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Barbara S. Esbin
Admitted in the District of Columbia

August 31, 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 29, 2012, Ross Lieberman, Vice President of Government Affairs, American Cable Association ("ACA"), and the undersigned, met with Michelle Carey, Deputy Chief, Media Bureau; Nancy Murphy, Associate Chief (via telephone); Steven Broeckaert, Kathy Berthot, and David Konczal, of the Media Bureau to discuss the program access rule changes proposed in ACA's filings in the above-referenced dockets and discussed the changes to the Commission's rules that would be needed to implement them.[1] ACA also disputed allegations in the record that notice was

[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, 27 FCC Rcd 3413 (2012) ("NPRM"); *In the Matter of Revision of the Commission's Program Access Rules; News Corp. and 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, Comments of the American Cable Association (filed June 22, 2012) ("ACA Comments"); *In the Matter of Revision of the Commission's Program Access Rules; News Corp. and 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, Reply Comments of the American Cable Association (filed July 23, 2012) ("ACA Reply Comments"); *see also 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-

not adequate for the Commission to revise its program access rules at this time and responded to concerns of the Content Companies that ACA is proposing to vastly expand the scope of discovery in program access proceedings.[2]

Program Access Revisions: ACA again urged the Commission to make two key sets of revisions to its program access rules to better address the potential competitive harms created by cable-affiliated programmers. 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.[3] Second, ACA reiterated its call for the Commission to close the "uniform price increases" loophole to the prohibition on price discrimination by prohibiting a cable-affiliated programmer from charging a price above "fair market value."[4] ACA illustrated how these proposed revisions could be incorporated into the Commission's rules through handouts containing two sets of model rule revisions.[5]

Notice: ACA also responded to claims in the record that adequate notice and opportunity for public comment were insufficient for the Commission to revise its program access rules at this time. In its filings, Madison Square Garden Company ("MSG") has asserted that if the Commission wishes to change its rules concerning any matter other than the prohibition on exclusive contracts, it must give fair notice and describe the alternatives with specificity, rather than simply asking commenters to give proposed rule changes and that the record of this proceeding is insufficient to give parties guidance regarding the nature or content of proposed rule changes.[6] Comcast-NBCU Universal

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192, Ex Parte Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission (filed Aug. 2, 2012).

[2] Ex Parte Communication from CBS, News Corp., Time Warner, Inc., Sony Pictures Entertainment, Univision Communications, Viacom, Inc. , and The Walt Disney Company ("Content Companies") to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 12-68 (filed Aug. 23, 2012)("Content Companies Aug. 23rd Ex Parte").

[3] *See* ACA Comments at 11-33. Consistent with its previous filings, ACA also urged the Commission to retain for an additional five years the prohibition on exclusive contracts between cable-affiliated programmers and their affiliated cable companies. *See* ACA Comments at 2-11; ACA Reply Comments at 8-19.

[4] *See* ACA Comments at 34-43; ACA Reply Comments at 7-8.

[5] The handouts containing ACA's proposed rule revisions are provided in the Attachment to this letter. The proposed revisions concerning price discrimination through uniform price increases illustrate how the fair market value standard could be incorporated into both 47 C.F.R. § 76.1001(b)((1)(a)(ii)(unfair practices generally concerning terrestrial cable programming) and 47 C.F.R. § 76.1002(b)(specific unfair practices concerning satellite cable programming and satellite broadcast programming). ACA recognizes that the rules concerning terrestrial cable programming were vacated by the D.C. Circuit Court of Appeals in *Cablevision Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010), but included a proposed revision to that rule should the Commission revisit the issue of discrimination with respect to terrestrial cable programming in a future rulemaking.

