an approach will advance the chances of reaching a fair result. 'Baseball style' arbitration sometimes helps encourage the parties to make reasonable final offers in a dispute, but this approach is generally only suitable when the range of issues at dispute is limited.").

final-offer arbitration backstop in bringing parties closer together on matters such as price thus avoiding the frequency and duration of disputes.[147] ACA suggests similarly that the threat that a case could be brought if the fair market value standard was violated would likely cause many parties to simply agree on a contract that both parties believed satisfied the fair market value standard, thus avoiding Commission processes altogether. Even in cases where the parties fail to reach a private agreement, many might opt for final-offer arbitration instead of pursuing a complaint before the Commission. This would leave the actual program access complaint process to be used only as a last resort when parties had failed to reach private agreement and failed to agree to opt for final offer binding arbitration.

* * *

By adopting this carefully targeted set of rules, the Commission can better ensure that MVPDs are not competitively disadvantaged in their purchase of programming from cable-affiliated programmers.

V. CONCLUSION

The Commission was right to address not only the question of whether to sunset the prohibition in exclusivity contained in Section 628(c)(2)(D), but also whether other revisions to its program access rules and procedures are required to improve their utility to MVPDs who must purchase cable-affiliated programming. The Commission has repeatedly and correctly recognized that the prohibition on exclusive contracts contained in Section 628(c)(2)(D) remains necessary for maintaining competition and diversity in the video distribution market. The Commission's own data amply demonstrates that nothing has changed in the key metrics

[147] *See* News Corp-Hughes Order, ¶174; Program Carriage NPRM, ¶ 54 ("Commission has explained that requiring parties to a programming dispute to submit their final offer for carriage and requiring the adjudicator to select the offer that most closely approximates fair market value has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected . . . .'").

concerning vertical integration in the cable industry since the Commission last made this finding in 2007 to warrant a different conclusion now. Indeed, the Commission must also strengthen its current program access rules to make them more effective. ACA has demonstrated that the current rules do little to protect small and medium-sized cable operators that obtain programming through buying groups, such as NCTC. Moreover, as the Commission has recognized, the program access rules have from the outset failed to address the significant competitive problem of "uniform price increases" imposed by cable-affiliated programmers that harm non-affiliated MVPDs while having no impact on the affiliated cable operator.

To address the three shortcomings of its rules concerning buying groups identified by ACA, the Commission must: (i) adopt an alternative and reduced liability condition that reflects current widely accepted industry practice; (ii) adopt a "safe harbor" rule to prevent cable-affiliated programmers from preventing a buying group's regularly participating members from opting into the cable-affiliated programmer's agreement with the buying group and (iii) explicitly state that buying groups are presumably comparable to individual MVPDs providing programming to the same number of subscribers with respect to volume discounts. Moreover, to address the "uniform price increase" loophole, the Commission should adopt a fair market value standard for determining whether volume discounts offered to buying groups are non-discriminatory.

These revisions to the program access rules are necessary to ensure that small and medium size MVPDs that purchase programming through buying groups, receive the same level of protection from the program access rules as do larger MVPDs, and to address the failure of the current program access rules to prevent cable-affiliated programmers from adopting pricing strategies that appear neutral, but in fact have a disparate impact on non-affiliated MVPDs. With these carefully targeted reforms, ACA is hopeful the program access rules will operate as intended to protect all MVPDs against the harmful effects of vertical integration.

Respectfully submitted,

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Appendix A

Rogerson Report

PROPOSED REVISIONS TO PROGRAM ACCESS RULES TO BETTER ADDRESS THE POTENTIAL COMPETITIVE HARMS CREATED BY CABLE-AFFILIATED PROGRAMMERS*

June 22, 2012

by

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OUTLINE

I. INTRODUCTION AND SUMMARY

The Commission has issued an NPRM[1] on program access rules to seek comment on (i) whether to retain, sunset or relax the prohibition on exclusive contracts contained in program access rules; and (ii) whether revisions to program access rules could be implemented in order to better address the potential competitive harms created by vertically integrated programmers. The American Cable Association (ACA) has asked me to provide an economic analysis of the second of these two issues.[2] In this paper I describe two different sets of revisions to program access rules and provide an economic analysis to explain how and why these revisions would better protect multichannel video programming distributors ("MVPDs") and their subscribers from the potential competitive problems created by the existence of cable-affiliated programmers.

Congress initially adopted program access rules in 1992 as amendments to the Communications Act of 1934 (the "Act"), as part of the Cable Television Consumer Protection and Competition Act of 1992.[3] These rules are contained in section 628 of the Act. Shortly thereafter, in 1993, the Commission adopted regulations implementing the program access rules.[4]

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[1] *See In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; and Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, ("*2012 Program Access NPRM*"), MB Docket No. 12-68, 07-18, and 05-192, March 20, 2012.

[2] In its comments, the ACA also explains why it is important to retain the prohibition on exclusive contracts contained in the program access rules and I agree with its conclusion that it is important to retain the prohibition on exclusive contracts. *See Comments of the American Cable Association, In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; and Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, ("*ACA Comments*"), MB Docket No. 12-68, 07-18, and 05-192, June 22, 2012. In this paper I will restrict myself to considering the second issue of describing and providing economic rationales for potential revisions to program access rules in order to better address the potential competitive harms created by vertically integrated programmers.

[3] *See* Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *See In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and*

These regulations are contained in Part 76, Subpart O of Title 47 of the C.F.R. As the Commission states in its current NPRM, the program access rules were adopted to deal with the problem that "cable-affiliated programmers had the incentive and ability to favor their affiliated cable operators over other, unaffiliated, MVPDs with the effect that competition and diversity in the distribution of video programming would not be preserved and protected."[5] Cable-affiliated programmers can favor their own operators either by charging other MVPDs higher license fees for programming or withholding this programming from other MVPDs altogether. Program access rules are designed to prohibit both of these behaviors and thereby promote competition and diversity in markets for distribution of video programming.

