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Barbara S. Esbin
Admitted in the District of Columbia

February 19, 2013

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Notice of Ex Parte; Revision of the Commission's Program Access Rules, MB Docket No. 12-68

Dear Ms. Dortch:

On February 14, 2013, Matthew Polka and Ross Lieberman, of the American Cable Association (ACA); William P. Rogerson, Professor of Economics, Northwestern University; Jeff Nourse, Senior Vice President, Legal & Regulatory Affairs of the National Cable Television Cooperative; Elvis Stumbergs and the undersigned, counsel to ACA, met with William Lake, Chief, Media Bureau; Nancy Murphy, Steven Broeckaert, and Kathy Berthot, also of the Media Bureau; and Jonathan Levy and Steven Wildman of the Office of Strategic Planning to discuss the above-captioned rulemaking.[1]

During the meeting, ACA representatives discussed ACA's positions on the issues raised in the Further Notice of Proposed Rulemaking concerning the need to revise the Commission's rules regarding buying groups, consistent with its filed comments and the attached presentation.[2]

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.

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[1] *See 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.; Implementation of the Cable Television Consumer Protection and Competition 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,* Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29, 27 FCC Rcd 12605 (2012).

[2] *See* Comments of the American Cable Association, MB Docket No. 12-68, at 1-62 (Dec. 14, 2012); Reply Comments of the American Cable Association, MB Docket No. 12-68, at 1-71 (Jan. 14, 2013).

Sincerely,

Barbara Esbin

Barbara Esbin

Enclosure (1)

cc (via email): William Lake
Nancy Murphy
Steven Broeckaert
Kathy Berthot
Jonathan Levy
Steven Wildman

CONNECTING HOMETOWN AMERICA

PROPOSED REVISIONS TO PROGRAM ACCESS RULES

Presentation to the FCC

February 14, 2013

American Cable Association

OUTLINE

I. PROPOSED REVISIONS RELATED TO BUYING GROUPS

   A. THE ALTERNATIVE LIABILITY CONDITION

   B. THE STANDARD OF COMPARABILITY

   C. PARTICIPATION GUARANTEES

   D. OTHER PROPOSALS SUGGESTED IN THE FNPRM

      1. AUTOMATIC TERMINATION OF DEFAULTING MEMBERS

      2. REGULATORY OVERSIGHT OF MEMBERSHIP DECISIONS

II. KEY ACA PROPOSALS RELATED TO REBUTTABLE PRESUMPTIONS

THE PROPOSED ALTERNATIVE LIABILITY CONDITION

1. Currently, a buying group must satisfy one of the following three liability conditions to avail itself of the protections provided by program access rules:

   (i) The "full liability" condition: The buying group agrees to be financially liable for any fees due pursuant to a programming contract which it signs as a contracting party as a representative of its members.
   (ii) The "joint and several liability" condition: The members of the buying group agree to joint and several liability.
   (iii) The "cash reserve" condition: The buying group must maintain liquid cash or credit reserves equal to the cost of one month's programming fees for all buying group members and each member of the buying group must remain liable for its pro rata share.

2. FNPRM tentatively concludes that the following fourth alternative liability condition should be added:

   (iv) The "liability to forward payments" condition: The buying group agrees to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.

CURRENT INDUSTRY PRACTICE

1. The National Cable Television Cooperative (NCTC) is the largest and most prominent buying group negotiating programming deals for MVPDs.
   - NCTC has master agreements with the vast majority of cable networks including 45 of the top 50 networks.
   - Almost all small and medium sized MVPDs are members of the NCTC and purchase a substantial share of the programming they distribute through the NCTC.

2. The NCTC business model satisfies condition (iv) but does not satisfy any of the existing three conditions.

3. Programmers and the NCTC have freely entered into their arrangements for almost two decades and could easily have agreed to different liability conditions if they wished.
   - The arrangements they have freely chosen to adopt are presumptively more efficient than arrangements they have freely chosen not to adopt.
   - If the value to programmers of having the NCTC commit to greater liability on behalf of its members exceeded to the costs to the NCTC of so doing, we would have expected programmers and the NCTC to have agreed to such an arrangement.