[6] *In the Matter of Revision of the Commission's Program Access Rules; News Corp. and 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, Comments of Madison Square

more narrowly focused on ACA's suggestion that cable-affiliated programmers be required to provide buying groups like NCTC with rate schedules applicable to different subscribership levels a buying group could provide and argued that the Commission could not adopt this particular proposal because it was not part of the NPRM.[7]

ACA explained that MSG's argument that the NPRM provided insufficient notice and lacked specific alternatives for revisions to the Commission's rules concerning any matters other than the exclusivity ban fails upon examination of the actual subjects and issues identified in the NPRM. ACA explained that the NPRM had provided parties adequate notice of the subjects and issues under consideration and the opportunity to respond.[8] The NPRM notified interested parties that the Commission was considering (i) adoption of revisions "to better address alleged violations," and specifically identified two forms of alleged violations of the prohibition on price discrimination arising from volume discounts and uniform price increases;[9] (ii) how the rules could be improved, and specifically whether the Commission's "current program access rules and procedures prevent or discourage the filing of legitimate complaints pertaining to volume discounts;[10] and (iii) whether the Commission's complaint process is too costly and time-consuming with respect to complaints alleging price discrimination, and, if so, how the Commission might improve its rules and procedures to avoid impeding the filing of legitimate complaints.[11] ACA noted that it is well-settled that the APA "does not require a precise notice of each aspect of the regulations eventually adopted," and that an agency's notice is adequate "so long as it affords interested parties a reasonable opportunity to

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Garden, at 33 (filed June 22, 2012); *In the Matter of Revision of the Commission's Program Access Rules; News Corp. and 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, Reply Comments of Madison Square Garden, at 16 (filed July 23, 2012).

[7] *In the Matter of Revision of the Commission's Program Access Rules; News Corp. and 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, Reply Comments of Comcast-NBCU, at 22 (filed July 23, 2012); *see* ACA Comments at 32.

[8] The APA requires that agencies give notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."5 U.S.C. § 553(b)(3). Notice is adequate if it "fairly apprise[s] interested persons of the subjects and issues" of the rulemaking. *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986)(agency must "fairly apprise interested persons of the subjects and issues" of the rulemaking). Notice of the substance of a rule or a description of the subjects and issues involved will be deemed adequate if the rule adopted can be considered a "logical outgrowth" of the proposed rule. *See Long Island Care at Home LTD v. Coke*, 551 U.S. 158, 174 (2007) (the "Courts of Appeals have generally interpreted this [portion of the APA] to mean that the final rule the agency adopts must be a 'logical outgrowth' of the proposed rule."); a rule is a logical outgrowth if (i) interested parties should have anticipated that the change was possible and (ii) reasonably should have filed their comments on the subject during the notice-and-comment period. *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005).

[9] NPRM, ¶¶ 96-102. In particular, the NPRM notified interested parties that the Commission was considering the adoption of revisions to its rules concerning volume discounts to address the concerns of smaller MVPDs that they were being discriminated against. NPRM, ¶¶ 98-100.

[10] NPRM, ¶¶ 96, 100.

[11] *Id.*, ¶ 100.

participate in the rulemaking process."[12] With respect to Comcast-NBCU's belief that notice was not sufficient for the Commission to adopt ACA's suggestion that cable-affiliated programmers provide buying groups with rate schedules applicable to different subscribership levels, ACA said that it would not object to the matter being considered, should it arise, on a case-by-case basis.

ACA further explained how all of its proposed revisions are squarely aimed at addressing the issues identified by the Commission in the NPRM concerning removing impediments to the use of program access rules by a buying group such as the NCTC, improving the Commission's current program access rules and procedures, and ensuring that MVPDs who purchase cable-affiliated programming through buying groups receive the protections Congress intended and have adequate redress to file legitimate complaints with the Commission in a cost-effective manner.

Revisions Relating to Buying Groups. ACA described how the Commission's rules impede the filing of legitimate complaints alleging price discrimination by the nation's largest programming buying group, the National Cable Television Cooperative ("NCTC"). Congress intended that buying groups be protected by program access rules, and specifically be permitted to file complaints alleging price discrimination.[13] In 1993, the Commission adopted rules that limit the buying groups covered by the program access rules to only those buying groups assuming full liability for payments due cable-affiliated programmers under programming contracts signed by the buying group on behalf of its members.[14] ACA explained that in practice deals between NCTC and programmers never require full liability, and therefore this current definition of buying groups unreasonably impedes the NCTC, with over 900 small and medium-sized MVPD members, from filing legitimate complaints alleging price discrimination.