As the Commission itself notes in its current NPRM, "program access rules have remained largely unchanged in the almost two decades since the Commission originally adopted them in 1993."[6] Thus it is natural and entirely appropriate for the Commission to consider whether or not experience with these rules over the past two decades and/or marketplace developments over the past two decades provide a basis for identifying ways in which these rules could be improved. In this paper I identify two such improvements.

A. Providing Protection to Small and Medium Sized MVPDs that License Programming Through Buying Groups.

Most small and medium sized MVPDs obtain access to a substantial share of the programming that they distribute through a Kansas not-for-profit buying group called the National Cable Television Cooperative, Inc. (NCTC). By aggregating subscriber count and negotiating standardized master agreements that its members can opt into, the NCTC is generally

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Carriage First Report and Order, ("*1993 Program Access Order*") MB Docket No. 92-265, April 30, 1993.

[5] *See 2012 Program Access NPRM* at para. 6.

[6] *See 2012 Program Access NPRM* at para. 5.

able to obtain significantly lower license fees for its members than these MVPDs could obtain through direct deals with programmers. Obviously, since small and medium sized MVPDs rely on this buying group to license programming, they will only receive protection from program access rules to the extent that buying groups are given the same protections in their dealings with cable-affiliated programmers as individual MVPDs are given. Although program access rules explicitly state that these protections are provided to buying groups as well as individual MVPDs, it turns out that three problems with the specific manner in which the rules are drafted have essentially resulted in a situation where these rules provide no protection at all to buying groups. The first set of revisions that I propose solves these problems, so that program access rules will provide the same level of protection to small and medium size MVPDs, that normally purchase programming through buying groups, as they provide to larger MVPDs, that normally purchase programming through individual deals with programmers.

The first problem is that, in order for a buying group to qualify for protection under program access rules, it must satisfy the condition (which I will refer to as the "full liability condition") that either the buying group assumes financial liability for all of the contractual commitments made by its members under master agreements, or its members assume joint and several liability for all of the contractual commitments made by its members under master agreements. However, in practice, the agreements that the NCTC and programmers actually choose to enter into never satisfy the full liability condition. Simple economic analysis suggests that the main economic function performed by buying groups does not require this condition to be satisfied and agreements that satisfy it would likely be inefficient and undesirable. Thus, because program access rules require buying groups to meet a condition that is not satisfied in practice and that would likely be uneconomic for a buying group to attempt to satisfy, program access rules have provided no protection at all to buying groups in practice. The solution is to revise the definition of buying groups to add as a third alternative liability requirement that buying groups can satisfy, the more limited liability condition that experience has shown that buying groups and programmers have found it efficient to use.

The second problem is that program access rules do not place any restrictions at all on the ability of a cable-affiliated programmer to unreasonably prevent particular members of a buying group from participating in a master agreement between the programmer and the buying group, even if the member normally purchases a substantial share of its programming through the buying group. It is clear that if a cable-affiliated programmer has the right to arbitrarily exclude any member that it wishes from any master agreement that it signs with a buying group, the requirement that cable-affiliated programmers must negotiate nondiscriminatory agreements with buying groups could be rendered completely meaningless. Therefore, standards need to be established for determining when there is a presumption that it is reasonable for a member of a buying group to be allowed to participate in a master agreement with a cable-affiliated programmer. I suggest that the Commission adopt a rule with a “safe harbor” subscriber level for individual MVPDs to participate, in the sense that MVPDs with no more than the “safe harbor” number of subscribers are presumptively entitled to participate in master agreements between the programmer and the buying group. In addition, the rule should state that: MVPDs with more than the “safe harbor” level of subscribers are also entitled to participate if they can demonstrate that some specified minimum share of their total expenditures on programming are incurred through the buying group; and that, when an expiring master agreement is being renewed, members participating in the expiring agreement have the right to participate in the renewed agreement.

The third problem is that program access rules have not explicitly established the standard upon which buying groups are to be compared in determining whether they are being offered nondiscriminatory volume discounts. I will argue that the only reasonable standard to impose is that a buying group should generally be entitled to the same volume discount to which an MVPD providing the same number of subscribers would be entitled. Although this is the standard that an administrative judge hearing a program access complaint would likely use in the absence of more explicit guidance being provided in the regulations, providing this explicit standard in the regulations would clarify the regulations and close a potential loophole which could otherwise render the rules completely ineffective in providing protection to buying groups. The regulations should also state that a cable-affiliated programmer has the obligation to offer a master agreement to a buying group that specifies an entire schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribes from its current membership eligible to participate in the master agreement. This would solve the "chicken and egg" problem that might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high, even though the license fees would drop if the members all decided to opt in. Finally, note that larger MVPDs may well be able to negotiate more advantageous terms along dimensions other than just price. The revised regulations should state that the standard of comparability for a buying group is presumptively an MVPD providing the same number of subscribers for all terms and conditions of the contract, and not simply price. That is, the regulations should state that a buying group is presumed to be entitled to receive all of the terms and conditions to which an MVPD providing the same number of customers would be entitled.

B. Closing the Uniform Price Increases Loophole and a Related Loophole by Requiring Cable-Affiliated Programmers to Offer Programming to Unaffiliated MVPDs at Fair Market Value.

The main specific practice that the program access rules prohibit in an attempt to limit the ability of cable-affiliated programmers to charge higher license fees than they would have the incentive or ability to charge if they were not vertically integrated, is contained in Section 628(c)(2)(B) of the Act which prohibits "discrimination . . . in the prices, terms and conditions of sale or delivery" of programming. On an economic level, the nondiscrimination requirement places two constraints on the price that a cable-affiliated programmer offers to an unaffiliated MVPD.

(i) The price must be no higher than the prices that the programmer charges to its own affiliated cable operator.

(ii) The price must be no higher than the prices that the programmer charges to other unaffiliated MPVPs.

