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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 Lyle Elder, Attorney-Advisor to Chairman Genachowski, 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 A copy of the presentation prepared by ACA's economic consultant, Professor

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-

William P. Rogerson, previously filed by ACA in the record of this proceeding, is attached.² ACA also disputed allegations in the record that notice was 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.³

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.⁴ 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.”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

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

² *Proposed Revisions to Program Access Rules to Better Address the Potential Competitive Harms Created by Cable-Affiliated Programmers*, Presentation to the FCC, American Cable Association (presented Aug. 1, 2012); see also, Aug. 2nd Ex Parte Letter, Attachment.

³ 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”).

⁴ 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.

⁵ See ACA Comments at 34-43; ACA Reply Comments at 7-8.

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 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).

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 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

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.

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).

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 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

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).

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.").

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

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 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

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.

* * *

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 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

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).

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

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 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

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).

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*

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 clearly 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 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

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).

³² *Id.*

³³ ACA Reply Comments at 5-7.

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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

Attachment

cc (via email): Lyle Elder

³⁴ NPRM, ¶101; ACA Comments at 37-39.

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. Rationale #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.