ACA explained that once the impediment to NCTC's use of the program access rules is removed, additional revisions to the Commission's rules concerning volume discounts are necessary. Specifically, the Commission must ensure that vendor interference with individual member participation in buying group programming contracts does not render the requirement that cable-affiliated programmers negotiate non-discriminatory agreements with buying groups completely

[12] *State of New York Dep't of Soc. Servs. v. Shalala*, 21 F.3d 485, 495 (2d Cir. 1994)(NPRM gave sufficient notice where it generally requested comment and identified the substance of the challenged requirement in a summary of major provisions of the regulations).

[13] ACA Comments at 11-33 (Commission should modify its program access rules to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of the program access protections as Congress intended).

[14] *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, ¶¶ 114-115 (1993); 47 C.F.R. § 76.1000(c). ACA's proposed rule changes concerning the buying group liability as reflected in the Attachment, illustrate how the current definition of a buying group as codified in the CFR would appear if the Commission were to adopt ACA's alternative liability proposal. ACA recognizes that in 1998, the Commission adopted a revision to the definition of a buying group to add an alternative liability condition to in Section 76.1000(c) that was never codified in the Code of Federal Regulations. See ACA Comments at 19-23; *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822, ¶78 (1998); *see also In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Erratum, 14 FCC Rcd 18611 (1999).

meaningless, thus impeding effective redress.[15] Relatedly, ACA stated that establishing a standard of comparability for volume discounts available to buying groups is directly responsive to the NPRM's exploration of ways to expedite the complaint process by reducing the number of issues to be litigated, and may reduce the number of complaints ultimately filed by adding a measure of certainty to negotiations.[16]

ACA's proposals concerning buying groups are directly aimed at removing impediments to the use of program access rules by a buying group such as the NCTC, improving the Commission's current program access rules and procedures, and ensuring that MVPDs who purchase cable-affiliated programming through buying groups receive the protections Congress intended and have adequate redress to file legitimate complaints with the Commission in a cost-effective manner. ACA's proposals concerning buying groups directly answer the Commission's questions and present a reasonable solution for addressing the Commission's concerns with the functioning of its rules and the adequacy of their protections against discriminatory volume discounts, and should be adopted without delay by the Commission.[17]

Closing the Uniform Price Increases Loophole. The second set of revisions ACA proposed are similarly directly responsive to the NPRM's discussion of the subject of rule changes to better address allegations of price discrimination and the specific issues raised in the NPRM concerning abuse of uniform price increases by cable-affiliated programmers.[18] In its comments and reply comments, ACA agreed with the suggestion in the NPRM that the Commission recognize as a form of price discrimination prices, terms and conditions that appear facially neutral because they are applied to all purchasers, but that have a disparate impact on unaffiliated MVPDs.[19] To address this form of discrimination, ACA recommended that the Commission adopt the same "fair market value" standard it used in its arbitration conditions in cases involving the vertical integration of programming and distribution assets.[20]

ACA additionally encouraged the Commission to create a presumption that certain evidence is relevant to a fair market value determination, similar to the presumption it established for program access arbitrations in the Comcast-NBCU Order.[21] In the Comcast-NBCU Order, to ensure that the

[15] *See* ACA Comments at 28 ("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.'"); Rogerson at 15.

[16] ACA Comments at 31-32 (providing explicit guidance on the standard of comparability "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 instances where complaints are filed, clarity will likely reduce administrative costs involved in addressing them. More importantly, without this stipulation, the non-discrimination rule will remain completely ineffectual in providing protection to buying groups.").

[17] *Id.*

[18] *Id.*, ¶¶ 96-103.

[19] ACA Comments at 37-39; NPRM, ¶ 102.

[20] ACA Comments at 34-42; ACA Reply Comments at 2-8.

[21] *See In the Matter of Applications of Comcast Corp. General Electric Co., and NBC Universal Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, Appendix A, Conditions, Rules of Arbitration, Section VII.B., ¶ 5 (2011) ("Comcast-NBCU Order") ("To determine fair market value, the arbitrator may consider any relevant evidence and may

arbitrations would be "more effective and less costly," the Commission established a presumption of relevance for certain classes of contracts, depending on the type of programming for which arbitration is sought.[22] ACA suggested that in order to reduce the costs of filing a program access complaint and streamline adjudications based on a claim that a cable-affiliated programmer charged prices above fair market value, the Commission make clear in its Order that the same presumption of relevance would apply as contained in its Comcast-NBCU conditions.[23] These proposed revisions too may reasonably be considered logical outgrowths of the subjects and issues concerning price discrimination through uniform price increases identified in the NPRM.