TWO JUSTIFICATIONS FOR ADOPTING ALTERNATIVE (iv)

1. Current rules contravene the clear intent of Congress that buying groups should receive protection under program access rules.
   - Section 628(c)(2)(B) specifically includes buying groups as protected entities without specifying any particular conditions that buying groups must satisfy.
   - A set of rules that does not apply to the business model for a buying group that has found near universal acceptance among all parties that have a need to use buying groups, cannot reasonably be interpreted as providing protection to buying groups.

2. Programmers dealing with a buying group satisfying alternative (iv) receive a level of protection against default that is substantially similar to the level they receive when dealing with an individual MVPD. The following is true for both an individual deal and a group deal:
   - An MVPD is able to obtain at most 30- 60 days of unpaid-for service before being terminated.
   - MVPDs know they will be quickly cut off from programming if they default.
   - Furthermore, an NCTC member defaulting on any individual master agreement will be terminated from all NCTC master agreements.
   - Maximum risk of default to programmer is only 30-60 days of payments.

ARGUMENTS AGAINST ALTERNATIVE (iv) ARE WITHOUT MERIT

1. **Argument #1: Alternative (iv) would require a programmer to pursue delinquent MVPDs on an individual basis.**
   - This is true but of minor significance. In 2011 (which is the most recent year for which complete data is available):
     - only 5 NCTC members with 661 total subs ultimately defaulted on any payments; and
     - monthly payments of defaulting members were less than .01% (1/10,000) of total monthly payments handled by the NCTC.
   - Defaults are insignificant largely because under NCTC deals, MVPDs are able to obtain at most 30-60 days of unpaid programming before being terminated.
   - The fact that an MVPD defaulting on one NCTC deal will be terminated on all NCTC deals provides extra incentives for MVPDs to honor NCTC agreements.
   - Transactions costs of dealing with delayed payments that are ultimately received are borne almost entirely by the NCTC.
   - NCTC has powerful incentives to minimize member defaults in order that programmers will view it as a more desirable business partner.
   - Broadstripe example.

2. **Argument #2: ACA has not presented any evidence that the existing alternatives are more costly or less efficient that alternative (iv).**
    - Programmers and MVPDs freely enter into their arrangements through the NCTC and could easily have agreed to different liability conditions if they wished.
    - The arrangements they have freely chosen to adopt are presumptively more efficient than the arrangements they have freely chosen not to adopt.

3. **Argument #3: NCTC is provided protection by the program access rules because NCTC could choose to change its business practices and adopt one of the existing three alternatives if it wished.**
    - The other alternatives are less efficient and thus more costly for parties to adopt.
    - Had Congress intended that buying groups meet some higher and more costly liability standard than the standard they meet in their regular course of business, then Congress would have explicitly said so.

4. Argument #4: It would inequitable to compel cable-affiliated programmers to deal with a buying group that satisfies only alternative (iv) while non-cable-affiliated programmers are free to insist on more stringent liability requirements.

- Non-cable-affiliated programmers have already demonstrated by their own freely chosen actions that they prefer alternative (iv) to more stringent liability requirements.
- The effect of the proposal will simply be to require cable-affiliated operators to use the same rules that non-cable-affiliated operators already choose to use.

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II. KEY ACA PROPOSALS RELATED TO REBUTTABLE PRESUMPTIONS

THE ACA PROPOSAL

1. ACA recommends that the Commission clarify that under program access rules:

   "Cable-affiliated programmers are required to extend to buying groups the same volume discounts or other advantageous terms and conditions based on the number of subscribers that they would ordinarily extend to individual MVPDs providing the same number of subscribers, controlling for the other factors that the rules permit satellite-delivered cable-affiliated programmers to consider in setting the pricing, terms, and conditions for programming."

2. ACA agrees with the Commission that this standard is "arguably already clear" because program access rules do not distinguish between buying groups and individual MVPDs when describing justifications for volume discounts.

3. However, issuing an explicit statement would make the standard *unarguably clear*.
   - This would reduce regulatory uncertainty and avoid needless litigation costs.
   - The reduction in regulatory uncertainty and potential litigation costs would make it more likely that harmed parties would be willing to file a complaint and thus provide better deterrence of the prohibited behavior in the first place.

