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July 3, 2013

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Revision of the Commission's Program Access Rules, MB Docket No. 12-68

Dear Ms. Dortch:

On July 1, 2013, Margaret Tobey, Vice President of Regulatory Affairs, NBCUniversal Media, LLC ("NBCUniversal"), and the undersigned met with Michelle Carey, Mary Beth Murphy, Nancy Murphy, Steven Broeckaert, and Kathy Berthot from the Media Bureau and Susan Aaron from the Office of General Counsel to discuss the above-captioned proceeding. Ms. Tobey and I reviewed material presented in the Comments and Reply Comments filed by Comcast Corporation and NBCUniversal on December 14, 2012, and January 14, 2013, respectively, especially pp. 3-5 and 17-24 of the former and pp. 1-3 and 7-9 of the latter. Among the points covered were the following:

New Program Access Rules Are Unnecessary in Light of Dramatic Marketplace Changes Over the Last 20 Years. Given the vast increase in competition throughout the video marketplace, and the sharp reduction in vertical integration between cable operators and video programmers, program access regulation should be curtailed, not expanded.

It would be senseless and marketplace-distorting to single out cable-affiliated programmers for new restrictions when all evidence points to a well-functioning marketplace in which willing sellers and willing buyers routinely reach agreement to bring vast amounts of video programming to viewers. That is especially true given that ACA's complaints apply to the costs and pricing practices for video programming generally, not just vertically integrated programming. Indeed, the vast majority of ACA members do not even compete with any of the cable companies that own programming networks (in contrast to the DBS companies for whose benefit the program access rules were written 20 years ago) because most ACA members own systems in markets that do not overlap the markets served by vertically integrated cable companies. And, to the extent the Commission has concerns about potential program access issues due to the combination of Comcast and NBCUniversal, it already accounted for that potential in the conditions adopted in the *Comcast-NBCUniversal Order*.

NCTC Is Successfully Negotiating Agreements with NBCUniversal and Other Programmers under the Existing Program Access Framework. The marketplace is working as it should: Late last year, NCTC and NBCUniversal successfully concluded negotiations and entered into a multi-year programming agreement – without resorting to the arbitration opportunity afforded by the *Comcast-NBCUniversal Order* condition. NBCUniversal and other vertically integrated programmers are perfectly willing to work with NCTC as it currently operates. But, in so doing, they are dealing with an entity that has purposefully structured its operations in a manner that does not leave it eligible to bring program access complaints. (Its members can, but it cannot.) NBCUniversal's decision to accommodate NCTC's and its members' chosen method of operation provides no justification for changing the rules to expose programmers to expanded litigation risks. While ACA may want NCTC to have increased leverage in programming negotiations, there is no evidence of a problem that warrants such regulatory action.

The FCC Should Continue to Require Buying Groups to Meet the Same Liability Requirements as MVPDs in Order to Have Standing to Bring a Complaint. The Commission has rightly required that buying groups that want to obtain the benefits of the program access rules must assume corresponding liability obligations and has afforded them three different ways in which to do so. While NBCUniversal has entered into agreements with an entity that did comply with the existing buying group rules, NCTC has chosen not to operate under any of those options.

A buying group should not have standing to file a complaint when it can simply walk away from a contract without assuming liability for its members or even binding its members to the contract. ACA has provided no evidence, or even a theory, as to why the current rules are insufficient, except to say that the rules do not match NCTC's preferred business practice. Moreover, it would put programmers at a severe disadvantage to have to defend themselves against program access complaints filed by a buying group in such circumstances, because the programmer would have no idea of the identity(ies) of the affected member(s) or the market(s) affected.

The elemental notion that an agent must bind its principals also is reflected in the FCC's most recent consideration of this issue – i.e., the *Comcast-NBCUniversal Order* conditions. There, the Commission required that, if a bargaining agent submits a dispute to arbitration, it must declare which MVPDs it represents, and those MVPDs *will be bound* by the final offer chosen by the arbitrator. *See* App. A, § VII.D. Here, in contrast, ACA wants a buying cooperative like NCTC to be able to bring a complaint *without* declaring which MVPDs it represents and *without* the ability to bind any MVPDs to the terms of a master agreement.

