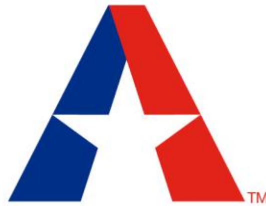
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	MB Docket No. 17-214
	)	

COMMENTS



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COMMENTS

I. INTRODUCTION

The American Cable Association ("ACA") submits these comments in response to the Commission's Public Notice soliciting data, information, and comment for the Commission's Nineteenth Report on the Status of Competition in the Market for the Delivery of Video Programming ("19th Report").[1] In response to the Commission's invitation for analyses regarding the relationship between the common ownership of video content and video delivery platforms for multichannel video programming distributors ("MVPDs") and the impact these relationships have on competition in the market for the delivery of video programming, ACA focuses its commentary on highlighting the fact that such vertical integration continues to pose a

[1] *See Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, 32 FCC Rcd 6654 (2017) ("Public Notice").

threat to competition and consumers, and on spotlighting a particular practice by Comcast-NBCU that limits the ability of its MVPD rivals to compete in serving the increasing number of households that want only a broadcast basic tier of service.

II. VERTICAL INTEGRATION BETWEEN CABLE OPERATORS AND VIDEO PROGRAMMERS CONTINUES TO POSE THREATS TO COMPETITION AND CONSUMER WELFARE

Congress and the Commission have long recognized that vigorous competition between MVPDs benefits consumers and that vertical integration between an MVPD and a programmer can potentially damage this competition and thus harm consumers. This is because a vertically-integrated firm has both the incentive and ability to disadvantage rival MVPDs by either raising the prices it charges rivals for programming or withholding this programming altogether. In the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Congress, recognizing these potential problems, directed the Commission to enact regulations related to the affiliation of cable operators and video programming networks,[2] including program access regulations that place general obligations on all vertically integrated cable operators to provide nondiscriminatory access to their programming.[3] In addition, the Commission has historically placed additional special restrictions on parties seeking approval to engage in vertical mergers that result in an MVPD gaining control of significant "must have" content.[4]

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[2] *Id.* at 9, n.28; 47 U.S.C. §§ 533(f), 536, 548 ("These provisions, among other things, prevent cable operators from engaging in unfair acts that have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite-delivered programming to consumers, ensure that competitive MVPDs obtain access to satellite programming affiliated with a cable operator, and prohibit cable operators or other MVPDs from requiring a financial interest in a video programming vendor or obtaining exclusive rights as conditions for carriage. *Id.* §§ 536, 548; 47 C.F.R. §§ 76.1001-04, 1301-02.").

[3] 47 U.S.C. § 548(c)(2); 47 C.F.R. § 76.1001.

[4] *See, e.g.*, *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("News Corp-DirecTV Order"); *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.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) ("Adelphia Order"); *News Corporation and The DirecTV*

ACA believes that program access regulations continue to play a vital role in protecting both competition and consumers. Notwithstanding changes in the marketplace from when program access protections were first created by the 1992 Act, it is still the case that significant amounts of "must have" programming are controlled by MVPDs. In particular, Comcast, directly and through its ownership of NBC Universal ("NBCU"), controls access to significant programming that its rivals must have access to in order to compete with it. This must have programming includes NBC broadcast network owned and operated ("O&O") local television stations, the bundle of extremely popular national cable programming networks controlled by NBCU and, in many regions of the country, regional sports networks ("RSNs") that hold exclusive rights to carry local and regional sports events. Denying a rival access to even one of these three categories of programming would threaten an MVPD's ability to compete, as the Commission has recognized.[5] Thus, without a doubt, program access protections administered by the Commission continue to be necessary and important to protect competition and consumers.

Two events that will occur in the near term further underscore the need for program access protections. The impending merger between AT&T and Time Warner Entertainment ("Time Warner") will result in yet another significant block of must have cable programming networks (including HBO, TBS, TNT and CNN) being under the control of a large cable

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Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008) ("Liberty-DirecTV Order"); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("Comcast-NBCU Order").