In the current NPRM, the Commission notes[7] that it has repeatedly determined in a series of major decisions regarding vertical mergers between programmers and MVPDs that constraint (i) likely places almost no practical limits at all on a cable-affiliated programmer, because the internal transfer price within a vertically integrated firm can be arbitrarily set at any level without necessarily influencing any internal decisions of the vertically integrated firm. Thus a cable-affiliated programmer that wishes to disadvantage its competitors by charging them high prices for programming can satisfy the non-discrimination requirement simply by raising its own internal transfer price to the same high level, and thus apparently imposing a uniform price increase on both itself and its competitors. However, because the price it charges itself is only an internal transfer price, it can ignore this price when it makes its own programming decisions and instead directly make programming decisions that maximize the total profit of the vertically

[7] *See 2012 Program Access NPRM* at para. 101.

integrated firm. Because the cable-affiliated programmer is apparently imposing a uniform price increase on both itself and its competitors, the Commission refers to this as the "uniform price increases" loophole.

The Commission notes that in various merger orders it has closed this loophole in program access rules by adopting a private arbitration remedy based on a fair market value standard. In such an arbitration, each side makes a "final offer" for carriage of the programming at issue and an arbitrator then chooses the final offer that most closely approximates the fair market value of the programming carriage rights at issue. The main difference between a nondiscrimination standard and fair market value standard is that the former compares the contract that a programmer offers to an MVPD with other contracts that the *same* programmer offer for the *same* programming, while the latter additionally compares the contract that a programmer offers to an MVPD with contracts that *other* programmers offer for *similar* programming.

The obvious solution to closing the uniform price increases loophole in program access rules is to directly require that cable-affiliated programmers make their programming available to unaffiliated MVPDs at fair market value. As the Commission itself suggests, it could adopt such regulations under the authority of the non-discrimination prohibition in Section 628(c)(2)(B) based on the rationale that "while a uniform price increase appears facially neutral in that it applies to all MVPDs equally, it has a disparate impact on MVPDs that are not affiliated with the cable-affiliated programmer because the price increase is not merely a transfer for unaffiliated MVPDs."[8] Thus the only way of guaranteeing non-disparate impact is to require that the affiliated programmer make its programming available to competing MVPDs at fair market value. The regulations should state that it is a violation of the program access rules for a cable-

[8]*See 2012 Program Access NPRM* at para. 102.

affiliate programmer to offer programming at a price higher than fair market value. The regulations should also state that the primary evidence that would be accepted to determine the fair market value of programming is evidence on the prices that other programmers charge for similar types of programming to similar MVPDs, including the MVPD filing the complaint itself. In the event that the Commission found that its requirement to set prices at fair market value was violated, it would have the authority to impose remedies and penalties. Presumably the most natural remedy would be to require the programmer to make the programming at issue available at fair market value.

The paper is organized as follows. Section II discusses the first set of revisions to program access rules whose purpose is to have program access rules provide the same level of protection to small and medium sized MVPDs that generally purchase programming through buying groups, as they do to larger MVPDs that generally purchase programming through individual agreements with programmers. Section III considers the second set of revisions to program access rules whose purpose is to close the uniform price increases by requiring cable-affiliated programmers to offer programming at fair market value. Finally, Section IV draws a brief conclusion.

II. PROVIDING PROTECTION TO SMALL AND MEDIUM SIZED MVPDS THAT LICENSE PROGRAMMING THROUGH BUYING GROUPS BY REVISING PROGRAM ACCESS RULES SO THAT THEY OFFER THE SAME PROTECTIONS TO BUYING GROUPS AS THEY DO TO INDIVIDUAL MVPDS

A. Introduction.

Most small and medium sized MVPDs obtain a substantial share of the programming they distribute through a Kansas not-for-profit buying group called the National Cable Television Cooperative, Inc. (NCTC).[9] The NCTC has approximately 910 members. Table 1 provides a list

[9] Unless otherwise indicated, the description of the NCTC and its operating practices contained in this section is

of the Kagan top-50 basic national cable networks ranked according to total affiliate revenue and indicates which of these networks the NCTC currently has master agreements with. As can be seen from Table 1, the NCTC has master agreements with almost all of the Kagan top-50 networks. The NCTC has master agreements with 45 of the top-50 networks, including all of the top-25 networks except for Lifetime, which is ranked 15th, and 21 of the next 25 networks.

A buying group is an organization made up of MVPDs that negotiates master agreements with programmers that its members can opt into, and then acts as an interface between its members and the programmer so that the programmer can deal with a single entity for purposes of negotiating contracts, determining technical standards, billing for payments, collecting payments, etc. From an economic perspective, the main efficiency that a buying group creates is that it dramatically reduces the transactions costs for a programmer of separately dealing with a large number of small and medium sized MVPDs by allowing the programmer to deal instead with a single entity to negotiate and administer contracts. Programmers benefit from reduced transactions costs and some of these benefits are passed on to MVPDs in the form of lower rates. Thus, small and medium sized MVPDs are generally able to obtain much better terms through participating in a buying group, such as the NCTC, than they would be able to obtain through directly dealing with the programmers themselves.

Since small and medium sized MVPDs normally rely on a buying group to license programming, they will only receive protection from program access rules to the extent that buying groups are given the same protections in their dealings with cable-affiliated programmers as individual MVPDs are given. Consistent with the language of section 628(c)(2)(B) of the Act, stating Congress' intention that the non-discrimination rule benefit both individual MVPDs as

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based on the Declaration of Frank Hughes, Senior Vice President of Member Service for NCTC, submitted by the ACA as part of its initial comments in this proceeding. *See Declaration of Frank Hughes, Senior Vice President of Member Services for NCTC, Inc*., attachment to *ACA Comments*, June 22, 2012.

well as their buying groups, the Commission enacted program access regulations that explicitly apply to buying groups. The Commission did so by including a buying group within its definition of an MVPD for purpose of the rules that provide MVPDs rights and protections under the program access provisions of the Act.[10] Therefore, when program access rules require cable-affiliated programmers to make their programming available to MVPDs and give MVPDs the right to file complaints, they also automatically give these rights to buying groups. However, three problems with the specific manner in which the rules are drafted have essentially resulted in a situation where these rules, in practice, provide no protection at all to buying groups. The revisions discussed in this section are designed to solve these problems, so that program access rules will provide the same level of protection to small and medium-sized MVPDs that normally purchase programming through buying groups, as they provide to larger MVPDs that normally purchase programming through individual deals with programmers. Each of the three problems and the proposed method for dealing with it will be considered in turn.

