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Barbara S. Esbin
Admitted in the District of Columbia

August 2, 2012

Via ECFS

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

Re: American Cable Association Notice of Ex Parte Communications; *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.*; MB Doc. Nos. 12-68, 07-18, 05-192

Dear Ms. Dortch:

On August 1, 2012, Matthew Polka, President and CEO, American Cable Association ("ACA"); Ross Lieberman, Vice President of Government Affairs, ACA; Peter C. Smith, Vice President Programming, Wide Open West (WOW!); Frank Hughes, Senior Vice President – Member Services, National Cable Television Cooperative ("NCTC"); Jeff Nourse, Senior Vice President – Legal Affairs, NCTC; William P. Rogerson, Professor of Economics, Northwestern University; and the undersigned, met with Michelle Carey, Deputy Chief, Media Bureau; Nancy Murphy, Associate Chief, Media Bureau; Steven Broeckaert, Kathy Berthot, and David Konczal, also of the Media Bureau; Jonathan Levy, Deputy Chief Economist, Office of Strategic Policy and Anne Levine, Policy Analyst, Office of Strategic Policy, to discuss ACA's Comments and Reply Comments in the above-referenced dockets.[1] A copy of the presentation delivered by Professor Rogerson during the meeting is attached.

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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 (rel. Mar. 20, 2012) ("NPRM"); *In the Matter of 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.,* MB Doc. Nos. 12-68, 07-18, 05-192, Comments of the American Cable Association (filed June 22, 2012) ("ACA Comments"); *In the Matter of 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*

Consistent with its comments and reply comments, ACA urged the Commission to better address the potential competitive harms created by cable-affiliated programmers by making two key revisions to its program access rules. First, the Commission must ensure that the program access rules may be effectively utilized by a buying group such as the National Cable Television Cooperative ("NCTC") by: (i) including in its definition of a "buying group" an additional liability option that an entity can satisfy in order to qualify as a buying group for program access purposes; (ii) setting standards for the right of buying group members to participate in their group's master licensing agreements; and (iii) establishing the standard of comparability for a buying group regarding volume discounts.[2] Second, the Commission must close the "uniform price increases loophole" by prohibiting a cable-affiliated programmer from charging a price above "fair market value."[3] Meeting participants also discussed the record in the proceeding with respect to the two key revisions discussed above. ACA also reiterated its support for the full extension of the prohibition on exclusive contracts between cable operators and their affiliated programmers for another five year period.[4]

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

Sincerely

Barbara Esbin

Barbara Esbin

Attachment

cc (via email): Michelle Carey
Nancy Murphy
Steven Broeckaert
Kathy Berthot
David Konczal
Jonathan Levy
Anne Levine

Warner Cable Inc. (subsidiaries), Assignees, et al., MB Doc. Nos. 12-68, 07-18, 05-192, Reply Comments of the American Cable Association (filed July 23, 2012) ("ACA Reply Comments").

[2] *See* ACA Comments at 11-33.

[3] *See* ACA Comments at 34-43; ACA Reply Comments at 2-8.

[4] *See* ACA Comments at 2-11; ACA Reply Comments at 8-19.

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

Presentation to the FCC

August 1, 2012

American Cable Association

OUTLINE

I. ENSURING THAT PROGRAM ACCESS RULES CAN BE USED BY BUYING GROUPS

II. CLOSING THE UNIFORM PRICE INCREASES LOOPHOLE

I. ENSURING THAT PROGRAM ACCESS RULES CAN BE USED BY BUYING GROUPS

INTRODUCTION

1. Nearly all small and medium sized MVPDs license programming through a buying group called the National Cable Television Cooperative (NCTC).

2. Economic functions of a buying group:
   - Negotiates standardized agreements with programmers that its members can opt in to.
   - Acts as an interface between the programmer and individual MVPDs, so that the programmer can deal with a single entity for purposes of negotiating contracts, determining technical standards, billing for payments, collecting payments, etc.
   - Programmers benefit because it reduces transactions costs of dealing with small and medium sized MVPDs so that they are comparable to the transactions costs of dealing with a single large MVPD.
   - MVPDs benefit because they receive lower rates than they would receive through direct deals.