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In sum, ACA expressed its belief that notice was adequate for the Commission to move forward at this time and revise its rules as proposed by ACA concerning both buying groups and uniform price increases. However, should the Commission reach the opposite conclusion, ACA

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require the parties to submit such evidence to the extent that it is in their possession or control. The arbitrator may not compel production of evidence by third parties."); *id.* at Section VII.B., ¶ 6 ("In the case of an arbitration under Section II of these Conditions [Conditions Concerning Access to Comcast-NBCU Programming], *there shall be a presumption that the following types of agreements, unredacted and including all exhibits and related agreements, are relevant evidence of fair market value*: a. for arbitration related to retransmission consent, current or previous contracts between MVPDs and broadcast stations; b. for arbitration related to RSNs, current or previous contracts between MVPDs and RSNs; c. for arbitration related to national cable networks, current or previous contracts between MVPDs and national networks; and d. for arbitration related to non-sports, non-broadcast regional cable networks, current or previous contracts between MVPDs and non-sports, non-broadcast regional cable networks. The fact that an agreement relates to more than one type of programming shall not be a basis for limiting its production or allowing redaction of its contents. There shall also be a presumption that for each agreement used as evidence of fair market value, the number of subscribers of the MVPD that is party to an agreement, the ratings for the networks covered by the contract, and similar information relating to the value of the contract terms shall be relevant evidence of fair market value. Any party seeking additional evidence from the other party must demonstrate that the likely probative value of such evidence clearly outweighs the burden of searching for and producing it.")(emphasis added).

[22] Comcast-NBCU Order, ¶¶ 51, 58 (recognizing the need for efficient and cost-effective discovery procedures, particularly for small and medium-sized MVPDs, who, given their subscriber bases and financial resources, "may be less able to bear the costs of commercial arbitration, thus rendering the remedy of less to value to them.").

[23] Comcast-NBCU Order, Appendix A, Conditions, Section VII.B., ¶ 6 ("In the case of an arbitration under Section II of these Conditions [Conditions Concerning Access to Comcast-NBCU Programming], *there shall be a presumption that the following types of agreements, unredacted and including all exhibits and related agreements, are relevant evidence of fair market value*: a. for arbitration related to retransmission consent, current or previous contracts between MVPDs and broadcast stations; b. for arbitration related to RSNs, current or previous contracts between MVPDs and RSNs; c. for arbitration related to national cable networks, current or previous contracts between MVPDs and national networks; and d. for arbitration related to non-sports, non-broadcast regional cable networks, current or previous contracts between MVPDs and non-sports, non-broadcast regional cable networks. The fact that an agreement relates to more than one type of programming shall not be a basis for limiting its production or allowing redaction of its contents. There shall also be a presumption that for each agreement used as evidence of fair market value, the number of subscribers of the MVPD that is party to an agreement, the ratings for the networks covered by the contract, and similar information relating to the value of the contract terms shall be relevant evidence of fair market value. Any party seeking additional evidence from the other party must demonstrate that the likely probative value of such evidence clearly outweighs the burden of searching for and producing it.") (emphasis added).

urges it to expeditiously release a further notice of proposed rulemaking at the same time it releases its order addressing whether to retain the exclusivity prohibition,[24] and to establish a comment cycle for filing comments and reply comments of no more than a 14/21 day period. ACA observed that the Commission frequently sets comment periods shorter than 30 days in rulemaking proceedings,[25] and should do so in this case. Because the issues raised by ACA concerning the Commission's rules have been fully aired in the record presently before the Commission, parties have had an opportunity already to consider ACA's proposals and respond to them, either in reply comments or subsequent ex parte submissions.