B. The Definition of a Buying Group.

Current program access regulations contain the following definition of a "buying group."

> "The term 'buying group' . . . means an entity representing the interests of more than one entity distributing multichannel video programming that:
>
> (1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and
> (2) Agrees to uniform billing and standardized contract provisions for individual members; and
> (3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group."[11]

Condition (1) above (the "full liability condition") requires either that the buying group assume

[10] *See* 47 C.F.R. 77.1000(e).

[11] *See* 47 C.F.R. 76.1000(c).

liability for the contractual commitment that members makes when they opt into master agreements or that the members of the buying group assume joint and several liability for the contractual commitments that members make when they opt into master agreements. In particular, if an individual member opts into a master agreement lasting (say) three years and after one year either refuses to or becomes unable to make further payments for programming, the NCTC or its members would be legally liable to continue to make payments on behalf of the member for the remaining two year duration of the deal under condition (1).

In reality programmers never require the NCTC or its members to satisfy the full liability condition. As mentioned above, the NCTC acts as an interface for all billing and collection activities between its own members and the programmer. At the end of each month, members report the total number of subscribers for each service to the NCTC for that month. The NCTC then bills its individual members, collects payments from them and remits a single aggregate payment to the programmer. The main legal liability that the NCTC assumes as part of the master agreement it signs with a programmer is to forward any payments that it actually receives from MVPDs on to the programmer. In particular, programmers never require the NCTC to assume liability to make all future payments over the life of the agreement of behalf of a reneging MVPD, nor do they require any single member to pay for the delinquent payments of any other member.

If an MVPD that has opted into a master agreement refuses to or becomes unable to make further payments for programming, the programmer has the legal right to attempt to require the MVPD to continue to make payments over the life of the agreement. The programmer also has the legal right to cease delivering programming to an MVPD when it becomes aware that the MVPD is not paying its bills. Given the various billing lags, if an MVPD participating in a master agreement ceases paying its bills, it will generally receive between 30 and 60 days of "free" programming before the programmer becomes aware of the problem and is able to cut-off programming.

This is essentially the same arrangement that a programmer has with an MVPD that it contracts with directly.[12] In this case, the programmer issues a bill to the individual MVPD at the end of the month for each month's programming. If an MVPD refuses to or becomes unable to make further payments for programming, the programmer has the legal right to attempt to require the MVPD to continue to make payments over the life of the contract. The programmer also has the legal right to cease delivering programming to the MVPD when it becomes aware that the MVPD is not paying its bills. The lag with which a programmer becomes aware that an MVPD has ceased making payments is generally about the same length regardless of whether the programmer contracts directly with the MVPD or contracts with the MVPD through the NCTC. Thus in either case, if an MVPD ceases paying its bills, it will generally be able to receive between 30 and 60 days of "free" programming before the programmer becomes aware of the problem and is able to cut-off programming.

In summary, the nature of the economic relationship that a programmer has with a particular MVPD, including all of the risks that each party accepts and the opportunities each party has to make threats or attempt to influence the other party, are essentially the same regardless of whether a programmer directly contracts with an MVPD or contracts with an MVPD through the NCTC.

It is important to note that the NCTC and programmers freely enter into the deals that

[12] The description of billing and collection practices for direct agreements between programmers and MVPDs in this paragraph is based on the Declaration of Peter Smith, Vice President-Programming for Wide Open West Finance, LLC ("WOW"), submitted by the ACA as part of its initial comments in this proceeding. *See Declaration of* Peter Smith, Vice President-Programming for Wide Open West Finance, LLC ("WOW"), attachment to *ACA Comments*, June 22, 2012.

they sign, and that the current NCTC business model, including the amount of liability it assumes on behalf of its members, has been accepted by essentially all programmers in the industry. Furthermore, programmers and the NCTC could clearly enter into arrangements where the NCTC assumed greater liability on behalf of its members if they wished. There is no reason to believe that the NCTC and programmers have failed to negotiate an efficient contractual arrangement. In particular, if the value to programmers of having the NCTC assume greater liability on behalf of its members generally exceeded to the costs to the NCTC of so doing, we would have expected such contractual arrangements to emerge in practice. Thus it seems reasonable to conclude that having the NCTC assume greater liability on behalf of its members would not be an efficient economic arrangement. Furthermore, the business model that they have agreed upon makes good economic sense. The main economic function that the NCTC is performing for programmers is to save them the transactions costs of dealing with multiple MVPDs. There is no good economic reason to expect that the NCTC in addition would be a natural entity to provide programmers with "extra insurance" against the possibility that an individual MVPD might become delinquent in its payments.[13]

Furthermore, there is at least one respect in which a buying group may actually reduce the risk of delinquency. When a member of the NCTC becomes delinquent on one of its master agreements with the NCTC, the NCTC generally terminates all of its master agreements with that particular member. Since most MVPDs enter into multiple master agreements, this means that the penalty for breaching an agreement with one programmer will be termination of all

[13] The requirement that members assume joint and several liability for the commitments of each member would likely create serious additional problems over and above the requirement that the NCTC assume this liability. It is likely that any potential member of the NCTC would find it highly undesirable to be exposed to the unpredictable risk of being potentially responsible for the failure to pay of all other members of the organization. Furthermore, programmers would likely target recovery efforts on the largest and financially strongest members, with the result that these MVPDs would be particularly unwilling to join the organization in the first place. Thus, it seems very likely that a buying group that attempted to impose joint and several liability on its membership would simply not be viable.

agreements that the MVPD has made with programmers through the NCTC. No such penalty applies for the case when an MVPD enters into direct deals with programmers. That is, when an MVPD reneges on a direct programming agreement it has with one programmer, there is no similar repercussion with regard to contract termination and loss of services from other programmers.