4. It would be sufficient to issue the clarification as part of the order, rather than to formally amend the Commission's rules.

5. Note that ACA's proposal explicitly acknowledges that the standard of comparability only applies controlling for other factors that the rules permit satellite-delivered cable-affiliated programmers to consider in setting the pricing, terms and conditions for programming.

NCTC's OPT-IN BUSINESS MODEL DOES NOT INVALIDATE THE STANDARD OF COMPARABILITY

1. The NCTC business model:
   - Master agreement that NCTC negotiates with a programmer provides a contract that members may choose to opt in to.
   - Individual members decide whether or not to opt in only after the master agreement is negotiated.

2. Economic rationale: A model where NCTC directly licenses programming on behalf of its members would require enormous amounts of extra coordination and communication between NCTC and its membership.

3. Comcast has suggested that volume provided by NCTC is not equivalent to volume provided by individual MVPDs because programmers cannot reliably predict the ultimate volume that will be provided by NCTC at the time the master agreement is signed.

4. The volume that NCTC will provide is actually quite predictable. See Comments of AMC:

   "NCTC and its members enjoy long-standing relationships with numerous programmers, including AMC's networks, and past participation in master agreements has been, and continues to be, a reliable indicator of which buying group members are likely to opt into future agreements."

"RATE CARD" AGREEMENTS

1. Definition: A rate card agreement specifies the price that will be paid in any given month as a function of the number of subscribers actually provided in that month.

2. FNPRM inquires whether cable-affiliated programmers should be required to enter into "rate card" agreements with buying groups where contingent prices are specified for any level of subscribership that the buying group could potentially provide.

3. Rationale: This would solve the "chicken and egg" problem that might occur if certain members of a buying group are unwilling to opt into a master agreement because license fees are too high, even though the license fees would go down if members decided to opt in.

4. ACA believes that this would provide useful extra protection to buying groups and make it more likely that buying groups would achieve all of the efficiencies they are capable of providing.

5. However, ACA's top priority is for the Commission to adopt the more basic standard of comparability proposal that the license fee specified by a master agreement be non-discriminatory based on the expected number of subscribers that a buying group will provide.

6. Assuming that just the basic standard of comparability proposal was adopted, if a complaint was filed and there was a dispute over the expected number of subscribers that the buying group would provide, this would be one of the issues that the Commission would need to decide. However, since buying group volume is relatively predictable, this should not be a major issue of dispute.

7. One advantage of requiring rate card agreements would be that the Commission would not have to make any determination regarding the expected number of subscribers that a buying group would provide.

8. Even if rate card agreements were not required, a programmer might choose to voluntarily enter into a rate card agreement if it believed that the expected number of subscribers was being overestimated. Under a rate card agreement lower prices would only be paid if larger volumes were actually achieved.

NATIONAL VS. LOCAL COMPETITORS

1. 1993 Program Access Order distinguishes between "national" and "local" distributors and states that for purposes of filing discrimination complaints:
   - A local distributor should compare itself only to another local distributor with whom it competes.
   - A national distributor may compare itself to other national distributors.

2. FNPRM asks if Commission's 1993 guidance should be interpreted to mean that a nationally oriented buying group such as the NCTC should only be allowed to compare itself to the two DBS providers when filing a discrimination complaint.

3. ACA believes that, both on legal and public policy grounds, a nationally oriented buying group such as the NCTC should be allowed to compare itself to cable MSOs and telco MVPDs as well as DBS providers.

REASONS WHY A NATIONALLY ORIENTED BUYING GROUP SUCH AS THE NCTC SHOULD BE ALLOWED TO COMPARE ITSELF TO CABLE MSOS AND TELCOS AS WELL AS TO DBS PROVIDERS

1. The extent to which various providers are national vs. regional is more properly viewed as a continuum rather than a black and white issue.
   - Only DBS providers literally serve all regions of the country.
   - All other large customers of programmers, including cable MSOs, telco MVPDs, and the NCTC, serve multiple regions of the country but not all regions of the country.
   - Even if national scope of operations is a relevant factor in pricing, it is difficult to see why NCTC is more properly compared to DBS providers than to cable MSOs or telco MVPDs that provide service over multiple regions.