[5] Comcast-NBCU Order, ¶ 36 ("[L]oss of Comcast-NBCU programming … would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers. This is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes from other sources.").

operator[6] and thus further increase the need for continued program access protections. The next troubling development scheduled to occur in the near future is the expiration, by their terms, of the conditions placed on Comcast when the Commission approved the license transfers associated with the Comcast-NBCU transaction on January 20, 2018.[7] While program access rules provide some protection to competition by requiring vertically integrated cable operators to provide other MVPDs non-discriminatory access to their programming, the additional conditions placed on Comcast when the Commission approved the Comcast-NBCU transaction provide significant additional protection. In particular, the additional conditions require Comcast to agree to the submission of disputes over prices, terms and conditions of programming agreements to arbitration to determine a fair market value for the programming in the event that a private agreement cannot be reached with an MVPD seeking to license Comcast-NBCU programming. This additional condition closes a loophole in program access rules that to some extent allows a vertically integrated firm to raise prices to rival MVPDs simply by charging itself an artificially high transfer price for the same programming.[8] Furthermore, small and medium-size operators that license programming through the National Cable Television Cooperative ("NCTC") are afforded access to this additional protection because they may appoint a bargaining agent to bargain collectively with a Comcast-NBCU programmer for carriage of video programming, and their bargaining agent is given the right to submit a dispute

[6] By their terms, the provisions of the program access rules apply to cable operators, cable affiliated programmers, and certain common carriers. They apply to AT&T today by virtue of its status as "a common carrier or its affiliate" that "provides video programming by any means directly to its subscribers. *See* 47 U.S.C. § 548(j). Shawn Shinnerman, *AT&T takes a step toward finalizing acquisition of Time Warner*, DALLAS BUSINESS JOURNAL (Sept. 28, 2017, 2:21 p.m.), https://www.bizjournals.com/dallas/news/2017/09/28/at-t-takes-a-step-toward-finalizing-acquisition-of.html.

[7] Comcast-NBCU Order, Appendix A, Section XX ("Except as expressly stated, these Conditions shall remain in effect for seven years following the date of this Order.").

[8] *See* News Corp-DirecTV Order, ¶¶ 82, 84 (program access non-discrimination rules do protect against harms caused by practice of uniform price increases that raise rivals costs).

concerning carriage of such programming to commercial arbitration.[9] As ACA has repeatedly informed the Commission in previous filings, a key failing of program access rules is that they fail to provide adequate protection to small and medium-size MVPDs that purchase programming through the NCTC by failing to provide the NCTC with the right to file a program access complaint.[10] Finally, the merger conditions also include a "standstill" provision affording an MVPD submitting a dispute to arbitration the right to carry the programming pending resolution of the arbitration. Without this, an MVPD would likely sustain crippling subscriber losses during the pendency of any dispute. As ACA has explained to the Commission in previous filings, while program access rules also allow an MVPD filing a program access complaint to seek a standstill until the dispute is resolved, in practice the evidentiary

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[9] *See* Comcast-NBCU Order, Appendix A, Section VII.D.1 & 2. These provisions permit an MVPD with 1.5 million or fewer subscribers to appoint an independent bargaining agent to bargain collectively on its behalf in negotiating with a Comcast-NBCU programmer for carriage of video programming and the bargaining agent is given the right to submit a dispute to commercial arbitration pursuant to the terms of the conditions. NCTC members with 1.5 million or fewer members have used this provision in the past, appointing NCTC as their bargaining agent to negotiate with Comcast-NBCU for carriage of its national cable programming and broadcast stations.

[10] *See* 47 U.S.C. § 548(c)(2)(B) (prohibiting discrimination by vertically integrated cable programmers among or between MVPDs "or their agents or buying groups"); *Revision of the Commission's Program Access Rules, et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Comments of the American Cable Association at 24 (filed June 22, 2012) ("ACA 2012 Program Access Sunset Comments"); Reply Comments of the American Cable Association at 20-21 (filed Jul. 23, 2012) ("ACA 2012 Program Access Sunset Reply Comments"). In its comments, ACA noted that while Congress provided for the right of MVPD "buying groups" to file program access complaints in the statute, the Commission's definition of a "buying group" is flawed because it excludes NCTC, the nation's largest programming buying group and it therefore has no right to file a program access complaint even though it NCTC functions as a programming buying group through which nearly all small and medium sized MVPDs license a significant share of their programming. The Commission unanimously agreed, and proposed to amend its definition of a buying group in a manner that would cover NCTC. *See Revision of the Commission's Program Access Rules, et al.*, 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, ¶¶ 83-90 (2012) ("2012 Program Access FNPRM"); Comments of the American Cable Association at 2-24 (filed Dec. 14, 2012) ("ACA FNPRM Comments"); Reply Comments of the American Cable Association at 2-23 (filed Jan. 14, 2013) ("ACA FNPRM Reply Comments"). This rulemaking remains pending without action before the Commission.