Thus, because program access rules require buying groups to meet a condition that is not satisfied in practice and that would likely be uneconomic for a buying group to attempt to satisfy, program access rules have provided no protection at all to buying groups, in practice. The solution is to revise the definition of buying groups to add, as a third alternative liability requirement that buying groups can satisfy, the more limited liability condition that experience has shown that buying groups and programmers have found it efficient to use. In particular, a third alternative requirement should be added to condition (1) of the Commission's rules that the buying group assumes liability to forward all payments that it receives from its members for payments under master agreements to the appropriate programmer. The marketplace has shown that this liability condition works in practice and is efficient for both programmers and MVPDs.

Finally, it is worth noting that there is precedent for the revision I am suggesting in the sense that the Commission has determined once before that the current full liability condition should be significantly weakened. Specifically, in 1998 the Commission reviewed its buying group liability requirement and decided to adopt a significantly weaker alternate liability condition that a buying group maintain liquid cash or credit reserves equal to the cost of one month of programming.[14] However, due to error or oversight, the amended rule was never

[14] *See Report and Order In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, "1998 Program Access Order,"* CS Docket No. 97-248 and RM. No. 9097, August 10, 1998, and note in particular the Erratum attached to the end of the document.

published in the Federal Register nor codified in the Code of Federal Regulations.[15]

C. Unreasonably Preventing Members of a Buying Group From Opting Into a Master Agreement.

Program access rules do not place any restrictions at all on the ability of a cable-affiliated programmer to unreasonably prevent particular members of a buying group from participating in a master agreement between the programmer and the buying group, even if the member normally purchases a substantial share of its programming through the buying group. It is clear that if a cable-affiliated programmer had the right to arbitrarily exclude any member that it wished from any master agreement that it signed with a buying group, the requirement that cable-affiliated programmers must negotiate nondiscriminatory agreements with buying groups could be rendered completely meaningless. Therefore standards should be established for determining when there is a presumption that a member of a buying group is allowed to participate in a master agreement with a cable-affiliated programmer.

The two general goals of these standards should be as follows:

(1) The standards for determining when a member of buying group is presumptively entitled to participate in a master agreement should be clear, simple, and easily verifiable.

(2) The general effect of the standards should be to guarantee that an MVPD that generally purchases a significant share of its programming through buying groups is presumed to be entitled to participate in a master agreement between a cable-affiliated programmer and the buying group.

The simplest and most easily verifiable standard for determining when there is a presumption that a member of buying group has a right to participate in master agreements

[15] Experience in the marketplace suggests that even the more modest condition that the Commission considered in 1998 is no longer needed. In its early years, the NCTC's standard practice was to require its members to deposit 30 days of payments into an escrow account when they opted into a master agreement that would be remitted to the programmer if they defaulted. However, beginning about 14 years ago, as the NCTC continued to grow more established and accepted by programmers, programmers and the NCTC decided to no longer require individual members to deposit any cash in an escrow account. Presumably the extra cost that MVPDs incurred by placing the money in escrow was greater than the insurance benefit that programmers received. Therefore the NCTC and programmers agreed to a new arrangement where no cash was held in escrow and price was adjusted to make all parties better off.

between the buying group and cable-affiliated MVPDs would be to base the standard on the number of subscribers belonging to the MVPD. This would be consistent with the approach that the Commission took in crafting remedies for the Comcast NBCU transaction where MVPDs below a specified size threshold were given the right to be represented by a buying group in binding arbitration.[16] I think this would be a reasonable course for the Commission to consider following in this situation as well.

Specifically, I suggest that the Commission adopt a rule with a "safe harbor" subscriber level for individual MVPDs to participate, in the sense that MVPDs with no more than the "safe harbor" number of subscribers are presumptively entitled to participate in master agreements between the programmer and the buying group. In addition, the rule should state that MVPVs with more than the "safe harbor" level of subscribers are also entitled to participate if they can demonstrate that some specified minimum share of their total expenditures on programming are incurred through the buying group. Finally, it should also state that when an expiring master agreement is being renewed, members participating in the expiring agreement have the right to participate in the renewed agreement. The "safe harbor" level should be set so that MVPDs that regularly purchase programming through the NCTC are included in the safe harbor. This rule would set a clear, simple and easily verifiable standard that has the effect of ensuring all MVPDs that currently license programming through the NCTC on a regular basis can participate in NCTC deals with cable-affiliated programmers. However, if over time larger MVPDs begin to participate more regularly in NCTC deals, the rule would also provide these MVPDs with the opportunity to demonstrate this, and thus to also have the right to be included in NCTC deals with cable-affiliated programmers.

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[16] *See Memorandum Opinion and Order*, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, ("*Comcast-NBCU Order*"), MB Docket No. 10-56, January 20, 2011 at para. 58.

D. The Standard of Comparability for Volume Discounts.

Congress and the Commission have recognized the fact that volume discounts generally exist in programming markets in the sense that buyers with a larger number of subscribers are generally able to negotiate lower per subscriber license fees than buyers with a smaller number of subscribers.[17] Volume discounts may occur because the per subscriber cost of serving an entity with a larger number of subscribers is lower, the per subscriber benefit (such as per subscriber advertising revenue) of serving an entity with a large number of subscribers is higher, or because there is some sense in which an entity with more subscribers simply has more "bargaining power." Therefore when evaluating whether or not a particular buyer is being charged non-discriminatory license fees, Congress and the Commission both recognized that the number of subscribers a buyer represents needs to be taken into account. In particular, they recognized that, holding all other factors constant, a buyer should generally be entitled to a rate no higher than any equal or lesser sized buyer receives but not necessarily to the rate no higher than a larger sized buyer receives.

All of the factors that explain why a buyer with more subscribers may be able to negotiate lower license fees than a buyer with fewer subscribers apply regardless of whether the buyer is a single MVPD or a buying group. Furthermore, program access rules do not distinguish between single MVPDs and buying groups when they explain and discuss the volume discounts that entities licensing programming receive. Therefore, it seems clear that program access rules as they are written ought to be interpreted as suggesting a presumption that, holding all other factors constant, a non-discriminatory price for a buying group offering a certain number of subscribers for the programming ought to be the same as the price for an individual MVPD offering the same number of subscribers.