ACA's Proposal that the FCC Adopt a Rate Schedule or Other "Comparability" Requirements Based on Potential, Rather than Actual, Subscribers Is Not Justifiable. The Commission has previously rejected a proposal to require rate cards as part of the program access rules, on the ground that this would impose an excessive constraint on programmers, and there is no reason to revisit that determination now. In any event, if NCTC wishes to avail itself of the program access rules, it can cure its own ills by providing the programmer with specific commitments regarding the number of subscribers it can deliver under a master agreement. As reflected in the attached article, NCTC's former President and CEO revealed that "Programmers routinely lament that the real differentiating factor of [NCTC] is that we don't make subscriber commitments…. Actually, they'll say we can't make subscriber commitments, but that's not true—we can; *we've chosen not to*" (emphasis added). He further stated that programmers have advised NCTC that "if you can find a way to truly provide us committed volume we would be happy to provide terms and conditions that reflect that," and he labeled that approach a "clear win-win" solution. In contrast, ACA's proposal here would effectively award NCTC more bargaining power *without* giving programmers the corresponding benefit of assured distribution to a specified number of subscribers.

The FCC Should Reject "Safe Harbor" Proposals Regarding what Entities Can Participate in a Master Agreement. ACA has not pointed to any evidence of inability on the part of NCTC members to participate in master agreements with any programmers, much less a need for a safe harbor rule applicable only to NCTC's dealings with cable-affiliated programmers.

The buying group rules were established to ensure that *small* MVPDs would be protected. In the business review letter cited by AMC, NCTC is quoted as having represented to the Department of Justice that its members serve from 100 to 190,000 subscribers, with a mean size of 2,000 subscribers and a median of 350 subscribers. But ACA is now trying to expand the class of MVPDs that are entitled to participate in a buying group to include those with up to *three million* subscribers (excluding only the nine largest MVPDs in the country), and Cox is trying to raise this to *six million* (which would include 6 of the 10 largest MVPDs). This would take the rules far from their intended purpose.

A three-million subscriber safe harbor is simply too high. In NBCUniversal's experience, MVPDs with three million subscribers – or even half that number, as the FCC found sufficient in the *Comcast-NBCUniversal Order* – have routinely negotiated independently from buying groups, and they have proved themselves to be perfectly capable of negotiating successfully on their own. (NBCUniversal and Cablevision jointly announced a multi-year deal for cable and broadcast programming last November, again with no need for arbitration.) If a programmer and a buying group both voluntarily agree to the inclusion of a larger MVPD in a particular contract, that is perfectly acceptable, but there is no reason for the agency to force any programmers – much less an artificially segregated subset of programmers – to agree to this.

Finally, in response to a question, we said that (as the *Sunset Order* explicitly recognizes) the First Amendment imposes additional constraints on Commission regulation in this area. The Supreme Court has held that "[C]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *E.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (citation omitted). Although the state of the record on factual and policy issues provides more than enough reason to dissuade the Commission from adopting new buying group rules, First Amendment considerations also counsel against expanding the government's role in supervising relationships between cable programmers and cable operators, and weakening the ability of programmers to manage rationally the business relations and economics that enable the creation of news and entertainment programming.

Please let us know if you have any questions.

Sincerely,

/s/ James L. Casserly
James L. Casserly
Counsel for Comcast Corporation

cc: Michelle Carey
Mary Beth Murphy
Nancy Murphy
Steven Broeckaert
Kathy Berthot
Susan Aaron

Attachment

COVER STORY

Hardly Cooperative

Special Deals Cause Friction Among Small Buyers

By Mike Farrell

OVER THE PAST 25 years, the National Cable Television Cooperative has evolved from a dozen small members with a combined 110,000 subscribers to a 950-member behemoth representing 27 million customers.

With that growth has come some growing pains — some small operators have griped that the co-op is dominated by a handful of major MSOs with their own agenda. Larger members have complained that they aren't getting better programming deals despite the resources and heft they contribute.

In the middle is NCTC president and CEO Jeff Abbas, who, despite the dissension, is embarking on a five-to-10-year plan to transform the Lenexa, Kan.-based buying cooperative into a stronger force in programming negotiations, mainly by increasing the participation of its larger members in each agreement.

That's a lot harder than it sounds.

The NCTC may be bigger than Comcast (the largest individual MSO, with 23.2 million customers) but the bulk of its members are considerably smaller. In an interview, Abbas estimated that between 600 and 700 of co-op members have less than 1,000 subscribers. Officially, NCTC members range from Atlanta-based Cox Communications, with about 6 million customers, to a tiny system in the Southwest with just seven subscribers.

Despite that gap — and maybe even because of it — most small and midsized members have benefitted greatly from the discounts being part of a larger group can bring. One member, 120,000-subscriber New Wave Communications, claims it saves "dollars per month" per subscriber in programming costs through the co-op. But despite its obvious stature as a negotiating force, some members complain privately that power could be much greater if all the members participated in most deals.

