



October 4, 2012

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68; *News Corporation, The DIRECTV Group, Inc., and Liberty Media Corporation*, MB Docket No. 07-18; *Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, MB Docket No. 05-192

Dear Ms. Dortch:

On October 4, 2012, undersigned counsel left a voicemail message for Alex Hoehn-Saric, Policy Director for Commissioner Rosenworcel, highlighting the attached materials from a Commission brief filed this summer with the Second Circuit on the question of when a proposed rule can be considered to be a logical outgrowth of the notice issued in a rulemaking proceeding. As discussed below, it is simply impossible to square that discussion with the argument posed by cable operators¹ that DIRECTV's proposals² here are not logical outgrowths of the *Notice* issued in this proceeding.

The relevant issue in the Second Circuit proceeding is whether the Commission had provided sufficient notice under the Administrative Procedure Act ("APA") before adopting a rule for considering requests for standstill orders in program carriage complaint proceedings. The notice in that proceeding did not propose or even discuss the possibility of such standstill orders. The Commission nonetheless concluded that, because the notice requested comment on whether the Commission "should adopt additional rules to protect programmers from potential retaliation if they file a complaint," and the standstill rule would "help to prevent retaliation while a program carriage complaint is pending," the rule is a "logical outgrowth" of the proposal.³

¹ See Letter from Rick Chessen to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, and 05-192, at 3 (filed Oct. 3, 2012).

² See Letter from William M. Wiltshire to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, and 05-192 (filed Sept. 21, 2012).

³ *Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, ¶ 36 (2011).

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In defending that conclusion, the Commission’s brief discusses the latitude afforded the agency under the APA. For example, “[a] notice will suffice if it contains ‘a description of the subjects and issues involved,’” and “an agency’s notice is adequate ‘so long as it affords interested parties a reasonable opportunity to participate in the rulemaking process.’”⁴ The brief concludes that the notice in that case met those requirements because it “informed the public ‘of the issues covered’ by the rulemaking and ‘the purpose’ of ‘any potential regulation.’”⁵

Applying this same logic, DIRECTV’s proposals are clearly encompassed as logical outgrowths of the *Notice* in this proceeding. It requested comment on an array of options under which the Commission would “retain, sunset, or relax” the cable exclusivity prohibition as necessary “to preserve and protect competition in the video distribution market.”⁶ Among the many alternatives discussed at length in the *Notice* are: (1) the possibility of retaining the cable exclusivity prohibition with respect to regional sports networks and other “must have” programming;⁷ (2) the alternative approach of a case-by-case regime with a rebuttable presumption related to such programming;⁸ (3) establishing a rebuttable presumption that would give a complainant the benefit of a prior determination that an exclusive contract involving the same network violated Section 628(b) (or, potentially, Section 628(c)(2)(B));⁹ and (4) modification of the current standstill procedures in Section 76.1003(l) to minimize any potential disruption to consumers.¹⁰ The proposals made by DIRECTV all fall within one of these discussed alternatives or are variants thereof. Given the breadth of the *Notice* and the program access regime to which it relates, as well as the “description of the subjects and issues involved” and “the purpose” of “any proposed regulation,” interested parties were clearly on notice that such proposals would be covered by this proceeding.

⁴ See attached materials at 64-65 (quoting 5 U.S.C. § 553(b)(3); *National Black Media Coal. v. FCC*, 822 F.2d 277, 283 (2d Cir. 1987); *State of New York Dep’t of Soc. Servs. v. Shalala*, 21 F.3d 485, 495 (2d Cir. 1994)).

⁵ *Id.* at 65 (quoting *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006)).

⁶ *Revision of the Commission’s Program Access Rules*, 27 FCC Rcd. 3413, ¶¶ 1, 4 (2012) (“*Notice*”).

⁷ *Id.*, ¶¶ 72-78.

⁸ *Id.*, ¶¶ 53-54.

⁹ *Id.*, ¶¶ 55-56.

¹⁰ *Id.*, ¶¶ 81-82.

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Respectfully submitted,

/s/

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Attachment

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11-4138 (L)

(CONSOLIDATED WITH NO. 11-5152)

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

TIME WARNER CABLE INC. AND NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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rules from being exempt from APA notice requirements. *JEM*, 22 F.3d at 326-28.

In any event, even if the Commission was required to provide notice of the standstill rule, it provided sufficient notice to satisfy the APA. In the *NPRM*, the FCC requested comment on whether it “should adopt additional rules to protect programmers from potential retaliation if they file a complaint.” *NPRM* ¶ 16 (JA____). The standstill rule was “a ‘logical outgrowth’ of this proposal” because the rule “will help to prevent retaliation while a program carriage complaint is pending.” *Order* ¶ 36 (JA____). Therefore, the agency’s notice complied with the APA. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

Petitioners fault the Commission for failing to propose any “specific” rule concerning standstills. NCTA Br. 38. As this Court has recognized, however, the APA “does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule.” *Mt. Mansfield*, 442 F.2d at 488. Indeed, the APA does not require a rulemaking notice to contain *any* rule proposals. A notice will suffice if it contains “a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3); *see also National Black Media Coal. v. FCC*, 822 F.2d 277, 283 (2d Cir. 1987) (notice is adequate if

it “fairly apprise[s] interested persons of the subjects and issues” of the rulemaking) (internal quotation marks omitted).

Because the APA “does not require a precise notice of each aspect of the regulations eventually adopted,” an agency’s notice is adequate “so long as it affords interested parties a reasonable opportunity to participate in the rulemaking process.” *State of New York Dep’t of Soc. Servs. v. Shalala*, 21 F.3d 485, 495 (2d Cir. 1994) (internal quotation marks omitted). The notice here met that requirement. It informed the public “of the issues covered” by the rulemaking and “the purpose” of “any potential regulation.” *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006). In particular, the *NPRM* notified interested parties that the FCC was considering the adoption of “rules to protect programmers from potential retaliation if they file a complaint.” *NPRM* ¶ 16 (JA____). That proposal led to the standstill rule. *Order* ¶ 36 (JA____).

Petitioners question the relationship between the standstill rule and the prevention of retaliation. NCTA Br. 38; TWC Br. 58. As noted above, however, it was entirely reasonable for the Commission to anticipate that, in the absence of a standstill, an MVPD might respond to a program carriage complaint by threatening to drop the complainant’s programming unless the complainant withdrew its complaint and acceded to carriage demands that

violate Section 616. *See* Part II, *supra*. Because “such a possibility” was “reasonably foreseeable,” *Long Island Care at Home*, 551 U.S. at 175, the standstill rule was a “logical outgrowth” of the Commission’s proposal to consider measures to prevent retaliation.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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