Limits on Discovery of Evidence Relevant to Fair Market Value: Additionally, ACA discussed the August 23rd ex parte submission of the Content Companies objecting to the Commission's adoption of the fair market value standard for judging price discrimination complaints and the broadening of the comparison set of programming agreements to include those entered into between MVPDs and unaffiliated programming vendors neither of which are a party to the complaint.[26]

In response to the Content Companies' charges that the evidentiary rules contemplated by ACA's fair market value standard would lead to the filing of program access complaints for the purpose of MVPDs conducting "fishing expeditions for information," ACA explained that its proposal to prohibit cable-affiliated programmers from charging prices above fair market value is far more limited in scope than that presumed by the unaffiliated programmers. ACA stressed that its filings were concerned solely with a discussion of evidence that would be relevant to a fair market value determination, which ACA noted could include programming agreements for similar programming.

ACA neither addressed the question of discovery nor requested that as a general rule third-party discovery be permitted by parties to a program access complaint. More importantly, ACA has proposed no changes to the current program access discovery rules.[27] Rather, ACA had assumed

[24] ACA fully supports retention of the exclusivity prohibition. ACA Comments at 2-11; ACA Reply Comments at 8-19.

[25] *See, e.g., In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 2764 (2012) (comment 14 days after date of publication/ reply comment 21 days after publication); *In the Matter of Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Notice of Proposed Rulemaking, 26 FCC Rcd 6496 (2011) (comment 14 days after date of publication/ reply comment 21 days after publication); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board,* Notice of Proposed Rulemaking, 26 FCC Rcd 2376 (2011) (comment 14 days after date of publication/ reply comment 21 days after publication); Comment Sought on Proposals for Standardized Data Fields for Simple Port Requests, Public Notice, 24 FCC Rcd 14423 (2009) (comment 14 days after date of publication/ reply comment 21 days after publication); *In the Matter of High-Cost Universal Service Support; Coalition for Equity in Switching Support Petition for Clarification*, Order and Notice of Proposed Rulemaking, 24 FCC Rcd 13004 (2009) (comment 14 days after date of publication/reply comment 21 days after publication).

[26] *See* Content Companies Aug. 23rd Ex Parte.

[27] ACA explained that under its proposal, parties to a program access complaint would be able to submit, in addition to their contracts for the disputed cable-affiliated programming, its own programming agreements with unaffiliated programmers for similar programming that it believes are relevant to the fair market value determination for the disputed programming. 47 C.F.R. § 76.1003(c)(contents of complaint). Further, ACA explained that it would expect that confidential information would be provided consistent with the terms of the confidentiality protections already established in the Commission's rules. 47 C.F.R. § 76.1003(k)(protective orders).

that the Commission would follow its existing precedent of limiting the scope of discovery by the parties to contracts for similar programming involving one of the parties to the complaint,[28] and further recommended that it do so in this case.[29] ACA noted that these safeguards should adequately safeguard Content Companies from the filing of program access complaints by MVPDs simply for the purpose of an "information fishing expedition."[30] The Content Companies appear to have assumed that ACA meant that the full range of potentially relevant programming would necessarily also be discoverable. ACA explained that it did not.

ACA also discussed how the Commission, in recent transaction reviews, had cleanly separated the concepts of "relevance" and "discovery" in establishing the rules for final offer arbitration based on a fair market value standard in recent license transfer proceedings. For example, in its license transfer conditions concerning access to Comcast-NBCU programming, the Commission specified as relevant *any* current or previous contracts between MVPDs and the programmer for the same type of programming that is the subject of the arbitration.[31] At the same

[28] *See* 47 C.F.R. § 76.7(f)(general special relief discovery); 47 C.F.R. § 76.1003(j)(program access discovery). Once served with the request, a respondent has the opportunity to object to the request if the document is "not in its control or relevant to the dispute;" if objected to, the obligation to provide the document is suspended following Commission review. *Id*.

