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**Barbara S. Esbin**  
Admitted in the District of Columbia

September 13, 2012

**Via ECFS**

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 September 12, 2012, Matthew Polka, President and CEO, American Cable Association ("ACA"); Ross Lieberman, Vice President of Government Affairs, ACA; Robert Gessner, ACA's Vice Chairman and President, Massillon Cable TV, Inc.; and the undersigned, met with Elizabeth Andron, Acting Chief of the Commission's Office of Strategic Planning & Policy Analysis to discuss ACA's views on the above referenced proceeding.<sup>1</sup>

Meeting participants discussed how the Commission's implementation of the program access rules has provided less protection for small and medium-sized multichannel video programming distributors ("MVPDs") than Congress intended, because, in practice, the rules prevent a buying

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<sup>1</sup> *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et. al.*, Notice of Proposed Rulemaking, 2012 FCC LEXIS 1257, MB Doc. No. 12-68, 07-18, 05-192 (rel. Mar. 20, 2012) ("NPRM"); *In the Matter of Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, MB Doc. Nos. 12-68, 07-18, 05-192, Comments of the American Cable Association (filed June 22, 2012) ("ACA Comments"); *In the Matter of Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time 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").

group such as the National Cable Television Cooperative (“NCTC”) from filing legitimate complaints, and how if the Commission either does not adopt reforms to its buying group rules or postpones action indefinitely, while at the same time permitting the exclusivity ban to sunset, the opportunities for redress available to these already under-protected MVPDs would be further limited. ACA characterized such an outcome as a “double whammy,” particularly for its members who compete head-to-head with cable operators who are vertically integrated, such as WOW! and RCN.

To better protect small and medium-sized MVPDs, ACA urged the Commission to immediately (i) revise its program access rules to ensure that they may be effectively utilized by a buying group such as the NCTC; (ii) close the “uniform price increases loophole,” by prohibiting a cable-affiliated programmer from charging a price above “fair market value;” and (iii) fully extend the prohibition on exclusive contracts between cable operators and their affiliated programmers for another five year period.<sup>2</sup>

With regard specifically to ensuring that the program access rules can be used by a buying group such as the NCTC, ACA repeated its request that the Commission: (i) include 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) set standards for the right of buying group members to participate in their group’s master licensing agreements; and (iii) establish the standard of comparability for a buying group regarding volume discounts.<sup>3</sup>

Meeting participants discussed how small and medium-sized MVPDs would fare should the Commission not extend the exclusivity ban, leaving case-by-case adjudication of complaints under Section 628(b) as the only relief available to them.<sup>4</sup> ACA stressed that seeking redress under Section 628(b) imposes a heavy burden on the complainant, especially with respect to demonstrating that a cable-affiliated programmers’ exclusive contract would be competitively significant,<sup>5</sup> and this would leave small and medium-sized MVPDs particularly vulnerable to a competitively harmful use of exclusive agreements.<sup>6</sup> The record demonstrates that even some of the largest MVPDs have found that the complaint process is an inadequate substitute for a *per se* prohibition against harmful conduct due to the costs, burdens and delays engendered by pursuit of a Section 628(b) complaint.<sup>7</sup>

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<sup>2</sup> See ACA Comments at 2-11; ACA Reply Comments at 8-19.

<sup>3</sup> See ACA Comments at 11-33.

<sup>4</sup> NPRM, ¶¶ 47-57.

<sup>5</sup> See 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a); NPRM, ¶ 48 (“These provisions require a complainant to establish three elements in order to demonstrate a violation: (i) the defendant is one of the three entities covered by these provisions (*i.e.*, a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor); (ii) the defendant has engaged in an “unfair act”; and (iii) the “purpose or effect” of the unfair act is to “significantly hinder or prevent” an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”).

<sup>6</sup> Even if the Commission were to establish a presumption that an exclusive contract regarding a satellite-delivered, cable-affiliated regional sports network (“RSN”) would be considered an unfair act under Section 628(b), an MVPD would still be left with a costly process to meet its obligation to prove that lack of access to other cable-affiliated programming, potentially including national networks that carry live sporting events, would be competitively significant.

<sup>7</sup> See, *e.g.*, Sept. 11th DirecTV Ex Parte (“Even if an MVPD is able to bear the large cost of such a proceeding, the delay in gaining access to programming can be sufficient to hand the withholding cable operator an advantage in the market that is difficult to overcome.”); *In the Matter of Revision of the*

Cable-affiliated programmers would know that meeting this burden would be cost prohibitive for small and medium-sized MVPDs, particularly against incumbent cable-affiliated programmers who have significantly more money and resources at their disposal to devote to the complaint, and act against them with impunity. Even if there was an intrepid small or medium-sized MVPD willing to bring a complaint, these programmers would have the incentive to make meeting the burden as expensive as possible for this MVPD to send a signal to the rest of the MVPD industry that “resistance is futile.”

ACA urged the Commission to adopt alternative approaches for small and medium-sized MVPDs should the Commission decide to relax or sunset the prohibition on exclusive contracts and rely on case-by-case adjudication under Section 628(b), which for these MVPDs affords a remedy without a reasonable prospect of relief. ACA noted that the Commission has confronted this issue in transaction reviews, and has accordingly imposed special conditions to protect small and medium-sized operators from the harms of vertical integration.<sup>8</sup> ACA also noted that if the Commission does not take into account that smaller MVPDs could not avail itself of relief, the harm would be vastly compounded if, at the same time, their buying group was unable to file a complaint due to a failure by the Commission to reform its buying group rules as ACA has recommended.

ACA reiterated its belief that the NPRM provided notice apprising parties of the Commission’s intention to address price discrimination, uniform price increases, and impediments to the filing of legitimate complaints by MVPDs sufficient to permit the Commission to adopt, as part of its forthcoming Order in this proceeding, ACA’s proposals to ensure that buying groups such as NCTC can effectively use the program access rules and to close the “uniform price increases loophole,” by prohibiting a cable affiliated programming from charging a price above “fair market value. However, if the Commission should reach the opposite conclusion, ACA would urge the Commission to promptly issue a further notice of proposed rulemaking, establish a short comment cycle, and commit to expeditiously adopt a further order by year’s end.<sup>9</sup>

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*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., Comments of DirecTV, MB Doc. No. 12-68, 07-18, 05-192, at 44 (filed June 22, 2012); 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., Comments of AT&T Comments, MB Doc. No. 12-68, 07-18, 05-192, at 23-26 (filed June 22, 2012).*

<sup>8</sup> See *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶¶58-59 (2011) (one-way fee shifting for small MVPDs who prevail in arbitration); *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 176 (2004) (small MVPDS may use bargaining agent).

<sup>9</sup> See Letter to Marlene Dortch, Secretary, FCC, from Barbara S. Esbin, Counsel to the American Cable Association, *In 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; Application for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time*

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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

cc (via email): Elizabeth Andrion

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*Warner Cable Inc. (subsidiaries), Assignees, et al.*; MB Doc. Nos. 12-68, 07-18, 05-192, at 6-7 (filed Aug. 31, 2012) (explaining the reasons notice was sufficient to permit the Commission to adopt ACA's proposed rule revisions at this time, but requesting expedited pleading cycle of 14/21 days should the Commission reach the opposite conclusion).