2. Variation in regions served or national scope of operations may result in variations in factors, such as demographics, that could affect prices or other terms. However:
   - Program access rules already allow adjustments for such factors.
   - There is no reason for Commission to take the position that two MVPDs becomes entirely non-comparable if there is some variation in regions served or in national scope of operations.

3. Restricting nationally oriented buying groups to comparing themselves only to the two DBS providers would essentially mean that program access rules would provide no protection at all to such buying groups.
   - Members of NCTC that meet the safe harbor standard proposed by ACA collectively serve approximately 8.4 million subscribers.
   - DirecTV serves approximately 20 million subscribers.
   - Dish serves approximately 14 million subscribers.
   - Because the Commission has declined to place any limits on the magnitude of volume discounts that are allowable under program access rules, a complaining distributor is, in reality, only able to compare itself to distributors no larger than itself when filing a discrimination complaint.

4. MFN clauses in individual license agreements generally do not limit the set of comparable distributors based on national scope of operations.

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THE ACA PROPOSAL

1. Even if program access rules are changed so that they require cable-affiliated programmers to negotiate non-discriminatory master agreements with buying groups such as the NCTC, this protection could be rendered completely meaningless if cable-affiliated programmers are allowed to arbitrarily exclude members of buying groups from participating in master agreements.

2. The Commission should preclude the possibility that its rules will be circumvented in this fashion by:
   - Establishing a safe harbor subscriber level such that an MVPD with no more than the safe harbor number of subscribers that is a member of a buying group is presumptively entitled to participate in master agreements between the buying group and cable-affiliated programmers.
   - Setting the safe harbor subscriber level equal to 3 million subscribers.

RATIONALE FOR SETTING THE SAFE HARBOR THRESHOLD AT 3 MILLION SUBSCRIBERS

1. Table 1, attached to these slides, provides a list of largest 25 MVPDs and indicates which are members of the NCTC.
   - Suddenlink is 11th largest with 1.23 million subs.
   - Suddenlink and all MVPDs smaller than Suddenlink on the list of top 25 MVPDs are NCTC members
   - Four of the larger MVPDs are NCTC Members: Cox, Verizon, Charter and Cablevision.

2. NCTC has reported that, while the four largest members do not purchase a substantial share of their programming through the NCTC, all of its other members generally do purchase a substantial share of their programming through the NCTC.

3. Bright House Networks:
   - Only MVPD intermediate in size between Cablevision ranked 9th with 3.26 million subs and Suddenlink, ranked 11th with 1.23 million subs.
   - Has 2.06 million subs.
   - Bright House is not a member of the NCTC and likely never will be because it is partially owned by Time Warner Cable (TWC) and purchases almost all of its programming through deals negotiated by TWC.

4. Therefore, if the safe harbor level was set higher than 1.23 million subs and lower than 3.26 million subs it would preserve the status quo in the sense that the set of MVPDs eligible to purchase programming through a buying group will be identical to the set of MVPDs that currently purchase a substantial share of their programming through a buying group.

5. ACA recommends that the safe harbor be chosen near the higher end of the allowable range in order to avoid creating disincentives for the larger members of the NCTC to pursue strategies that might cause them to grow, either organically or through mergers and acquisitions.

ARGUMENTS AGAINST THE SAFE HARBOR PROPOSAL ARE WITHOUT MERIT

1. **Argument #1: ACA's proposal will change the status quo and will significantly increase the extent to which MVPDs are able to participate in master agreements between buying groups and cable-affiliated programmers.**
   - This is completely false.
   - Any safe harbor level between 1.26 million and 3.26 million will simply preserve the status quo in the sense that the set of MVPDs eligible to purchase programming through a buying group will be identical to the set of MVPDs that currently purchase a substantial share of their programming through a buying group.

2. **Argument #2: The safe harbor level of 3 million is significantly higher than the safe harbor level of 1.5 million chosen in conditions imposed on the Comcast-NBCU transaction.**
   - Situation in 2011 when Commission adopted the Comcast-NBCU Order was very similar to situation today.
   - In both cases ACA has pointed out that any safe harbor level between approximately 1.26 million subscribers and 3.26 million subscribers will preserve the status quo.

