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April 11, 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 April 10, 2013, Ross Lieberman, Vice President of Government Affairs, American Cable Association (ACA); William P. Rogerson, Professor of Economics, Northwestern University (via teleconference); and the undersigned, met with Michelle Carey, Nancy Murphy, Steven Broeckert, and Kathy Berthot, Media Bureau, to further discuss ACA's proposals concerning the Commission's rules concerning buying groups, consistent with its previous filings in the above-referenced docket, and the attached handout, which was provided to meeting participants.¹ ACA reiterated its position that the Commission must ensure that the protections gained for small and mid-sized multichannel video programming distributors through revision of its program access rules to include a buying group such as the National Cable Television Cooperative ("NCTC") not be rendered completely meaningless by the ability of cable-affiliated programmers to arbitrarily exclude members of buying groups from participating in master agreements.

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); 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). See also Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 (filed Feb. 19, 2013) ("ACA Feb. 19th Media Bureau Ex Parte Letter") (attaching ACA Feb. 14, 2013 Presentation to the FCC); and Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 (filed Feb. 19, 2013) ("ACA Feb. 19th 8th Floor Ex Parte Letter") (attaching ACA Feb. 14, 2013 Presentation to the FCC).

ACA reiterated that the Commission must establish *at a minimum* a safe harbor level equal to 3 million subscribers such that a member of a buying group with less than the safe harbor number of subscribers has the presumptive right to participate in master agreements between the buying group and cable-affiliated programmers. ACA explained that, in proposing a safe harbor level equal to 3 million subscribers, it took a conservative approach intended, at a minimum, to simply preserve the status quo for NCTC members who regularly purchase a substantial share of their programming through the buying group, while also allowing some room for growth. The small and mid-sized operators who regularly participate in NCTC-negotiated master agreements are dependent upon the NCTC for virtually all of their cable network purchases and would be substantially harmed if programmers could arbitrarily exclude them from participating in NCTC master agreements.

Meeting participants also discussed concerns expressed by Cox Communications, in its recent *ex parte* letter, about ACA's proposal.² ACA explained that it disagrees with Cox's view that the Commission must limit itself to either (i) choosing a safe harbor level that includes larger MVPDs such as Cox, that do not currently purchase a substantial share of their programming through buying groups; or (ii) choosing no safe harbor level at all, that is for the Commission to leave the matter unaddressed. However, ACA reiterated that it would not be opposed to Cox's suggestion that the Commission set the safe harbor at a higher level that would include Cox. ACA also confirmed, in response to a question from staff that it would not object to the Commission adopting a rule granting any MVPD that is a member of a buying group the presumptive right to participate in master agreements between the buying group and cable-affiliated programmers, regardless of size. Meeting participants also discussed the role of the antitrust laws and the U.S. Department of Justice ("DOJ") in policing the size and behavior of buying groups. ACA acknowledged that DOJ would act as an additional check against anticompetitive growth in the purchasing power of the buying group and behavior on the part of a buying group in negotiating particular deals.

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 (1)

cc (via email): Michelle Carey
Nancy Murphy
Steven Broecker
Kathy Berthot

² See Letter from David J. Wittenstein, Counsel to Cox Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68 (Apr. 4, 2013) at Attachment ("The modest benefits of buying group reform can be realized only if the commission adopts its proposals without the 'safe harbor' provision. Adoption of the 'safe harbor' provision would make an unfair situation even worse.")

Participation Guarantees and Program Access Reforms Related to Buying Groups

1. Even if program access rules are changed so that they require cable-affiliated programmers to negotiate non-discriminatory rates with a buying group 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 presumptively¹ entitled to participate in master agreements between the buying group and cable-affiliated programmers.
3. In order for program access rules to protect buying groups from cable-affiliated programmers (as Congress intended) program access rules must *at a minimum* guarantee that MVPDs that purchase a substantial share of their non-cable-affiliated programming through a buying group should also have the right to purchase cable-affiliated programming through buying group.
4. Setting the safe harbor level higher than 1.23 million and lower than 3.26 million would accomplish this result. (See attached table.)
5. ACA recommends that the safe harbor level *at a minimum* be chosen near the higher end of this range (3 million subscribers) in order to avoid creating disincentives for the larger members of the NCTC to pursue strategies that might cause them to grow.
5. ACA is not opposed to the possibility that the Commission might consider expanding the scope of program access rules to provide participation rights for larger MVPDs such as Cox that do not currently purchase a substantial share of their programming through buying groups.
6. However ACA disagrees completely with Cox's view that the Commission must limit itself to either (i) choosing a safe harbor level that includes larger MVPDs such as Cox, that do not currently purchase a substantial share of their programming through buying groups; or (ii) choosing no safe harbor level at all.
7. The Commission should *at a minimum*, choose a safe harbor level high enough to provide protection to MVPDs that currently purchase a substantial share of their programming through a buying group, regardless of whether it decides to choose an even higher safe harbor level that provides protection to larger MVPDs such as Cox, that do not currently purchase a substantial share of their non-cable-affiliated programming through a buying group.

¹ By including the term "presumptively," we acknowledge that the Commission has previously identified other factors such as a lack of creditworthiness that might justify the decision of a cable-affiliated programmer not to deal with a particular member of a buying group, even if the member satisfies the safe harbor subscriber level standard.

Table 1
Top 25 MVPDs – 3Q12

RANK	MVPD	SUBSCRIBERS
1	COMCAST	22,002,000
2	DIRECTV	19,981,000
3	DISH NETWORK CORPORATION	14,042,000
4	TIME WARNER CABLE INC	12,344,000
5	COX COMMUNICATIONS INC	4,595,000
6	VERIZON COMMUNICATIONS INC	4,592,000
7	AT&T	4,344,000
8	CHARTER COMMUNICATIONS INC	4,197,000
9	CABLEVISION SYSTEMS CORPORATION	3,247,000
10	BRIGHT HOUSE NETWORKS LLC	2,038,000
11	SUDDENLINK COMMUNICATIONS	1,230,000
12	MEDIACOM COMMUNICATIONS CORPORATION	1,019,000
13	WIDEPENWEST NETWORKS	710,000
14	CABLEONE INC	601,000
15	RCN CORP.	331,000
16	ATLANTIC BROADBAND GROUP LLC	251,000
17	ARMSTRONG CABLE SERVICES	237,000
18	MIDCONTINENT COMMUNICATIONS	234,000
19	SERVICE ELECTRIC CABLE TV INCORPORATED	215,000
20	METROCAST CABLEVISION	174,000
21	BLUE RIDGE COMMUNICATIONS	167,000
22	WAVEDIVISION HOLDINGS LLC	153,000
23	GENERAL COMMUNICATIONS	143,000
24	BUCKEYE CABLESYSTEM	132,000
25	RIO HOLDINGS, INC.	93,020

Rows shaded in grey indicate members of the NCTC.