INTRODUCTION (CONT'D)

3. Because small and medium sized MVPDs rely on buying groups to license programming, these MVPDs will receive protection from program access rules only to the extent that buying groups are given the same protections as individual MVPDs.

4. Congress intended that program access rules apply to buying groups.
   - Section 628(c)(2)(B) of the Cable Act prohibits discrimination "among or between cable systems, cable operators, other MVPDs, or their agents or *buying groups* [italics added]."

5. Commission regulations implementing the program access provisions of the Cable Act were structured to explicitly apply to buying groups.
   - Regulations include a buying group within the definition of an MVPD.
   - Therefore, regulations that require cable-affiliated programmers to make their programming available to MVPDs on non-discriminatory terms and give MVPDs the right to file complaints also apply to buying groups.

INTRODUCTION (CONT'D)

6. Three problems with the manner in which the statutory mandate has been implemented mean that, in practice, program access rules provide no protection at all to buying groups and thus provide less protection for small and medium-sized MVPDs than they should.

7. ACA's proposal is to revise program access rules to address these three problems so that program access rules can be effectively used by NCTC and similar buying groups.

8. The Three Problems:

   - The definition of a buying group is too restrictive.

   - Cable-affiliated programmers are not prohibited from unreasonably excluding buying group members from participating in master agreements.

   - The standard of comparability for volume discounts for buying groups is not explicitly articulated.

DEFINITION OF BUYING GROUP

1. Current Definition: 47 CFR §76.1000(c)

   "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 standards for the individual members of the group.

2. For purposes of this presentation, condition (1) will be referred to as the "full liability condition."

DEFINITION OF BUYING GROUP (CONT'D)

3. Suppose that a member of a buying group opts into a three-year programming agreement and after one year refuses to or is unable to make further payments:

   - Full liability condition means that the buying group, or each of its members individually, must be responsible for making payments for the defaulting member for the two-year duration of deal.

4. In practice deals between NCTC and programmers NEVER exhibit this feature.

   - Individual members are directly liable only for their own commitments.
   - The only liability that NCTC assumes that protects programmers from a defaulting member is the liability to forward all programming payments it receives from members on to the appropriate programmer.

DEFINITION OF BUYING GROUP (CONT'D)

5. Since programmers and NCTC freely enter into these deals, it is reasonable to assume they are efficient.
   - If the cost to NCTC of bearing the risk that its members will default was less than the benefit programmers would receive from having NCTC bear this risk, they would have negotiated such an arrangement together with a payment that left them both better off.

6. ACA proposal:
   - Program access rules should include an additional liability option in the definition of a buying group that an entity can satisfy in order to qualify as a buying group. This is that the entity is liable to forward all programming payments it receives from its members on to the appropriate programmer.

THE RIGHT OF BUYING GROUP MEMBERS TO PARTICIPATE IN MASTER AGREEMENTS

1. In practice, program access rules will offer no protection at all to buying groups if a programmer has the right to arbitrarily exclude any member of a buying group from participating in a master agreement between the programmer and a buying group.

2. Standards need to be specified to determine when there is a presumption that a member of a buying group has the right to participate in a master agreement.

3. Two goals:
   - Standards should be clear, simple, and easily verifiable.
   - Standards should 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 a buying group.

TABLE 1
THE NUMBER OF SUBSCRIBERS OF THE LARGEST 25 MEMBERS OF NCTC AND OF ALL OTHER NCTC MEMBERS

Member Name	Subscribers (000's)
Cox	4,761
Charter	4,314
Verizon	4,173
Cablevision	3,250
Cequel	1,252
Mediacom	1,069
Cable One	621
Wide Open West	428
RCN	334
Knology	257
Atlantic Broadband	255
Armstrong	239
Midcontinent	227
Service Electric	217
MetroCast	172
Blue Ridge	168
General Comm.	143
Buckeye	134
Wave Division	128
Northland	89
New Wave	70
Wehco	68
Schurz	66
Shentel	65
Comporium	58
All Other Members	2,988
Total NCTC	25,500

Notes:

1. Identity of NCTC members and subscribers for other members provided by NCTC.
2. Subscriber levels for top 25 MVPDs provided by Kagan (2012).