- For its Comcast-NBCU conditions, the Commission chose a safe harbor level at the lower end of the range.
- ACA recommends that Commission consider choosing a safe harbor level at the higher end of the range in order to avoid creating disincentives for larger members of the NCTC to pursue strategies that would cause them to grow.

3. Argument #3: There is no evidence that cable-affiliated programmers currently exclude MVPDs from participating in master agreements.

- Given that program access rules do not currently apply to the NCTC, there is no reason to expect that cable-affiliated programmers would currently have any reason to attempt to avoid dealing with the NCTC.
- ACA's concern is that once the Commission amends its definition of a buying group so that the protections of program access rules come into play, cable affiliated programmers will then have the incentive to avoid dealing with the NCTC (and thus evade regulations) by not allowing members of the NCTC to participate in master agreements.
- Therefore the fact that cable-affiliated programmers may not currently exclude MVPDs from participating is irrelevant to predicting their behavior once the rules are changed.

4. **Argument #4: The proposed modification will place cable-affiliated programmers at a disadvantage to non-cable-affiliated programmers because non-cable-affiliated programmers will be able to exclude MVPDs below the safe harbor level from opting into master agreements, while cable-affiliated programmers will not be able to do so.**
    - Most programmers currently allow NCTC members below the safe harbor threshold to participate in NCTC deals.
    - There is no reason to believe that the incentives of non-cable-affiliated programmers will change if the Commission modifies program access rules.
    - Thus, the rule will simply require cable-affiliated programmers to act in the same way that unaffiliated programmers choose to act.
    - This will not disadvantage cable-affiliated programmers.

5. **Argument #5: In some cases due to differing circumstances, it may be efficient for an MVPD below the safe harbor threshold to negotiate an individual deal with a programmer.**
    - ACA agrees with this observation.
    - The proposal does not *require* MVPDs below the safe harbor threshold to participate in master agreements.
    - It simply gives them the right to insist on being included if the programmer is unable or unwilling to offer them a better deal.

- If it is more efficient for the MVPD to enter into an individual deal, then, by definition, there are a set of terms that the programmer can offer the MVPD for an individual deal that will make both the programmer and MVPD better off than they would be if the MVPD opted into the master agreement.

6. **Argument #6: A problem with the ACA proposal is that, when members of the NCTC that are below the safe harbor threshold bargain with a cable-affiliated programmer, they will take advantage of the fact that they have the right to opt-in to the master agreement, and thus will be able to guarantee that any individual deal they sign makes them at least as well off as they would be if they opted into the master agreement.**
   - ACA agrees that its proposal will have this result.
   - ACA also agrees that programmers might view this result as a "problem" in the sense that it will constrain their ability to disadvantage smaller MVPDs and thus raise their profits.
   - However, while this result may be a "problem" from the perspective of cable-affiliated programmers it is actually the intended result from a public policy perspective.

ADDITIONAL ACA PROPOSALS RELATED TO PARTICIPATION GUARANTEES

In addition to adopting the safe-harbor proposal, the Commission should:

1. Provide that members of a buying group with an existing individual programming contract with a cable-affiliated programmer that has not expired by the start date of a new master agreement with the programmer, have the right to opt into the master agreement once their individual agreements have expired.

2. Provide that when an expiring master agreement is being renewed, members participating in the expiring agreement should have the right to participate in the renewed agreement even if they have more than the safe harbor number of subscribers.

3. Provide that MVPDs with more than the safe harbor number of subscribers also have the presumptive right to participate if they can show that the share of programming they purchase through the buying group is not significantly smaller that the average share of programming that other buying group members purchase through the buying group.

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AUTOMATIC TERMINATION OF DEFAULTING MEMBERS

1. ACA has previously noted that:
   - NCTC has the right to terminate a member that defaults on any master agreement and to thus terminate its participation in all master agreements.
   - NCTC generally exercises this right.
   - This creates an extra incentive for members not to default on any single master agreement.