[17] *See* Section 628(c)(2)(B)(iii) of the Act and 47 C.F.R. 76.1002(b)(3).

However, to clarify this understanding and to close a potential loophole which could otherwise render the rules completely ineffective in providing protection to buying groups, I recommend that the Commission consider explicitly stating in program access rules that the standard upon which buying groups are compared with regard to discriminatory pricing shall be to an MVPD providing the same number of subscribers. The regulations should also state that a cable-affiliated programmer has the obligation to offer a master agreement to a buying group that specifies an entire schedule of non-discriminatory license fees over any range of subscribership levels that the buying group requests, so long as it is possible that the buying group could provide this number of subscribes from its current membership eligible to participate in the master agreement. This will solve the "chicken and egg" problem that might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high even though the license fees would drop if the members all decided to opt in.

Finally, note that larger MVPDs may well be able to negotiate more advantageous terms along dimensions other than just price. The revised regulations should state that the standard of comparability for a buying group should be an MVPD providing the same number of subscribers for all terms and conditions of the contract, and not simply price. That is, the regulations should state that a buying group is presumed to be entitled to receive all of the terms and conditions that an MVPD providing the same number of customers would be entitled to receive.

III. CLOSING THE UNIFORM PRICE INCREASES LOOPHOLE BY REQUIRING CABLE-AFFILIATED PROGRAMMERS TO OFFER PROGRAMMING AT FAIR MARKET VALUE

A. Introduction.

The main specific practice that the program access rules prohibit in an attempt to limit the ability of cable-affiliated programmers to charge higher license fees than they would have the incentive or ability to charge if they were not vertically integrated, is contained in Section 628(c)(2)(B) of the Act which prohibits "discrimination . . . in the prices, terms and conditions of sale or delivery" of programming. On an economic level the nondiscrimination requirement places two types of constraints on the prices that a cable-affiliated programmer can offer to an unaffiliated MVPD.

(i) The prices must be no higher than the prices that the programmer charges to its own affiliated cable operator.

(ii) The prices must be no higher than the prices that the programmer charges to other unaffiliated cable operators.

In the current NPRM the Commission notes[18] that it has repeatedly determined in a series of major decisions regarding vertical mergers between programmers and MVPDs that non-discrimination requirement (i) likely places almost no practical limits at all on a cable-affiliated programmer, because the internal transfer price within a vertically integrated firm can be arbitrarily set at any level without necessarily influencing any internal decisions of the vertically integrated firm. Thus a cable-affiliated programmer that wishes to disadvantage its competitors by charging them high prices for programming can satisfy the non-discrimination requirement (i) simply by raising its own internal transfer price to the same high level and thus apparently imposing a uniform price increase on both itself and its competitors. However, because the price it charges itself is only an internal transfer price, it can ignore this price when it makes its own programming decisions and instead directly make programming decisions that maximize the total profit of the vertically integrated firm. Because the cable-affiliated programmer is apparently imposing a uniform price increase on both itself and its competitors, the Commission refers to this as the "uniform price increases" loophole.

I agree with the Commission's conclusion that the uniform price increases loophole

[18] *See Program Access NPRM* at para. 101.

creates a large and significant impediment to the ability of the price discrimination prohibition in program access rules to prevent a cable-affiliated programmer from raising license fees to competing programmers in order to disadvantage these competitors. In this section I will propose a revision to program access rules that will close this loophole.

B. The Fair Market Value Standard.

The Commission notes in the NPRM that in various merger orders it has closed the uniform price increases loophole in program access rules by adopting a commercial arbitration remedy based on a fair market value standard. In such an arbitration, each side makes a "final offer" for carriage of the programming at issue and an arbitrator then chooses the final offer that most closely approximates the fair market value of the programming carriage rights at issue. The main difference between a nondiscrimination standard and fair market value standard is that the former compares the contract that a programmer offers to an MVPD with other contracts that the *same* programmer offers for the *same* programming, while the latter additionally compares the contract that a programmer offers to an MVPD with contracts that *other* programmers offer for *similar* programming.

The obvious solution to more generally closing the uniform price increases loophole in program access rules is to directly require that cable-affiliated programmers make their programming available to unaffiliated MVPDs at fair market value. As the Commission itself suggests, it could adopt such regulations under the authority of the non-discrimination prohibition in Section 628(c)(2)(B) based on the rationale that "while a uniform price increase appears facially neutral in that it applies to all MVPDs equally, it has a disparate impact on MVPDs that are not affiliated with the cable-affiliated programmer because the price increase is not merely a transfer for unaffiliated MVPDs."[19] Thus the only way of guaranteeing non-disparate treatment is to require that the affiliated programmer makes its programming available to competing MVPDs at fair market value.

The regulations should state that it is a violation of the program access rules for a cable-affiliated programmer to offer programming at a price higher than fair market value and that the primary evidence that will be accepted to determine the fair market value of programming is evidence on the prices that other programmers charge to the complaining MVPD as well as to other MVPDs for similar types of programming. The regulations should also note that regression analysis or other techniques that can be used to predict how programming prices are affected by other characteristics of the programming such as ratings, advertising revenue, genre, etc. can be employed, so that even pricing data on programming with somewhat different characteristics than a particular network can be used to provide useful information about fair market value of a network. Finally, the regulations should also specifically state that evidence on the prices that the cable-affiliated programmer charges its own affiliated cable operator or other unaffiliated MVPDs for the same programming will not be considered as evidence for determining the fair market value of the programming.

Note that an MVPD that is attempting to determine if it has a valid complaint will generally have much better information regarding the evidence relevant to determining the validity of a fair market value complaint than the evidence relevant to determining the validity of a price discrimination complaint. For a price discrimination complaint, the primary relevant evidence is the prices that the cable-affiliated programmer charges other MVPDs for the same programming. The MVPD will generally not have access to this information. For a fair market

[19] *See 2012 NPRM* at para. 102.

value complaint, the relevant evidence includes the prices that the MVPD itself pays for other similar sorts of programming. Obviously the MVPD has access to this information.