[29] ACA is also mindful of the concerns of unaffiliated programmers about the highly sensitive nature of the programming contracts, and observed that the Commission too has already considered how to address such concerns in its program access rules. ACA noted that through the use of strong protective orders that prohibit business decision makers from seeing discovered agreements, and a discovery process that permits parties to submit discovery requests only for documents under the control of the other party, the confidentiality concerns of these programmers can be easily addressed. *See In the Matter of Implementation of the Cable Television Consumer Protection 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 Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶¶ 100-103 (2007) ("2007 Program Access Order"); *see id.*, Appendix E, Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings (limiting production of "confidential and extremely competitively-sensitive information to a limited set of authorized representatives of viewing parties not including "persons in a position to use the confidential information for competitive commercial or business purposes"); *see In the Matter of Special Access for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, 25 FCC Rcd 17725 (2010); *see also Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Protective Order, 26 FCC Rcd 2133 (2010); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Protective Order, 25 FCC Rcd 2140 (2010). A model protective order is included in the Commission's *2007 Program Access Order*, the terms of which should fully address the confidentiality concerns of the Content Companies. If this level of protection is deemed inadequate, however, the Commission routinely uses second level protective orders for highly confidential information in its transaction reviews and there would be no impediment to it issuing such an order in a program access complaint proceeding involving an allegation of pricing above fair market value that required submission of the programming contracts of unaffiliated programmers for similar programming.

[30] 47 C.F.R. § 76.1003(j)(discovery).

[31] Comcast-NBCU Order, Appendix A, Conditions, Rules of Arbitration, Section VII.B., ¶ 5 ("To determine fair market value, the arbitrator may consider *any* relevant evidence and may require the parties to submit such evidence to the extent that it is in their possession or control. *The arbitrator may not compel production of evidence by third parties.*") (emphasis added).

time, the Commission limited the scope of discovery by prohibiting the arbitrator from compelling the production of evidence by third parties.[32]

Finally, ACA addressed the Content Companies' objection that the Commission lacks statutory authority to adopt a fair market value standard to close the uniform price increases loophole. As ACA pointed out in its reply comments, the argument that the Commission lacks authority to address uniform price increases under Section 628(c)(2)(B) is without merit.[33] Section 628(c)(2)(B) expressly requires that the Commission's program access regulations "prohibit discrimination" by cable-affiliated programmers against non-affiliated MVPDs "in the prices, terms, and conditions of sale or delivery" of cable programming. These express statutory terms provide the Commission with broad authority over wholesale rates, terms and conditions of cable-affiliated programming arrangements that fall within the scope of Section 628(c)(2)(B). As discussed above, within this broad grant of authority to prohibit price discrimination, the Commission may reasonably take account of prices that, while uniformly applied to all MVPDs, including the cable-affiliated programmer's affiliated cable operator, have a disparate, discriminatory impact on unaffiliated MVPDs.[34]

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

[32] *Id*.

[33] ACA Reply Comments at 5-7.

[34] NPRM, ¶101; ACA Comments at 37-39.

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1000 is amended by revising paragraphs (c) and (j) to read as follows:

§ 76.1000 Definitions.

As used in this subpart:

*** * * * ***

(c) *Buying groups.* 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)<u>**(i)**</u> 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; <u>**(ii)**</u> or whose members, as contracting parties, agree to joint and several liability; <u>**or (iii) agrees to forward all payments due and received from its members for payments 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;**</u> 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.

*** * * * ***

(j) *Similarly situated.* The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor or by a terrestrial cable programming vendor alleged to have engaged in conduct described in §76.1001(b)(1)(ii), that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of §76.1001(a) or §76.1002(b) has occurred. The analysis of whether an alternative multichannel video programming distributor is properly comparable to the complainant includes consideration of, but is not limited to, such factors as whether the alternative multichannel video programming distributor operates within a geographic region proximate to the complainant, has roughly the same number of subscribers as the complainant, and purchases a similar service as the complainant. Such alternative multichannel video programming distributor, however, must use the same distribution technology as the “competing” distributor with whom the complainant seeks to compare itself. **For purposes of determining the size of the volume discount applicable to a buying group, a buying group will be considered similarly situated to an alternative multichannel video programming distributor with approximately the same number of subscribers for programming as expected to be supplied by the buying group for programming.**

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3. Section 76.10002 is amended by revising the Note to paragraph (b)(3) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

*** * * * ***

(b) *Discrimination in prices, terms or conditions.* No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the 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. Nothing in this subsection, however, shall preclude:

(1) The imposition of reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

Note 1: Vendors are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability, although any such distinctions must be applied for reasons for other than a multichannel video programming distributor's technology. Vendors are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

Note 2: Vendors may establish price differentials based on factors related to offering of service, or difference related to the actual service exchanged between the vendor and the distributor, as manifested in standardly applied contract terms based on a distributor's particular characteristics or willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Such factors include, but are not limited to, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; meeting competition at the distributor level; and other legitimate factors as standardly applied in a technology neutral fashion.

