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

REPLY COMMENTS OF
THE ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES
and
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)[1] and the National Telecommunications Cooperative Association (NTCA)[2] (the Associations) hereby submit these reply comments in the above-captioned proceedings.[3] The Associations' initial comments urged the Commission to extend the exclusive

[1] OPASTCO is a national trade association representing approximately 420 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve approximately 3 million customers.
[2] NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.
[3] *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

contract prohibition[4] in full for an additional five year term, demonstrated that proposed alternatives would be ineffective, and called for comprehensive reform of program access rules. Numerous commenting parties concur with the Associations' request for extension of the exclusive contract prohibition and reform of program access rules. In these replies, the Associations also support the adoption of program access rule proposals offered by the American Cable Association (ACA) that call for improved program access for buying groups, and the establishment of a fair market value standard, among other reforms.

II. THE RECORD SHOWS THAT THE EXCLUSIVE CONTRACT PROHIBITION SHOULD BE EXTENDED

Numerous commenting parties have demonstrated that retention of the exclusive contract prohibition is necessary to preserve competition in the video distribution marketplace.[5] For example, USTelecom illustrates that the number of vertically integrated networks remains unchanged since the Commission last extended the exclusive contract prohibition, and that access to regional sports networks (RSNs) remains particularly important to preserving competition in the video market.[6] USTelecom also shows that vertically integrated cable

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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, Notice of Proposed Rulemaking (rel. March 20, 2012) (NPRM).

[4] Section 628(c) of the Communications Act of 1934, as amended, generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor (also referred to as vertically integrated programmers). Congress determined that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." In two consecutive prior reviews, the Commission has found that extension of the exclusive contract prohibition has been necessary. *See* NPRM, ¶¶2-3.

[5] ACA, pp. 2-10; Associations, pp. 3-9; Blooston Rural Video Service Providers (Blooston), pp. 6-7; CenturyLink, pp. 5-22; DIRECTV, pp. 6-49; DISH Network LLC, pp. 3-22; Free Press, pp. 2-8; Independent Telephone & Telecommunications Alliance (ITTA), pp. 3-8; Interstate Communications *et. al.*, pp. 2-5; USTelecom, pp. 5-23; Verizon, pp. 3-13; Writer's Guild of America, West, pp. 4-10.

[6] USTelecom, pp. 6-10.

companies have an even greater incentive to discriminate against other multichannel video programming distributors (MVPDs) when they face direct competition.[7]

In addition, the record shows that proposed alternatives to retaining the exclusive contract prohibition[8] are not viable. For instance, USTelecom observes that the alternatives considered by the NPRM would still have the effect of extinguishing competition and the consumer benefits it brings.[9] Similarly, ITTA observes that the current complaint process is an "unrealistic" avenue for small providers, as it "is inadequate even for large, well-financed MVPDs, [and] is virtually unusable for smaller and new entrant MVPDs who cannot devote the substantial time and resources required to pursue such relief."[10]

Parties demonstrate how extension of the exclusive contract prohibition will preserve the ability of MVPDs of all sizes to compete, while also highlighting the unique challenges faced by small providers in the video distribution market. For instance, USTelecom observes that "[s]maller, wireline entrants – particularly those competing in the vast majority of smaller [designated market areas] – are competing against large, national cable incumbents that are much better able to spread the costs of programming across their nationwide customer base."[11] In contrast, no commenting parties that oppose extending the prohibition consider the impacts that the rule's expiration would have on small MVPDs. Worse, some of these parties appear to disregard small providers altogether. For instance, Madison Square Garden claims, inaccurately, that "[c]able's MVPD competitors are not small…"[12] Likewise, Cablevision contends that:

[7] *Id.*, p. 12.
[8] NPRM, ¶¶46-50.
[9] USTelecom, p. 15.
[10] ITTA, p. 9.
[11] USTelecom, p. 13.
[12] Madison Square Garden, pp. 8-9.

> [Satellite] operators and telcos have the resources to counter exclusivity by cable by engaging in their own exclusive arrangements, developing their own programming, or engaging in a wide range of competitive counter-measures…[13]

Cleary, sweeping declarations regarding the availability of ample resources do not apply to MVPDs with only a few thousand subscribers, if that, operating in sparsely populated, high-cost rural markets. Small MVPDs, even if considered collectively, lack the scale to develop alternative programming or establish exclusivity arrangements of their own. Therefore, retention of the exclusive contract prohibition is all the more imperative to preserve the ability of small MVPDs, in particular, to compete.