THE RIGHT OF BUYING GROUP MEMBERS TO PARTICIPATE IN MASTER AGREEMENTS (CONT'D)

4. Observations from Table 1:
   - NCTC has four very large members that each have more than 3 million subscribers.
   - All other members of NCTC currently have less than 1.5 million subscribers.

5. Declaration of Frank Hughes, Senior Vice President of Member Services, NCTC:

   "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."

THE RIGHT OF BUYING GROUP MEMBERS TO PARTICIPATE IN MASTER AGREEMENTS (CONT'D)

6. ACA's three-part proposal:

   (1) A "safe harbor" subscriber level should be established.
   - Members with no more than the "safe harbor" number of subscribers are presumptively entitled to participate in master agreements.
   - The "safe harbor" standard should be set between 1.5 million and 3 million subscribers.

   (2) Members with more than the "safe harbor" number of subscribers should also be entitled to participate if they can demonstrate that they regularly license a substantial share of their programming through the buying group.

   (3) When an expiring agreement is being renewed, members participating in the expiring agreement should be presumptively entitled to participate in the renewed agreement.

THE RIGHT OF BUYING GROUP MEMBERS TO PARTICIPATE IN MASTER AGREEMENTS (CONT'D)

7. The "safe harbor" provision sets a clear, simple and easily verifiable standard that insures that all MVPDs that currently license programming through NCTC on a regular basis can participate in NCTC deals with cable-affiliated programmers.

8. If in the future larger MVPDs begin to regularly participate in NCTC deals, the second provision provides these MVPDs with a way to obtain the presumptive right to participate.

   - NCTC is actively working to have its four largest members included in more deals and is hopeful that this will happen.

9. ACA's recommended policy is completely consistent with the approach that the Commission took in fashioning remedies for the Comcast-NBCU transaction.
   - MVPDs with 1.5 million subscribers or fewer are entitled to be represented by a buying group in commercial arbitration.

THE STANDARD OF COMPARABILITY REGARDING VOLUME DISCOUNTS

1. Both Section 628 and Commission regulations state that the prohibition on discrimination does not prohibit volume discounts so long as the volume discounts "take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor" (Section 628(c)(2)(B)(iii); 47 CFR§76.1002(b)(3)).

2. What does this language mean in practice?
   - Holding all other factors equal, an entity that licenses programming for a larger number of subscribers should pay a license fee no higher than the license fee paid by an entity that licenses programming for a smaller number of subscribers.

3. ACA's proposal:
   - Under program access rules, a buying group providing a certain number of subscribers for programming should be presumptively entitled to the same volume discount as an individual MVPD providing the same number of subscribers.

THE STANDARD OF COMPARABILITY REGARDING VOLUME DISCOUNTS (CONT'D)

4. Rationale #1: Economic:
   - The statutory factors that explain why a buyer with more subscribers should receive a lower license fee depend on the number of subscribers the buyer provides - not on whether the buyer is an MVPD or a buying group.

5. Rationale #2: Legal:
   - Section 628 does not distinguish between MVPDs and buying groups when justifying volume discounts.

6. Rational #3: Practical:
   - There is no other buying group comparable in size to NCTC.
   - If the prices that NCTC pays cannot be compared to the prices that individual MVPDs pay, then the prohibition on discrimination would be meaningless for NCTC and its members.
   - There is no natural or simple basis of comparison to choose other than an MVPD with the same number of subscribers. (If the basis of comparison is an MVPD with x% fewer or more subscribers, how do we choose x?)

II. CLOSING THE UNIFORM PRICE INCREASES LOOPHOLE

THE UNIFORM PRICE INCREASES LOOPHOLE

1. The problem:
   - A programmer that is affiliated with a cable operator will have the incentive and ability to charge higher prices to rival MVPDs than if the programmer was not affiliated with the cable operator.