requirements that an MVPD must meet in order to be granted a standstill are so stringent and unrealistic that the provision affords little or no protection to MVPDs.[11]

At an absolute minimum, the Commission must continue to vigorously enforce program access rules to provide at least some minimum level of protection to competition between MVPDs. Furthermore, the Commission should also correct its flawed definition of a "buying group" for program access purposes so that the NCTC qualifies as a buying group under the Commission's rules and can file program access complaints, thus affording small and medium-sized MVPDs the same level of protection by program access rules as large MVPDs as Congress intended.[12] In addition, the Commission should immediately open a proceeding to determine if there is a need to extend and/or renew the Comcast-NBCU program access conditions. Comcast still controls access to programming that remains "must have" for other MVPDs, including many of the most popular cable networks, the signals of its NBC O&O stations, and numerous RSNs serving many of the major metropolitan areas of the United States.[13] Therefore, the need for conditions is just as high now as it was when the transaction was originally approved.

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[11] ACA FNPRM Comments at 39-40 (highlighting harms to consumers without a standstill provision to protect against withdrawal of programming during negotiations); ACA FNPRM Reply Comments at 47-61 (arguing in support of adoption of a rebuttable presumption in cases involving requests for standstill relief).

[12] The Commission's rules include within the definition of an MVPD for program access purposes both "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming" . . . "as well as buying groups or agents of all such entities." 47 C.F.R. § 76.1000(e). The rules further define "buying groups" and "agent" for purposes of the definition of an MVPD set forth in subparagraph (e) of Section 76.1000 as "an entity representing the interests of more than one entity distributing multichannel video programming" that meets certain standards. 47 C.F.R. § 76.1000(c). An MVPD aggrieved by any conduct that it believes constitutes a violation of the program access rules, in turn, is given the right to file a complaint pursuant to the procedures set forth in 47 C.F.R. § 76.1003.

[13] According to its 2016 SEC filings, Comcast's regional sports and news networks together serve more than 27 million households across the U.S. Comcast Corporation, *Form 10-K For the Fiscal Year Ended December 31, 2016*, United States Securities and Exchange Commission at 7 (filed Feb. 3, 2017), *available at* https://www.sec.gov/Archives/edgar/data/902739/000119312517030512/d290430d10k.htm.

III. COMCAST-NBCU LIMITS THE ABILITY OF ITS MVPD RIVALS TO COMPETE IN SERVING THE INCREASING NUMBER OF HOUSEHOLDS THAT WANT ONLY A BROADCAST BASIC TIER OF SERVICE

A long-standing position of ACA is that the minimum penetration and tiering requirements that programmers include in their cable programming network agreements with MVPDs harm consumers. These conditions dramatically restrict an MVPD's ability to offer, and consumers' ability to flexibly purchase, cable networks on an individual basis or in small ("skinny") bundles tailored towards their specific interests.[14] The effect of these practices has been to require MVPDs to offer a bundle of 50 or more cable programming networks in the so-called "expanded basic" tier that are essentially indivisible in the sense that a consumer must buy the entire bundle of cable programming networks to have access to any single cable programming network.[15] The major exception to this programmer-imposed rule that all MVPD subscribers must purchase the super-sized expanded basic tier is that cable programmers effectively have permitted MVPDs to offer their subscribers stand-alone access to a much smaller bundle of networks consisting of primarily broadcast channels at a significantly lower price by not including subscribers to this tier in their minimum penetration requirements. This tier of service is often referred to as the "broadcast basic" or "lifeline" service. This option has always been of value to consumers who only wanted access to broadcast stations but had poor over-the-air reception or wanted to avoid the expense and trouble of installing a large antenna. The option to purchase only the broadcast basic tier has recently begun to grow in popularity as price-sensitivity among subscribers has grown and as on-demand video programming and cable networks have become available from online video distributors ("OVDs") over the Internet.