Particularly for small MVPDs, the problem of finding relevant evidence to support a price discrimination complaint is compounded by the problems that volume-related discounts create. When an MVPD is attempting to determine if it is being discriminated against, it basically needs to determine if there is another MVPD that pays more for the same programming. However, because of the volume discounts issue, any given MVPD is essentially restricted to looking at the set of MVPDs less than or equal to it in size in order to establish a price discrimination claim. Very small MVPDs have almost no possible comparisons to look at. In the extreme case of the smallest MVPD that purchases the programming, there are literally no MVPDs that it can look at to establish a price discrimination complaint! The situation is not nearly as hopeless, however, for the case of a fair market value complaint because in this case the MVPD is obviously perfectly comparable to itself so the prices that the MVPD itself pays for all other similar sorts of programming are always in the set of relevant evidence. Thus shifting from the price discrimination standard to the fair market value standard will particularly ease the evidentiary problems faced by very small MVPDs.

If the Commission makes a finding that the current price being offered by a cable-affiliated programmer exceeds the fair market value of the programming at issue, it will then be able to impose remedies or penalties just as when it makes a finding that the non-discrimination requirement has been violated. Presumably, in the case where the Commission finds the price being offered by the affiliated programmer exceeds fair market value, the most natural remedy would be to require the programmer to begin charging a price equal to fair market value. The Commission necessarily will have had to determine its best estimate of fair market value in order to decide whether a violation of the fair market value standard occurred in the first place.

After a complaint is filed, the regulations should also clearly give the complainant and defendant the option of agreeing to participate in an alternate "final offer" dispute resolution mechanism such as commercial arbitration as an alternative to pursuing the complaint and having the Commission provide a remedy, if it determines that the fair market value standard has been violated. Thus, if the new regulation worked very well it might have a large effect even if very few cases were ever actually carried through to completion. In the first instance, hopefully the threat that a case could be brought if the fair market value standard was violated would cause many parties to simply agree on a contract that both parties believed satisfied the fair market value standard. In the second instance, even when parties fail to reach a private agreement, hopefully many of them would decide to opt for final offer binding arbitration instead of pursuing the complaint with the Commission. The actual complaint process would only be used as a last resort when parties had failed to reach private agreement and they failed to agree to opt for final offer arbitration.

IV. CONCLUSION

In this report I have described two sets of revisions to program access rules that would improve the extent to which program access rule protect MVPDs from the incentive and ability of cable-affiliated programmers to disadvantage the competitors of their cable operator affiliates. The first set of revisions would provide protection to small and medium sized MVPDs that license programming through buying groups, by revising program access rules to offer the same protections to buying groups as they do to individual MVPDs. The main required revisions for this case are to: (i) revise the definition of buying groups to add as a third alternative liability requirement that buying groups can satisfy, the more limited liability condition that experience has shown that buying groups and programmers have found it efficient to use; (ii) explicitly state that buying groups are presumed to be entitled to the same volume discounts as individual MVPDs providing the same number of subscribers; and (iii) explicitly state that there is a “safe harbor” subscriber level for MVPDs to participate in the sense that MVPDs with no more than the “safe harbor” number of subscribers are presumptively entitled to participate in master agreements between the programmer and the buying group, that MVPVs with more than the “safe harbor” level of subscribers are also entitled to participate if they can demonstrate that some specified minimum share of their total expenditures on programming are incurred through the buying group and that, when an expiring master agreement is being renewed, members participating in the expiring agreement have the right to participate in the renewed agreement. The second set of revisions would close the uniform price increases loophole by requiring cable-affiliated programmers to offer programming to unaffiliated MVPDs at fair market value.

TABLE 1

NCTC MASTER AGREEMENTS WITH THE TOP 50 BASIC CABLE NETWORKS
(Networks That Have a Master Agreement with the NCTC are Denoted by *)

Rank	Network	Rank	Network
*1.	ESPN/ESPN HD	*26.	Bravo
*2.	TNT	*27.	Cartoon Network
*3.	Disney Channel	*28.	VH1
*4.	FOX News	29.	BTN
*5.	ESPN2	*30.	TLC
*6.	USA	*31.	SPEED
*7.	CNN/HLN	*32.	National Geographic Channel
*8.	TBS	*33.	FOX College Sports
*9.	Nickelodeon/Nick at Night	*34.	MSNBC
*10.	NFLNetwork	*35.	BET
*11.	FX Network	*36.	Food Network
*12.	MTV	37.	MLB Network
*13.	Discovery Channel	*38.	Comedy Central
*14.	CNBC	*39.	HGTV
15.	Lifetime Television	*40.	ESPNews
*16.	A&E	*41.	Nick Jr.
*17.	AMC	42.	WGN America
*18.	History		*43. ESPNU
*19.	Golf Channel	*44.	Independent Film Channel
*20.	TCM	*45.	The Weather Channel
*21.	Spike TV	*46.	TV Land
*22.	ABC Family Channel	*47.	SOAPnet
*23.	NBC Sports Network	*48.	Travel Channel
*24.	Syfy	*49.	Disney XD
*25.	E! Entertainment Television	50.	NHL Network

Notes:
1. Rankings are for 2012 by SNL Kagan (www.snl.com) according to total affiliate revenue.
2. Information on programmer master agreements with NCTC from NCTC.

Appendix B

NCTC Declaration

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

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

Declaration of Frank Hughes, Senior Vice President of Member Services for National Cable Television Cooperative, Inc.

Declarant hereby states as follows:

1. My name is Frank Hughes. I am the Senior Vice President of Member Services at the National Cable Television Cooperative ("NCTC"). My business address is 11200 Corporate Avenue, Lenexa, Kansas 66219.

2. I have been with the NCTC since 1992. I have served in various roles at NCTC, but I have spent most of my time at NCTC responsible for the negotiation, execution and renewal of all content agreements with programmers.