2. Prohibition on discrimination is meant to address this problem.

3. Prohibition on discrimination places two constraints (subject to various exceptions) on the prices an affiliated programmer can offer to non-affiliated MVPDs.

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

THE UNIFORM PRICE INCREASES LOOPHOLE (CONT'D)

4. The problem identified by the Commission:

   - 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 having any impact on the vertically integrated firm as a whole.

5. This is called the "uniform prices increases" loophole because a firm can increase prices to its rivals without violating the discrimination prohibition simply by imposing a uniform price increase on its rivals and itself, which has no direct effect on itself.

CLOSING THE UNIFORM PRICE INCREASES LOOPHOLE WITH LICENSE TRANSFER CONDITIONS

1. MVPDs have the right to ask for binding arbitration based on a “fair market value” standard.

2. Determination of fair market value is based on:
   - The prices that the programmer charges other MVPDs for the same programming; and
   - The prices that other programmers charge the complaining MVPD and other MVPDs for other programming controlling for differences in the programming.

3. The problem with the uniform price increases loophole is solved by adding the second basis of comparison.

CLOSING THE UNIFORM PRICE INCREASES LOOPHOLE MORE GENERALLY

1. ACA proposal:
   - Program access rules should prohibit a cable-affiliated programmer from charging prices above fair market value.

2. As the Commission suggests, the Commission could adopt this under the authority of the non-discrimination prohibition 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."

3. MVPDs will generally be in a much better position to provide evidence on the prices they pay for similar programming as opposed to the prices that the programmer charges other MVPDs for the same programming.

CLOSING THE UNIFORM PRICE INCREASES LOOPHOLE MORE GENERALLY (CONT'D)

5. The ACA proposal is very workable.
   - Under current policy, if an MVPD files a complaint, the Commission compares the contract that the complaining firm is being offered to the contracts that the same programmer offers other MVPDs for the same programming.
   - Under the proposed policy, if an MVPD files a complaint, the Commission compares the contract that the complaining firm is being offered not only to the contracts that the same programmer offers other MVPDs for the same programming, but also to the contracts that other programmers offer the same MVPD and other MVPDs for similar programming.
   - The same process is used, but with a broader comparison set.

CLOSING THE UNIFORM PRICE INCREASES LOOPHOLE MORE GENERALLY (CONT'D)

6. The ACA proposal does not amount to full blown cost-based regulation of wholesale programming prices.
   - Under full-blown cost-based regulation, a regulator calculates accounting cost and sets prices equal to accounting cost. The regulator always engages in this activity.
   - Under the ACA proposal, the prices a programmer charges are compared to the prices that other programmers charge for similar programming. Furthermore, the regulator only engages in this activity if a complaint is filed.

SUMMARY OF ACA'S PROPOSED CONDITIONS

I. Conditions to ensure that buying groups can use program access rules.

1. Program access rules should include an additional option in the definition of a buying group that an entity can satisfy in order to qualify as a buying group. This is that the entity is liable to forward all programming payments it receives from its members on to the appropriate programmer.

2. Standards for the right of members of a buying group to participate in master agreements.
   (a) A "safe harbor" subscriber level should be established.
      - Members with no more than the "safe harbor" number of subscribers are presumptively entitled to participate in master agreements.
      - The "safe harbor" standard should be set between 1.5 million and 3 million subscribers.

SUMMARY OF ACA'S PROPOSED CONDITIONS (CONT'D)

(b) Members with more than the "safe harbor" number of subscribers should also be entitled to participate if they show that they regularly license a substantial share of their programming through the buying group..

(c) When an expiring agreement is being renewed, members participating in the expiring agreement should be presumptively entitled to participate in the renewed agreement.

3. Under program access rules, a buying group providing a certain number of subscribers for programming should be presumptively entitled to the same volume discount as an individual MVPD providing the same number of subscribers.

II. Condition to close the uniform price increases loophole.

1. Program access rules should prohibit a cable-affiliated programmer from charging prices above fair market value.