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[14] *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Comments of the American Cable Association at 26-28 (filed Mar. 30, 2016) ("ACA 2016 Independent Programming NOI Comments").

[15] According to the Commission's data, expanded basic grew from an average of 70.5 channels in 2005 to 181.3 channels in 2015. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, 31 FCC Rcd 11498, ¶ 19 Table 4 (2016) ("2016 Cable Price Report").

These so-called “cord shavers” can purchase one or more OVD services tailored toward their specific interests and still have access to broadcast stations by subscribing to the broadcast basic service or lifeline tier through their cable operator.

Through this filing, ACA would like to draw the Commission’s attention to the fact that a minimum penetration policy now being used by one particular vertically-integrated programmer – Comcast-NBCU – has begun to threaten some of its members’ ability to continue to offer their subscribers access to a basic broadcast tier of service. In general, a minimum penetration requirement requires an MVPD to distribute a cable network to a minimum specified percentage of its video subscribers. However, for purposes of implementing minimum penetration requirements, almost all programmers exclude subscribers that only receive basic broadcast or lifeline service when calculating penetration rates. A penetration requirement that excludes broadcast basic or lifeline subscribers is usually referred to by industry participants as a penetration requirement incorporating a “lifeline exclusion.” When a penetration requirement for a cable programming network is implemented in this fashion, it essentially requires an MVPD to provide the cable programming network to a specified percentage of its customers that subscribe to any cable programming network, but leaves the MVPD free to offer a basic broadcast or lifeline tier of service to as many of its customers as it can that desire this more limited service. Thus, while it preserves the existence of an expanded basic tier, it does not interfere with consumers’ opportunity to purchase a low-priced broadcast basic tier of service. The use of a lifeline exclusion is altogether reasonable and appropriate given the historical distinction between carriage of broadcast and cable network programming under the Communications Act and the Commission’s rules.

In its RSN licensing agreements with a number of ACA members, however, Comcast-NBCU has insisted on including a minimum penetration requirement that does not incorporate a lifeline exclusion and on setting the penetration rate at a high enough level such that these

members are no longer able to broadly sell a broadcast basic or lifeline tier service at their existing prices without automatically violating the minimum penetration requirement in their RSN agreements. This is true even if they were to include the RSN in every video bundle (expanded basic and specialty tiers) they offer except for broadcast basic service. An MVPD in this position must ultimately either raise the price of the broadcast basic tier to dampen demand for this service, or essentially cease to offer a true broadcast basic tier that does not include cable programming networks.[16] Either outcome will obviously harm consumers.[17]

ACA believes that it is no coincidence that the programmer adopting this restrictive policy – Comcast-NBCU – is a vertically integrated provider of MVPD and broadband Internet access services. The ACA members that are being disadvantaged by this policy directly compete with Comcast for MVPD and broadband Internet access service customers. Comcast-NBCU's minimum penetration policy restricts its competitors from offering broadband Internet access service bundled with broadcast basic video service and thus restricts their ability to compete with Comcast for broadband Internet customers. While it interferes with its competitors' ability to offer consumers a broadcast basic tier of service, Comcast is aggressively marketing a bundle of networks very similar to the broadcast basic tier to its own customers through its Instant TV service.[18]

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[16] It is worth noting that simply including the Comcast RSN as the only mainline cable programming network in the broadcast basic service tier would not be an option. If an MVPD included this cable programming network on its broadcast basic tier, various other penetration requirements in the MVPD's agreements with other programmers would automatically require the MVPD to include a large number of other cable networks in this tier as well. This is essentially the dynamic that created the bloated expanded basic tier in the first instance. While the broadcast basic service tier might remain the lowest price tier a cable operator can offer, it would inevitably cost far more than the true broadcast basic offering available today, harming consumers.

[17] The footprint of MVPDs carrying the RSNs controlled by Comcast reach a significant percentage of all MVPD households nationwide.