2. FNPRM inquires whether the Commission should require that a buying group must have a policy that it automatically terminates any member that defaults on a single master agreement in order to have the right to avail itself of the protections provided by program access rules.

3. ACA recommends against adopting this policy.

4. Although the NCTC has the right to take this action and although it generally exercises this right, it does so with some discretion.

5. Programmers and the NCTC could have negotiated agreements where the NCTC was required to automatically terminate a member that defaults on any single agreement without any opportunity to exercise discretion, but have chosen not to. The arrangement they have chosen is presumptively efficient.

6. This arrangement allows the NCTC to deal with temporary problems that can be resolved fairly quickly without necessarily terminating a member.

7. Furthermore, programmers have the independent right to cease delivering programming to a member in default regardless of whether they are terminated by the NCTC.

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THE PROPOSED POLICY IN THE FNPRM

1. FNPRM proposes that a buying group only be eligible to avail itself of the protections provided by program access rules if it does not unreasonably deny any MVPD membership.

2. FNPRM provides two examples of cases where denial of membership would potentially be reasonable:
   - "an MVPD seeking membership has a history of defaulting on its payments for programming;" and
   - "legitimate antitrust reasons."

3. Process proposed in FNPRM:

   "Upon being denied membership, an MVPD could file a Petition for Declaratory Ruling that the buying group no long qualifies as a "buying group" as defined by Section 76.1000(c) because it has 'unreasonably' denied the MVPD membership. The central issue in the Declaratory Ruling proceeding would be whether the buying group's conduct in denying membership was 'unreasonable.' If the Commission finds that the buying group's conduct was 'unreasonable,' the buying group would no longer be eligible to receive the benefits of the nondiscrimination provision of the program access rules."

4. Commission's main concern appears to be that a buying group could potentially attempt to disadvantage rivals of existing members by excluding them from buying group.

ACA RECOMMENDS AGAINST ADOPTING THE PROPOSAL FOR TWO REASONS

1. Second-guessing membership decisions of buying groups would involve the Commission in a costly, time consuming and error-prone rule of reason analysis to evaluate the reasonableness of membership decisions.

2. The proposal would needlessly create duplicative FCC oversight in an area that is already subject to adequate regulatory oversight through antitrust statutes.

SECOND GUESSING THE MEMBERSHIP DECISIONS OF BUYING GROUPS WOULD INVOLVE THE COMMISSION IN A COSTLY, TIME-CONSUMING AND ERROR PRONE RULE OF REASON ANALYSIS

1. There are many perfectly legitimate, pro-competitive and efficiency enhancing reasons why a buying group may choose to limit its membership:
    - The applicant is not able to demonstrate sufficient levels of credit-worthiness, financially responsibility, or financially viability.
    - The applicant is unable or unwilling to meet technical standards required of all members.
    - The applicant is unwilling or unable to provide information such as financial records that the buying group requires all applicants to submit as part of the application process in order to evaluate their suitability for membership.
    - The applicant is unwilling to follow or abide by general membership rules that all members are required to abide by.
    - The applicant was previously terminated for cause based on rules applied to all members.
    - The buying group may limit either the competitive overlap of members or the aggregate size of its membership in order to limit antitrust risk.

- The buying group may specialize in only certain types of buyers with similar needs and requirements (based for example on technology used or geographic location) in order to simplify purchasing requirements, achieve other efficiencies, and/or to obtain better prices or other terms from suppliers.

2. Assessment of the various factors described above necessarily involves some exercise of judgment and can be very complex.

3. Second guessing the membership decisions of buying groups to determine whether they are on balance reasonable taking all of the above factors and possibly additional factors into account would be costly and time consuming both for the Commission and for the buying group.

4. Given the complexity of this evaluation, there is a significant potential for the Commission to make errors.

5. Given the potential costs of litigation, buying groups may feel pressured to admit some inappropriate applicants simply to avoid litigation costs. Moreover, the existence of a complaint process provides an opportunity for denied applicants to file complaints even when their denial was appropriate, thus subjecting buying groups to needless litigation costs.

6. Buying groups may lose control over their ability to limit membership for perfectly legitimate, pro-competitive efficiency enhancing reasons.