> **"We get a lot of mileage [out of the relationship. … Those kinds of programmers don't play with rate cards."**
>
> TOM GLEASON, NEWWAVE COMMUNICATIONS

By its own account, the NCTC said that typically, about half of the co-op's subscribers — between 10 million and 12 million — participate in most of its programming agreements.

The rest, mostly the larger MSO members such as Cox, Charter Communications and Cablevision Systems, cut their own separate arrangements with programmers, save for a handful of deals through the co-op. That, according to smaller operators and programmers alike, diminishes the value of the scale those larger members bring. (Cox, Charter and Cablevision represent about 14 million subscribers, or more than half of the 27 million claimed by the NCTC).

On the other hand, some bigger operators complain that they are getting the short end of the negotiating stick — smaller operators get the advantage of the NCTC's negotiating staff and expertise but sometimes, the deals are no better than agreements they can reach on the own.

"Welcome to my world," Abbas said in an interview.

Although every large organization is subject to disagreements and friction within the ranks over time, the rift appears to be growing (a characterization which Abbas says is exaggerated) or at least growing more vocal. And despite the different business agendas of each operator, small and large, they can agree on one thing — the NCTC is not getting the full advantage of its subscriber bulk in its programming agreements.

In an interview last week, Abbas said he has not seen a spike in complaints among the membership and would encourage any member to express their concerns with him directly. The NCTC makes a concerted effort to get information out to its membership, he said, adding that those who are unaware of the co-op's strategic initiatives perhaps are not as engaged with the organization as they should be.

"For people who have chosen to be engaged with us, the reaction we get is this is one more tool in your tool kit to try to lower pricing, way to go,'" Abbas said. "For people who are less engaged, I can understand why they don't understand our strategy, but shame on them, they should be calling us."

The NCTC was formed specifically in response to discounts that larger operators were getting from programmers. Spawned during a friendly card game hosted by Mid-America Cable Association president Rob Marshall in 1984, a handful of small operators decided that by banding together, perhaps they, too, could attract

BUYING POWER

NCTC at a Glance:

Headquarters: Lenexa, Kan.

Members: 950

Largest Members: Cox Communications, Charter Communications, Cablevision Systems, Mediacom Communications, Suddenlink Communications, Verizon Communications

Subscribers Represented: 26.7 million

Year Founded: 1985

SOURCE: NCTC, reports

discounted programming.

The NCTC was formed a year later in 1985, with 10 members representing 110,000 subscribers. The fledgling buying co-op struck its first deal that same year with The Weather Channel.

By 2003, the organization had swelled to 1,100 members representing about 14 million subscribers.

And while some members have complained about larger operators coming into the fold for years — Abbas said it probably started with Jones Intercable (since purchased by Comcast) joining in 1995 with about 1.4 million customers — it reached a head in the past two years. The NCTC added Cox Communications' 6 million customers in 2008 and in 2009 brought on Cablevision Systems' 3 million customers. Charter Communications, which has about 5 million customers, joined in 2003.

'EBB AND FLOW'

"To have two of them come in that span of time; I guess that's meaningful," Abbas said. "Adelphia had 6 million subs in the organization, Charter also joined in that window, Adelphia exited and Cox joined two years later. It's kind of an ebb and flow. We've always had large operators and we've always had those issues."

But some members have said they don't necessarily mind larger operators being in the fold, just their level of participation. Many join the organization for a single programming deal and cut the rest of their programming agreements separately.

The latest example of that was Cablevision Systems, which joined the co-op in 2009 essentially to take advantage of its agreement with Tennis Channel. Cablevision had been in a heated battle with Tennis for months over its placement on a sports tier, which the programmer had resisted. The MSO was able to circumvent that resistance by joining the NCTC, which already had a deal in place that allowed members to put the channel on a tier.

That Tennis Channel agreement is set to expire next year and according to people familiar with the situation, the network is likely to seek to remove that tier provision from their NCTC agreement.

In an interview, Tennis Channel CEO Ken Solomon wouldn't talk about specifics. "All we ever want to do is ensure that it's a genuinely free market and that programming is evaluated on the basis of merit and not because of corporate ownership," Solomon said.

He added that despite his scuffle with Cablevision — Tennis Channel tried to block the MSO from taking advantage of the NCTC deal, originally made in 2002 when the network was just starting out — he holds no animosity towards the organization. But he also cautioned about the lure of being dominated by larger players.

"We like these guys," said Tennis Channel CEO Ken Solomon. "They've mostly done right by us. We just don't want the balance of power to change so much that it becomes harmful for programmers and the viewers they serve."

