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April 15, 2014

Via ECFS

Marlene H. 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 11, 2014, Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association ("ACA"); William Rogerson, Professor of Economics, Northwestern University; and the undersigned met with Gigi Sohn, Special Counsel for External Affairs and Maria Kirby, Legal Advisor, Media, Consumer and Governmental Affairs and Enforcement to Chairman Wheeler to discuss ACA's position in the above-captioned proceeding.¹ ACA representatives also met separately with Courtney Reinhard, Senior Legal Advisor and Chief of Staff – Media to Commissioner O'Rielly on the same matter.

In both meetings, ACA explained that Congress expressly provided that the program access rules were to apply to buying groups used by multichannel video programming distributors ("MVPDs").² However, in practice the program access rules provide essentially no protection to buying groups such as the National Cable Television Cooperative ("NCTC"), through which nearly all MVPDs that currently use a buying group license most of their national cable programming. This result is due to flaws in the Commission's implementing rules that were first drafted more than twenty years ago. ACA brought this problem to the Commission's attention nearly two years ago, and now urges the Commission to update the relevant rules so program access protections account for and extend to the longstanding business model of the NCTC – a business model that has near universal acceptance among programmers.

¹ See *Revision of the Commission's Program Access Rules, etc.*, 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 During the meetings, ACA discussed the presentation attached to this letter.

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
Counsel to the American Cable Association

Attachments (1)

cc (*via email*): Gigi Sohn
Maria Kirby
Courtney Reinhard

**PROPOSED REVISIONS TO PROGRAM ACCESS RULES
TO EXTEND THEIR PROTECTIONS TO SMALL AND
MEDIUM SIZE MVPDS THAT LICENSE PROGRAMMING
THROUGH BUYING GROUPS**

Presentation to the FCC

April 11, 2014

American Cable Association

INTRODUCTION

1. Small and medium sized MVPDs generally license most of their programming through a single buying group, the National Cable Television Cooperative (NCTC).
 - 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. Economic functions of a buying group:
 - Negotiates standardized agreements with programmers that its members can opt-in to.
 - Acts as an interface between the programmer and individual MVPDs so that the programmer can deal with a single entity for purposes of negotiating contracts, determining technical standards, billing for payments, collecting payments, etc.
 - Programmers benefit because it reduces transaction costs of dealing with small and medium sized MVPDs so that they are comparable to the transaction costs of dealing with a single large MVPD.
 - MVPDs benefit because they receive lower rates than they would receive through direct deals.

INTRODUCTION (CONT'D)

3. Congress clearly intended that program access rules apply to buying groups.
 - Section 628(c)(2)(B) of the Cable Act prohibits discrimination “among or between cable systems, cable operators, other MVPDs, or their agents or *buying groups*” [emphasis added].”
4. Because small and medium sized MVPDs rely on buying groups to license programming, these MVPDs will receive protection from program access rules only to the extent that buying groups are given the same protections as individual MVPDs.
5. Three problems with the manner in which the statutory mandate was initially implemented mean that, in practice, program access rules provide no protection at all to the NCTC and thus provide less protection for small and medium-sized MVPDs than Congress intended.
 - The definition of a “buying group” that is used to determine if an entity qualifies for protection under program access rules requires a buying group to assume an excessive level of liability on behalf of its members.
 - Cable-affiliated programmers are not prohibited from unreasonably excluding members of a buying group from participating in master agreements negotiated by their buying group with programmers.
 - The standard of comparability for volume discounts for buying groups is not explicitly articulated.

INTRODUCTION (CONT'D)

6. ACA originally brought these problems to the FCC's attention and suggested proposals for addressing them when the FCC sought comment on program access rules in spring of 2012.
7. When the Commission issued its Order in the proceeding in October 2012, it also issued an FNPRM that:
 - Tentatively concluded that the definition of "buying group" should be broadened as ACA proposed
 - Asked for comment on ACA's other two proposals.
8. Cable-affiliated programmers have raised objections to the ACA proposals. Although ACA has fully responded to these objections, the item appears stalled without action.
9. In December 2013, several members of U.S. House Committee on Energy & Commerce questioned the FCC Chairman on the fact that the item remains pending.
10. In April, the U.S. Small Business Administration urged the FCC to take action on ACA's proposals.
11. In light of the proposed Comcast-Time Warner Cable transaction, which will dramatically increase the amount of vertical integration in the cable industry, there is a heightened need to ensure that program access rules are working as Congress intended.