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming, satellite broadcast programming, or terrestrial cable programming;

Note: Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in costs, or additional costs, incurred for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies. A price differential for a program service may not be based on a distributor's retail costs in delivering service to subscribers unless the program vendor can demonstrate that subscribers do not or will not benefit from the distributor's cost savings that result from a lower programming price.

(3) The establishment of different prices, terms, and conditions which 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; or

Note: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership. <u>**Vendors may not use volume-related justifications to establish price differentials between a buying group and an alternative multichannel video programming distributor that has approximately the same number of subscribers for the programming as expected to be supplied by the buying group.**</u>

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4. Section 76.10002 is amended by adding new paragraph (g) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

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(g) *Rights to participate in buying group programming contracts.* No satellite cable programming vendor in which a cable operator has an attributable interest or satellite broadcast programming vendor may unreasonably interfere with or prevent a member of a buying group from participating in a programming contract which a buying group signs as a contracting party as a representative of its members if: (1) the member has no more than 3 million subscribers; or (2) the share of programming that the member licenses through the buying group is not significantly smaller than the average share of programming that other members of the buying group license through the buying group. Upon the expiration of a satellite cable programming, or satellite broadcast programming contract which a buying group signs as a contracting party as a representative of its members, all buying group members participating in the expiring programming contract shall be presumptively entitled to participate in the renewed programming contract.

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PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1001 is amended by revising paragraph (b)(ii) to read as follows:

§ 76.1001 Unfair practices generally.

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(b) *Unfair practices involving terrestrial cable programming and terrestrial cable programming vendors.* (1) The phrase "unfair methods of competition or unfair or deceptive acts or practices" as used in paragraph (a) of this section includes, but is not limited to, the following:

(i) Any effort or action by a cable operator that has an attributable interest in a terrestrial cable programming vendor to unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms, and conditions for the sale of, terrestrial cable programming to any unaffiliated multichannel video programming distributor.

(ii) Discrimination in the prices, terms, or conditions of sale or delivery of terrestrial cable programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors, or their agents or buying groups, by a terrestrial cable programming vendor that is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; except that the phrase does not include the practices set forth in §76.1002(b)(1) through (3). <u>**Notwithstanding these practices, vendors may not charge multichannel video programming distributors a price for the sale or delivery of terrestrial cable programming that is above fair market value.**</u> The cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors that wholly own or control, or are under common control with, such terrestrial cable programming vendor shall be deemed responsible for such discrimination and any complaint based on such discrimination shall be filed against such cable operator, satellite cable programming vendor, or satellite broadcast programming vendor.

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3. Section 76.10002 is amended by revising paragraph (b) to read as follows:

§ 76.1002 Specific unfair practices prohibited.

*** * * * ***

(b) *Discrimination in prices, terms or conditions.* No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the 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. Nothing in this subsection, however, shall preclude:

(1) The imposition of reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

Note 1: Vendors are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability, although any such distinctions must be applied for reasons for other than a multichannel video programming distributor's technology. Vendors are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

Note 2: Vendors may establish price differentials based on factors related to offering of service, or difference related to the actual service exchanged between the vendor and the distributor, as manifested in standardly applied contract terms based on a distributor's particular characteristics or willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Such factors include, but are not limited to, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; meeting competition at the distributor level; and other legitimate factors as standardly applied in a technology neutral fashion.

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming, satellite broadcast programming, or terrestrial cable programming;

Note: Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in costs, or additional costs, incurred for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies. A price differential for a program service may not be based on a distributor's retail costs in delivering service to subscribers unless the program vendor can demonstrate that subscribers do not or will not benefit from the distributor's cost savings that result from a lower programming price.

(3) The establishment of different prices, terms, and conditions which 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; or

Note: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.

<u>Notwithstanding §76.1002(b)(1) through (3), vendors may not charge multichannel video programming distributors a price for the sale or delivery of satellite cable programming or satellite broadcast programming that is above fair market value.</u>

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