Along those lines, the NCTC has launched an effort to increase participation in deals, essentially moving towards subscriber guarantees, which the co-op has avoided since its inception. Abbas said the push is not to diminish the influence of larger MSO members, but to encourage them to participate more fully, offering their expertise as well as their heft. That ultimately would lead to making subscriber commitments to programmers, something the NCTC has done on only rare occasions in the past and has been a frequent complaint of programmers.

"Programmers routinely lament that the real differentiating factor of the co-op is that we don't make subscriber commitments," Abbas said. "Actually, they'll say we can't make subscriber commitments, but that's not true — we can; we've chosen not to."

Abbas said the group won't likely require 100% participation by the big members. "I don't think you need to go there," Abbas said.

Programmers, he said, will still come. "The principal reaction has been if you can find a way to truly provide us committed volume we would be happy to provide terms and conditions that reflect that," Abbas said. "That's a clear win-win."

The ultimate goal: to get more consistent participation by most members. That, in theory, could force members to make buying guarantees. Such a process could take as long as five to 10 years, said Abbas.

Some programmers, however, haven't been willing to wait.

Showtime Networks, with several big carriage agreements done, rejected an NCTC proposal earlier this year and decided not to negotiate with the co-op. Instead, according to one co-op member's customer newsletter — tiny Three River Digital in Lynch, Neb. — Showtime told operators that it would only directly negotiate with MSOs with 1.5 million subscribers or more. Smaller operators had until April 30 to accept a flat rate that in some cases was significantly higher than what they had paid the premium channel in the past.

Showtime declined to comment.

Abbas wouldn't comment directly on the Showtime deal. "We didn't come to terms," Abbas said.

Member participation isn't the only bone of contention with programmers. Some have pointed to the structure of deals which allow members to opt into co-op deals even if they have an earlier agreement with that programmer. It is a practice that Abbas not only encourages, but said has been a cornerstone of the co-op's existence.

"We're a bit of a behemoth, sometimes people have to have content quicker than we're able to access it for the whole organization, so we'll say, 'Here's how we'd like you to do that, go negotiate your own separate deal, but include this paragraph of language that enables you to join into any resultant NCTC deal down the road.' That's been standing practice for us for our entire existence."

One example is NFL Network, which completed an NCTC master agreement in August. Abbas added that NFL Network and other programmers know that other members may join in later and price their deals accordingly.

Abbas certainly has his work cut out for him and no matter the actual level of dissension, members who voiced some concerns admitted they couldn't survive without a relationship with the co-op. Even a 10 million-subscriber-strong NCTC has substantially more buying power than a 2,000-subscriber system on its own.

> *"For people who are less engaged, I can understand why they don't understand our strategy, but shame on them, they should be calling us."*
>
> **JEFF ABBAS, NCTC**

SATISFIED CUSTOMER

New Wave executive vice president Tom Gleason, a 40-year cable veteran, said that he couldn't be happier with his NCTC relationship. And though he admits that some larger operators do get better deals when they negotiate on their own, the connection to the bigger companies translates into savings for smaller ops.

While Gleason said he is not privy to other MSOs' programming deals, he estimates that the NCTC agreements aren't far from the prices that larger members negotiate separately.

"We get a lot of mileage [out of the relationship]," Gleason said. "Those kinds of programmers don't play with rate cards."

Gleason said that ideally, it would benefit the NCTC if all members participated in all deals, but he understands that sometimes doing separate agreements makes better business sense. He estimated that his NCTC saves him "dollars per month" per subscriber in programming costs.

"In the long run, the idea is to close the gap [between prices paid by large operators and those paid by small operators]," Gleason said. "It's a process. The gap is much closer together than it was five years ago. Our bargaining power may not be as great as it could be, but it is bargaining power." ■

Members Only

Membership in the NCTC is made through an application process and applicants must meet two criteria: that they provide television reception or service to the public via a cable system, as defined by 47 U.S.C. Section 522(7), and that they either presently provide or plan to provide within the next 90 to 180 days multichannel video service to residential subscribers. Once an applicant meets both criteria, they are forwarded further application materials. The full application review process usually takes between 30 to 90 days after NCTC receives all necessary fees and documentation.

SOURCE: NCTC

Competitors Welcome

The NCTC counts the three largest overbuilders as members — RCN, WideOpenWest and Knology — and WOW even has representation on its board (WOW vice president of programming Peter Smith is NCTC vice chairman). The largest telco competitor, Verizon Communications, also is a member (through its ownership of the former overbuilder, GTE Ventures). Missing from the ranks is AT&T, which has a competing video service, U-Verse. The reason: AT&T has stressed on several occasions that because U-Verse is an IPTV service (its programming is delivered via broadband and at the demand of the consumer, not in a continuous stream), it should not be considered a cable-TV service by regulators.

SOURCE: NCTC