12. In these slides ACA will briefly summarize:
- Its proposals for dealing with the three problems and their rationales.
 - Its responses to the arguments against its proposals raised by cable-affiliated programmers.

ACA PROPOSALS

1. The definition of “buying group” that is used to determine if an entity qualifies for protection under program access rules should be expanded to include entities that satisfy an alternative liability condition that the NCTC currently satisfies.
2. A provision should be adopted that prohibits cable affiliated programmers from excluding a member of a buying group from participating in a master agreement the buying group has negotiated with a programmer, so long as the member is below a reasonable size threshold and satisfies other reasonable criteria normally applied in the industry for participation in programming agreements.
3. The Commission should clarify that cable-affiliated programmers are required to extend the same volume discounts to buying groups as they extend to individual MVPDs, controlling for other factors that program access rules allow programming rates to depend on.

THE ALTERNATIVE LIABILITY CONDITION

1. Currently, in order to avail itself of the protections provided by program access rules, a buying group must agree to assume full financial liability for all commitments made by its members.
2. In practice, deals between NCTC and programmers do not exhibit this feature.
 - Individual members are directly liable for their own commitments.
 - The only financial liability that NCTC assumes is the liability to forward all programming payments it receives from members on to the programmer.
3. Nonetheless, as explained below, the arrangements in place provide strong protections to programmers while minimizing burdensome and unnecessary requirements on members of the buying group, and are properly characterized as being the joint choice of programmers and NCTC working together over a period of decades to develop a regime that best serves their needs.
4. Programmers and NCTC freely enter into their arrangements and could have agreed to different liability conditions if they wished. The long-standing arrangements they have freely chosen to adopt are presumptively more efficient than arrangements they have freely chosen not to adopt.

THE ALTERNATIVE LIABILITY CONDITION (CONT'D)

5. The ACA Proposal:
 - The definition of “buying group” that is used to determine if an entity qualifies for protection under program access rules should be expanded to include entities that satisfy an alternative liability condition. The condition is that the buying group is liable to forward all payments it receives from its members due to programmers on to the appropriate programmer.

6. Current rules contravene the clear intent of Congress that MVPD 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.

THE ALTERNATIVE LIABILITY CONDITION (CONT'D)

7. Under the alternative liability condition, programmers receive a level of protection against default that is substantially similar to the level they receive when dealing with an individual MVPD. In both cases:
 - 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.
 - Maximum risk of default to programmer is only 30-60 days of payments.
8. The fact that an MVPD defaulting on one NCTC deal will generally be terminated on all NCTC deals provides an extra incentive for MVPDs to honor NCTC agreements.
9. Defaults among NCTC members are insignificant. Over the last three years less than .005% of billed amounts were uncollected due to bad debt.

PROHIBITION AGAINST ARBITRARY EXCLUSION

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

2. The ACA Proposal:
 - ACA has shown that MVPDs with fewer than 1.5 million subs generally purchase a substantial share of their programming from the NCTC, MVPDs with more than 3 million subs generally do not, and currently there are no independent MVPDs that have between 1.5 and 3 million subs.
 - ACA therefore proposes that a safe harbor level be established somewhere between 1.5 million and 3 million subs such that members of buying groups with less than the safe harbor level of subs are presumptively entitled to opt-in to master agreements between the buying group and cable affiliated programmers.

PROHIBITION ON ARBITRARY EXCLUSION (CONT'D)

3. ACA recommends that the safe harbor be chosen near the high 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.
4. ACA's proposal is specifically designed to maintain the status quo based on the existing participation patterns of MVPDs in buying group master agreements.
5. ACA's proposal also explicitly acknowledges that programmers will continue to have the right to exclude members of buying groups from participating in master agreements based on reasonable criteria normally applied in the industry for participation in programming agreements, such as lack of creditworthiness, inability to meet necessary technical standards, etc.
6. ACA's proposal follows the precedent established by the Commission in its Comcast-NBCU license transfer conditions, which provide that MVPDs with no more than 1.5 million subscribers have the right to collectively negotiate and engage in commercial arbitration through a bargaining agent.