3. The NCTC was organized as a buying group in 1984 by a dozen small and medium-sized multichannel video programming distributors ("MVPDs") for the purpose of purchasing satellite cable programming. Because programmers offer volume discounts based on the number of subscribers an MVPD brings to the table, NCTC sought to aggregate its

members' subscribers to secure volume discounts and other favorable terms and conditions commensurate to those obtained by larger MVPDs serving a similar number of subscribers as the group. Over time, the NCTC began to serve this same role with respect to other vendors its members typically deal with for system needs, such as hardware and equipment manufacturers.

4. NCTC's primary role is that of an interface between its members and the programmer so that the programmer is able to deal with a single entity for purposes of functions such as contract negotiations, determining technical standards, and billing and collection. More specifically, NCTC negotiates master agreements and their renewals with video programmers. NCTC then allows its members to opt-in to the master agreements, manages the collection of subscriber counts, calculates billing based on the prices in the master agreements and issues a single remittance to the programmer on behalf of those members participating in a master agreement. Programmers have accepted the role NCTC plays in this manner and NCTC has generally been able to provide significantly lower license fees for its members than its members could obtain by negotiating individually with the programmers.

5. Today, the NCTC has approximately 910 member companies representing approximately 25 million MVPD subscribers. NCTC member companies vary in size; from a few dozen subscribers to several million subscribers. Of NCTC's 910 members, a little over 100 members have more than 10,000 subscribers; more than half of NCTC's members have less than 1000 subscribers. The largest four members of the NCTC do not currently license substantial amounts of programming through the NCTC, often due to the insistence of the programmer and over the strong objection of NCTC. However the remaining members within the group of the largest 25 members do license substantial amounts of programming through the NCTC. On average, NCTC members outside its 25 largest members generally rely even more heavily on NCTC to secure their programming.

6. It is NCTC's practice to act as an interface for all billing and collection activities between its own member companies and the programmer. Generally, under the agreements,

each member is required at the end of each month to report the number of subscribers receiving a service to NCTC. NCTC calculates the licensing fees for each member for each network in which it participates and then issues a single invoice to each member. After collecting the amount due from each member for each network, NCTC remits a single aggregate payment to the programmer.

7. The principal legal liability that the NCTC currently assumes as part of the master agreement it signs with the programmer is to forward any payments due and received from members on to the programmer. This model represents an evolution away from NCTC's earlier practice of requiring individual members to deposit cash in an escrow account to cover 30 days worth of programming upon opting into a particular master agreement. The other requirement, joint and several liability, proved impracticable because it interfered with some members' loan covenants as to debt and resulted in fewer MVPDs being able to participate in NCTC master agreements. Over time, as the NCTC continued to grow and become established and accepted by programmers, the NCTC and the programmers realized that providing escrowed payments became an impediment for smaller members to participate in a master agreement. Eventually both NCTC and programmer decided to no longer require individual members to deposit any cash in an escrow account. The NCTC and programmers have been using the current business model, including the reduced level of liability that NCTC assumes under a master agreement, for over 14 years, and it has been widely accepted among the programming community.

8. When a member that has opted into a master agreement fails to make further payments due for its programming, the master agreement permits the programmer to attempt to require the member to continue to make payments over the life of the agreement. In my experience and that of the NCTC, it is very rare for a programmer to attempt to enforce this right. Once they become aware the member is not paying its bills, the vast majority of programmers will instead choose to cease delivering the programming to the MVPD. As a result, if an NCTC member participating in a master agreement ceases payment for

programming, it will not be penalized by the programmer but will find its distribution of the programming to be cut-off by the programmer and it will thereafter be unable to provide that programming to its subscribers.

9. Over the years, the NCTC has developed practices for dealing with delinquent buying group members. When a member of the NCTC becomes delinquent in one of its master agreements with the NCTC, the NCTC generally terminates all of its master agreements that that particular member. Since most of its members enter into multiple master agreements with the NCTC, the penalty for breaching a master agreement with a single programmer is generally quite severe.

Executed on June 22, 2012

Appendix C

WOW! Declaration

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

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

Declaration of Peter C. Smith, Vice President-Programming for WideOpenWest Finance, LLC

Declarant hereby states as follows:

1. My name is Peter C. Smith, I am Vice President-Programming of Wide Open West Finance, LLC ("WOW!"). My business address is 7887 East Belleview Avenue, Suite 1000, Englewood, CO 80111. I also serve as Vice Chairman of the Board of Directors of the National Cable Television Cooperative ("NCTC"). I have been in the cable business for thirteen years.

2. WOW! is a competitive provider of residential and commercial High-Speed Internet, cable television and telephone services. WOW! Cable features a range of services from Basic Cable to advanced services such as Ultra TV, an innovative whole-home gateway solution that combines television and PC entertainment. WOW! Internet provides customers with a choice of High-Speed connections from 2 Mbps all the way to 50Mbps. WOW! Phone

offers the convenience of unlimited local and local toll calling, as well as packages that include unlimited nationwide long distance in the United States.

3. As a cable service provider, WOW! obtains its cable programming both through master agreements negotiated by the NCTC, a buying group established for the purpose of reducing its members' operating and capital costs through the negotiation and efficient administration of cooperative purchasing of goods and services, including programming, and through direct deals.

4. Programming contracts negotiated directly typically carry contract terms of three to six years. WOW! generally commits to paying for the programming on a monthly per-subscriber basis. Typically, WOW! receives a bill within 30 days of obtaining the programming and is obligated to remit payment to the programmer within forty-five days of airing the programming.

5. Under these direct programming agreements, WOW! agrees to make payments over the term of the contract. This gives the programmer the right, in the event WOW! is unable or unwilling to pay its monthly bills, to require WOW! to continue to make payments over the life of the contract. In the alternative, the programmer can exercise its right at any time to stop providing its programming to WOW!, thereby removing it from WOW!'s channel line-up.

Executed on June 21, 2012

Peter C. Smith