

August 23, 2012

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

RE: *Ex Parte* Communication  
MB Docket No. 12-68

Dear Ms. Dortch:

The undersigned content companies (the “Content Companies”) hereby submit this brief, limited response to two recent *ex parte* letters filed with the Commission by the American Cable Association (“ACA”) as part of the above-referenced docket.<sup>1</sup> In short, the undersigned businesses wish to make clear for the record of this proceeding their strong opposition to ACA’s proposal to vastly expand the scope of discovery – and in doing so to put at risk the confidentiality of the Content Companies’ most sensitive commercial information – during program access controversies to which the Content Companies are innocent bystanders.

Specifically, ACA has proposed that, in evaluating complaints of “uniform price” discrimination, the Commission should “compare[ ] 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.*”<sup>2</sup> ACA attempts to characterize its proposal as a modest broadening of the “comparison set” of information that the Commission would review.<sup>3</sup> In reality, however, ACA’s proposal effectively would make *every* programming contract a potential target for discovery in a price discrimination dispute. ACA ignores the vast anti-competitive impact that its proposal would have on the video programming marketplace – thwarting, rather than facilitating, the goals of Section 628 of the Communications Act.<sup>4</sup> ACA also disregards that the Commission lacks jurisdiction under the Act to grant this proposal, which necessarily would pull within its ambit the confidential agreements of non-vertically integrated parties to whom Section 628 has absolutely no applicability.

Indeed, there is no statutory basis for ACA’s proposal. Section 628 by its plain terms is applicable only to programming vendors in which a “cable operator has an attributable interest.”<sup>5</sup> Section 628 confers on the Commission no authority whatsoever over programmers who operate independent from cable operators, such as the programming networks owned by each of the Content Companies. Moreover, because the statute is designed to preclude price discrimination *by vertically integrated programming networks*, it is irrational even to suggest that the terms and

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<sup>1</sup> See Letters from Barbara Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 (each dated Aug. 2, 2012).

<sup>2</sup> *Id.* at Attachment, p. 20 (emphasis supplied).

<sup>3</sup> *Id.*

<sup>4</sup> See 47 U.S.C. § 548 (the “Act”).

<sup>5</sup> 47 U.S.C. § 548(b).

conditions (including price) in contracts between MVPDs and *independently-owned programmers* have any relevance to a program access complaint. It is a comparison between the prices charged by a vertically-integrated programmer to both affiliated and unaffiliated MVPDs that could reveal price discrimination. An arms-length agreement between an independent programming network and an MVPD could not possibly be of use in this context except as a part of a fishing expedition for information.

Just as important, as the Commission by now is well aware, programming agreements often contain very sensitive business data and information.<sup>6</sup> They include highly proprietary and carefully crafted terms and conditions, including pricing information, which reflect the unique concerns of the parties and lie at the heart of how the Content Companies compete in a robust marketplace. If the Commission were to adopt the ACA proposal, inviting numerous MVPDs to demand disclosure of these agreements' closely guarded terms and conditions during a wide array of program access disputes, it would endanger the functioning of the well-developed competitive marketplace for video programming, inhibiting competition and contravening the very purpose of Section 628 of the Act.

The bottom line is that the Commission has no authority to accede to ACA's proposal, and it would be extraordinarily inequitable to permit MVPDs to engage in a broad exploration for confidential information under the auspices of the program access rules. This is especially so when disclosure would implicate the rights of innocent bystanders like the Content Companies, who are not parties to program access disputes and who have not placed their private business dealings at issue before the Commission.

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules.

Respectfully submitted,

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<sup>6</sup> See, e.g., *In re Media Bureau Seeks Comment on Whether Comcast-NBCU Benchmark Condition Needs Clarification and Whether a Proposed Third Protective Order for Compliance Should be Adopted*, MB Docket No. 10-56, Joint Opposition filed by the Content Companies named therein (dated Apr. 3, 2012).

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