7. If buying groups are forced to admit less financially responsible and creditworthy members this may make them less attractive business partners for programmers and thus reduce the usefulness of buying groups to both MPVDs and programmers.

8. Buying groups may decide to sacrifice their right to use the program access rules if they determine that losing control of their membership is more harmful than losing the protection of program access rules.

THE PROPOSAL WOULD NEEDLESSLY CREATE DUPLICATIVE FCC OVERSIGHT IN AN AREA ALREADY SUBJECT TO ADEQUATE REGULATORY OVERSIGHT THROUGH THE ANTITRUST STATUTES

1. It is well-established that Section 1 of the Sherman Act controls and limits the extent to which a buying group may exclude rivals from joining the buying group in order to competitively disadvantage rivals.

2. There is a large established body of case law and precedents that guide the rule of reason analysis that courts conduct.

3. ACA recognizes the general principle that there may be a need for the Commission to exercise oversight of competitive issues in instances where the antitrust laws also apply if:
   - Congress has statutorily required the Commission to exercise independent authority and judgment.
   - As an expert agency, the Commission has determined that general antitrust enforcement is not able to deal with the particular problems that arise in a specific industry over which the Commission has jurisdiction.

4. However neither condition applies in this instance.

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KEY ACA PROPOSALS RELATED TO REBUTTABLE PRESUMPTIONS

1. The Commission should adopt the rebuttable presumption that exclusive contracts over cable-affiliated Regional Sports Networks (RSNs) satisfy the “unfair act” standard of Section 628(b).

2. The Commission should adopt the rebuttable presumptions that exclusive contracts over cable-affiliated National Sports Networks (NSNs) satisfy the “unfair act” and “significant hindrance” standards of Section 628(b).

3. The Commission should adopt the rebuttable presumptions that exclusive contracting over cable-affiliated programming for previously challenging exclusive contracts found to violate Section 628(b) satisfy the “unfair act” and “significant hindrance” standards of Section 628(b).

4. The Commission should adopt the rebuttable presumption that standstill relief is warranted pending resolution of complaints involving exclusive RSN contracts.

5. Furthermore, the Commission should adopt rules that protect MVPDs from withdrawals of programming while a standstill request is being adjudicated. This could be accomplished either by adopting the ACA proposal for establishing a TRO-like process and a 14 day review period for action on program access standstill petitions, or the AT&T proposal that the Commission agree to rule on a standstill request prior to expiration of an existing contract, so long as the standstill is filed at least 20 days before the expiration of the existing contract.

6. The Commission should determine that discrimination with respect to cable-affiliated terrestrially delivered programming that does not satisfy one of the four exceptions listed in Section 628(c)(2)(B) categorically satisfies the "unfair act" standard of Section 628(b).

Table 1
Top 25 MVPDs

Rank	MVPD	Subscribers
1.	Comcast Corporation	22,118,000
2.	DirecTV	19,915,000
3.	Dish Network Corporation	14,061,000
4.	Time Warner, Cabe, Inc.	12,484,000
5.	Cox Communications, Inc.*	4,661,000
6.	Verizon Communications Inc.*	4,473,000
7.	Charter Communications, Inc.*	4,269,000
8.	AT&T, Inc.	4,146,000
9.	Cablevision Systems Inc.*	3,257,000
10.	Bright House Networks LLC	2,059,000
11.	Cequel (Suddenlink) Communications*	1,230,000
12.	Mediacom Communications*	1,037,000
13.	CableOne, Inc.*	613,000
14.	WideOpenWest Networks, LLC*	456,000
15.	RCN Corp.*	332,000
16.	Knology Corp.*	255,000
17.	Atlantic Broadband Group, LLC*	252,000
18.	Armstrong Cable Service*	237,000
19.	Midcontinent*	229,000
20.	Service Electric Cable TV Inc.*	216,000
21.	MetroCast Cablevision*	178,000
22.	Blue Ridge Communications*	167,000
23.	WaveDivision Holdings, LLC*	159,000
24.	General Communications*	144,000
25.	Buckeye CableSystem*	133,000

* Member of the NCTC