CLARIFYING THE STANDARD OF COMPARABILITY

1. ACA recommends that, in its order revising program access rules, the Commission include a statement that clarifies the standard of comparability that will be applied in determining whether a buying group filing a complaint has been treated in a discriminatory manner. ACA proposes the following language:

“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. However, issuing an explicit statement would make the standard *unarguably clear* and thus reduce litigation costs and regulatory uncertainty.
3. 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.

ARGUMENTS AGAINST THE ACA PROPOSALS ARE WITHOUT MERIT

1. Program access rules are no longer necessary because all relevant markets are sufficiently competitive.
2. Comcast-NBCU is the largest cable-affiliated programmer and it is currently covered by the Comcast-NBCU license conditions through 2018. Similar conditions can be extended to Comcast-TWC if the proposed license transfers are approved.
3. The majority of NCTC members do not currently compete with vertically integrated cable operators.
4. There is no evidence that cable-affiliated programmers currently discriminate against buying groups.

Argument #1: Program Access Rules are No Longer Necessary Because all Relevant Markets Are Competitive

1. This argument is incorrect.
 - The Commission itself has found as recently as 2010 when it evaluated the Comcast-NBCU transaction that cable-affiliated programmers still have both the ability and incentive to disadvantage rival distributors.
2. Even if the Commission decided that this argument was correct, it would still be irrelevant because Section 628 explicitly provides that program access rules should protect buying groups in addition to individual MVPDs.
3. It would be unfair and unreasonable for the Commission to selectively provide protection to only one of the two groups that Congress specified should receive protection from program access rules.

Argument #2: Comcast-NBCU is the Largest Cable Affiliated Programmer and it is Already Covered by the Comcast-NBCU Transaction Conditions. Similar Conditions Can be Extended to Comcast-TWC if The License Transfers are Approved

1. The merger conditions are temporary while program access rules are intended to provide permanent protection.
2. The merger conditions only apply to programming that is directly controlled by Comcast while program access rules apply to the larger set of programming that is affiliated with Comcast. Examples of national programming networks not controlled by Comcast that are affiliated with Comcast include FEARnet, MLB Network, NHL Network, PBS Kids Sprout, Retirement Living TV, Shop NBC, TV One, Weather Channel and Universal Sports.
3. A number of national programming networks that are not affiliated with Comcast are affiliated with other cable operators. Examples include:
 - AMC Networks (AMC, IFC, Sundance, and WE tv) are affiliated with Cablevision
 - Discovery Communications Networks (3net, Animal Planet, Discovery Channel, Discovery Español, Discovery Familia, Discovery Fit & Health, Military Channel, OWN, Science Channel, The HUB, and TLC) are affiliated with Bright House and with Charter
 - Travel Channel is affiliated with Cox

Argument #2 (Cont'd)

4. The extent to which programming is vertically integrated can change very quickly and dramatically and program access rules must be in place to deal with future conditions as well as current conditions.
5. The Comcast-NBCU conditions supplement but do not fully substitute for the protections provided by the program access rules.
 - Large MVPDs that do direct deals with programmers have access to both sets of protections.
 - Small and medium-sized MVPDs that license programming through buying groups should also have access to both sets of protections.

Argument #3: The Majority of NCTC Members Do Not Currently Compete with Cable-Affiliated Programmers

1. A significant number of NCTC members do have a significant competitive overlap with one or more programmer-affiliated cable operators.

Data on NCTC members with 1.5 million or fewer subscribers that have a competitive overlap of at least 10% with the six largest cable operators affiliated with a national cable network.

Cable Operator	Number of Competing NCTC Members	Number of Subs Served
Comcast	34	1,760,079
Time Warner Cable	20	1,526,078
Charter	18	167,000
Cox	3	157,769
Bright House	1	127,638
Cablevision	0	0
Any of the Six	66	2,257,079

2. Program access rules are in place to respond to current as well as future conditions. A large vertical merger could dramatically change industry structure overnight.