Although some larger entities seeking the sunset of the exclusive contract prohibition may find it self-serving to disregard how the prohibition's expiration would impact small MVPDs, the Commission does not have that option. The NPRM's Initial Regulatory Flexibility Analysis recognizes that the Commission is bound to give particular consideration to the impacts its decision will have on small MVPDs.[14] While expiration of the rule would impair competition in the video distribution market overall, it would be especially harmful to the customers of small MVPDs that lack the resources to produce alternative programming or engage in effective counter-measures. Therefore, it is particularly imperative to extend the exclusive contract prohibition to avoid the disproportionate consequences that the rule's expiration would impose on the markets served by small MVPDs.

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[13] Cablevision, p. 4.

[14] NPRM, Appendix E, *e.g.*, ¶¶27-29.

III. THE RECORD DEMONSTRATES THAT PROGRAM ACCESS RULES SHOULD BE REFORMED, AND INCLUDE IMPROVED ACCESS FOR BUYING GROUPS AND THE ADOPTION OF A FAIR MARKET VALUE STANDARD

Multiple commenting parties have shown that program access rules are outdated, impede competition in the video distribution market, and should be reformed.[15] ACA, in particular, provides numerous detailed rule proposals. Among other recommendations, ACA suggests 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 – in other words, 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.[16] The Associations support this "safe harbor" proposal, as small MVPDs often rely on buying groups to obtain access to content. Competition in the video distribution market will be significantly impeded if buying groups' ability to obtain affordable content is not protected.[17]

[15] ACA, pp. 11-43, *see also* Appendix A; Associations, pp. 9-13; Blooston, pp. 3-6; ITTA, pp. 8-9; Interstate Communications, *et. al.*, pp. 5-8; USTelecom, pp. 23-25.
[16] ACA, pp. 27-33.
[17] Furthermore, a number of small MVPDs, even if they would meet the "safe harbor" subscriber level, may still be restricted by programmer requirements that prohibit the MVPD from obtaining content through a buying group. In some cases, this requirement persists even beyond the expiration date of the content access agreement. Content access rules should prohibit this discriminatory practice, as it prevents small MVPDs and their customers from leveraging the competitive benefits conveyed by buying groups.

In response to the NPRM's inquiry about the uniform price loophole,[18] ACA also suggests that the Commission resolve this issue by "adopting a fair market value standard for complaints brought pursuant to Section 628(c)(2)(B) alleging price discrimination."[19] ACA observes that the Commission has previously "established a baseball-style commercial arbitration remedy using a fair market value standard"[20] that is determined by "the prices that other non-cable-affiliated programmers offer for similar types of programming."[21] This proposal constitutes a workable approach, as it addresses the volume discount issue while overcoming the fact that small MVPDs are generally unable to learn what other MPVDs pay for content and thus cannot demonstrate discrimination even when it occurs frequently.

ACA shows that its detailed proposals are consistent with Commission precedent, and are backed by prodigious amounts of evidence[22] illustrating how modernizing these outdated and ineffective rules as suggested would promote competition in the video distribution market. ACA's proposed reforms would contribute significantly to improving the efficacy of the rules, as well as to the Commission's ability to meaningfully enforce them. Therefore, the Associations urge the Commission to adopt ACA's program access proposals.

IV. CONCLUSION

The record demonstrates that the exclusive contract prohibition should be extended in full for an additional five years. Proposed alternatives have been shown to be ineffective, further highlighting the need for an extension. Furthermore, program access rules are in need of

[18] NPRM, ¶¶98-100. The NPRM observes 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 vertically integrated programmer. This is due to the need for rival MVPDs to respond either by raising their prices to subscribers, declining to purchase the programming, or reducing marketing activities. The vertically integrated operator would 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.

[19] ACA, p. 38.

[20] *Id*. p. 39.

[21] *Id*. p. 40.

[22] ACA, Appendices A-C.

comprehensive reform. Therefore, the Commission should adopt proposals to ensure program access for buying groups and to establish a fair market value standard, among other reforms.

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CERTIFICATE OF SERVICE

I, Steven Fravel, hereby certify that a copy of the foregoing reply comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association in MB Docket No. 12-68, MB Docket No. 07-18, and MB Docket No. 05-192 was served on this 23rd day of July 2012 via first class or electronic mail to those listed on the attached sheet.

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