[18] *See* Michelle Caffrey, *This Week in Comcast: Internet but no cable? Meet Xfinity Instant TV*, PHILADELPHIA BUSINESS JOURNAL (Oct. 3, 2017), https://www.bizjournals.com/philadelphia/news/2017/10/03/comcast-xfinity-instant-tv-skinny-bundle.html; Bob Fernandez, *Comcast launches Instant TV that will cost $68 to $100 a month after internet charges*,

Although ACA members directly negotiate licensing agreements for RSNs with Comcast-NBCU, most ACA members license Comcast-NBCU national cable programming networks under a collective licensing agreement negotiated on their behalf between NCTC and Comcast-NBCU.[19] ACA and NCTC believe that there is a significant risk that Comcast-NBCU will attempt to take advantage of the imminent expiration of the Comcast-NBCU merger conditions to introduce the same sort of anti-consumer minimum penetration requirements into its licensing agreement for national cable programming networks with the NCTC. The current agreement was negotiated when the Comcast-NBCU merger conditions were in effect. NCTC has informed ACA that in the last negotiation, Comcast-NBCU pressed very hard for inclusion of a minimum penetration requirement with no lifeline exclusion and only relented at the last minute when this became a final sticking point and NCTC, acting as a bargaining agent for its members, threatened to ask for commercial arbitration if Comcast-NBCU would not relent in its demand. The current agreement is set to expire less than a year after the Comcast-NBCU merger conditions expire in January 2018. Both ACA and NCTC fear that NCTC will be less able to resist Comcast's unreasonable, anti-consumer and anti-competitive demands without the threat of being able to ask to submit the dispute to baseball-style arbitration to determine fair and reasonable terms and conditions and without the ability to file a program access complaint with the Commission.

THE INQUIRER (Oct. 5, 2017, 2:52 p.m.), http://www.philly.com/philly/business/comcast/comcast-launches-instant-tv-that-will-cost-90-to-100-a-month-after-internet-charges-20171005.html.

[19] Many NCTC members compete head to head with Comcast. According to data ACA reported to the Commission during its review of the aborted Comcast-Time Warner Cable merger in December 2014, 20 percent of NCTC's members (excluding it's four largest members at the time – Charter, Cox, Cablevision and Verizon) overlapped with Comcast. *See In the Matter of Applications of Comcast Corp., Time Warner Cable, Inc., Charter Communications, Inc., and SpinCo, for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, Comments of the American Cable Association, Exhibit A, The Harms of Comcast-TWC-Transaction, Gary Biglaiser at 16 (filed Aug. 25, 2014) (noting that NCTC's four largest members, Verizon, Cox, Charter and Cablevision, rarely participate in NCTC deals).

ACA believes that Comcast-NBCU's use of minimum penetration requirements without a lifeline exemption in the RSN licensing agreements it negotiates with ACA members is both anti-competitive and anti-consumer and is not in the public interest. At a minimum, the Commission should further investigate this practice. ACA believes that should the Commission do so, it will determine that the practice of imposing minimum penetration requirements in cable programming network agreements that do not contain a lifeline carve-out unreasonably limits consumer choice and competition without providing any offsetting benefits, and that this conclusion should provide a sufficient basis for the Commission to prohibit this practice under the program access rules.[20] The threat that Comcast-NBCU will further expand its use of this practice to licensing agreements for national cable programming networks following the impending expiration of the merger conditions adds further urgency to this issue and provides additional support for ACA's call to the Commission to open a proceeding to determine if the Comcast-NBCU merger conditions should be extended as well as to extend the right to file a program access complaint to the NCTC.

IV. CONCLUSION

While the video programming marketplace continues to evolve in significant and exciting new ways, some things remain the same. Problems associated with the common ownership of video content and multichannel video delivery are among those that have endured, and ACA has identified one such specific practice that presently threatens competition and consumer welfare. In these comments, ACA has highlighted several modest steps the Commission could take to ensure a healthier MVPD marketplace for providers and consumers alike.

[20] *See* 47 U.S.C. § 548(b) (prohibiting vertically integrated cable operators and cable programming vendors from engaging in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to its subscribers or customers).

Respectfully submitted,

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