Argument #3 (Cont'd)

3. Individual MVPDs are provided protection by program access rules regardless of their level of overlap with vertically integrated cable operators, and there is no basis in the statute or the Commission's program access rules for treating buying groups any differently. If the Commission were to decide to allow buying groups to be protected by program access rules only if they met some minimum competitive overlap condition, then it should impose the same requirement on individual MVPDs.

4. If participation guarantees were provided only to MVPDs that directly compete with a cable-affiliated programmer, then a programmer could disadvantage these rivals by excluding all other MVPDs from the buying group and thus denying volume-based cost savings to the MVPDs it competes with. (The Commission accepted this argument as sufficient justification to provide all MVPDs with no more than 1.5 million subscribers the right to collectively negotiate and arbitrate through a bargaining agent – that is, no minimum competitive overlap condition was applied.)

Argument #4: There Is No Evidence That Cable-Affiliated Programmers Discriminate Against Buying Groups

1. Evidence on discrimination is very difficult to produce because all programming agreements are subject to non-disclosure agreements. Normally such evidence can be produced only after a complaint is filed and the FCC mandates disclosure of contract terms.
2. There is a strong statutory basis for action
 - In Section 628(c)(2)(B), Congress specifically includes buying groups as protected entities without specifying any particular conditions that buying groups must satisfy
 - A set of rules that do 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 and that do not protect the participation rights of MVPDs that normally purchase a substantial share of their programming through buying groups cannot reasonably be interpreted as providing protection to buying groups.
3. Congress intended that buying groups such as the NCTC should have the right to file program access complaints. NCTC should not have to prove that it would currently be able to win a program access complaint simply in order to be given the right to file such claims.

CONCLUSION

1. Congress clearly intended that program access rules apply to buying groups.
2. A rule that does not apply to the business model for a buying group that essentially all programmers and all small and medium sized MVPDs have freely chosen to use cannot reasonably be interpreted as providing protection to buying groups.
3. Therefore, in order to implement the clear intent of Congress, an additional liability alternative must be added so that a buying group using the NCTC business model qualifies as a buying group for purposes of receiving protection under program access rules.
4. It is equally clear that program access rules would provide no protection at all to buying groups if programmers were allowed arbitrarily to exclude members of buying groups from participating in master agreements even if the members licensed a substantial share of their programming through buying groups as part of their normal course of business.

CONCLUSION (CONT'D)

5. Therefore, in order to implement the intent of Congress, the Commission must also guarantee that when a buying group enters into a master agreement with a cable-affiliate programmer, the programmer is not allowed arbitrarily to exclude members of the buying group from participating in the master agreement that license a substantial share of their programming through buying groups as part of their normal course of business.
6. The Commission should follow the precedent it established in its Comcast-NBCU license conditions and determine a safe harbor subscriber level such that MVPDs with no more than the safe harbor number of subscribers are protected from arbitrary exclusion. The safe harbor level should be set between 1.5 million and 3 million subscribers.
7. The Commission should also clarify that cable-affiliated programmers are required to extend the same volume discounts to buying groups as they extend to individual MVPDs, controlling for other factors that program access rules permit programming rates to reflect.

Table 1
Top 25 MVPDs

Rank	MVPD	Subscribers
1	Comcast Corporation	21,995,000
2	DirecTV	20,080,000
3	Dish Network Corporation	14,056,000
4	Time Warner Cable, Inc.	12,218,000
5	Verizon Communications, Inc.	4,726,000
6	Cox Communications, Inc.	4,540,280
7	AT&T, Inc.	4,536,000
8	Charter Communications, Inc.	4,158,000
9	Cablevision Systems Corporation	3,197,000
10	Bright House Networks, LLC	2,013,000
11	Suddenlink Communications	1,211,200
12	Mediacom Communications Corporation	1,000,000
13	WideOpenWest Networks, LLC	702,101
14	CableOne, Inc.	593,615
15	RCN Corporation	327,613
16	Atlantic Broadband Group, LLC	247,792
17	Midcontinent Communications	236,250
18	Armstrong Cable Services	234,573
19	Service Electric Cable TV, Inc.	213,058
20	MetroCast Cablevision	164,921
21	Blue Ridge Communications	164,796
22	WaveDivision Holdings, LLC	152,975
23	General Communication, Inc	140,000
24	Buckeye CableSystem	130,954
25	Grande Communications	92,667

Members of NCTC Highlighted