



April 2, 2014

Via Electronic Filing

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

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

Dear Ms. Dortch:

On behalf of the U.S. Small Business Administration Office of Advocacy, I am writing to urge the Federal Communications Commission to move forward and strengthen protections for small multichannel video programming distributors (MVPDs) under the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act) by finalizing certain revisions to the Commission's Program Access Rules. In light of increasing vertical integration between cable programmers and distributors, including the anticipated acquisition of Time Warner Cable by Comcast/NBCU, small MVPDs have asked Advocacy to raise their concerns regarding the FCC's program access rules and support reasonable revisions that would better protect small MVPDs from discriminatory pricing in cable programming.

About the Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy come from input received from outreach to small businesses and do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (RFA) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.¹ Congress crafted the RFA to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or to comply with federal laws.² In addition, the RFA's purpose is to address the adverse effect that

¹ Pub. No. 96-354, 94 Stat. 1164 (1980).

² Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

“differences in the scale and resources of regulated entities” has had on competition in the marketplace.³

Background

Congress passed the Cable Act in 1992 to protect competition in the cable market, giving the FCC authority to craft rules to protect small MVPDs from discriminatory pricing practices among or between cable systems, cable operators, other MVPDs, or their agents or buying groups.⁴ The FCC adopted such rules with the aim of preventing cable affiliated programmers from overcharging MVPD competitors for programming; however, small MVPDs have indicated to Advocacy and the FCC that certain provisions have rendered the rules ineffective at protecting small MVPDs from discriminatory pricing. The American Cable Association (ACA), whose membership represents almost every small and medium sized MVPD, has also proposed several reforms to the program access rules for which the FCC solicited public comment, but has yet to act upon.

Small Business Concerns and Proposed Alternatives

Small MVPDs have expressed concerns that the FCC’s definition of “buying groups” includes unreasonable restrictions on the eligibility of entities for protection under the rules. Buying groups negotiate agreements with programmers on behalf of their members—this allows small MVPDs to increase their purchasing power and reduces transactions costs for all parties. The majority of small MVPDs purchase programming licenses through agreements between the National Cable Television Cooperative (NCTC); however, the NCTC is excluded from the program access rules because it does not assume liability for its buying group members. Small MVPDs believe that this restriction has effectively rendered the program access rules moot, as they have little choice other than to purchase programming licenses through NCTC agreements. The fact that NCTC does not assume full financial liability for its members has not impeded contracts between NCTC and programmers—NCTC remains the primary buying group used by MVPDs and programmers have existing remedies available to them in the event a buying group member defaults. Advocacy encourages the FCC to reexamine whether the requirement that buying groups assume liability for their members’ contracts is necessary given that the market does not demand it, and whether that restriction is statutorily supported under the Cable Act.

ACA has also suggested two proposals which have received support from their small members that would further protect small MVPDs access to programming at reasonable prices. First, ACA has asked the FCC to enact a safe-harbor that would prevent programmers from unreasonably excluding buying group members with fewer than 3 million subscribers from a contract. Second, ACA has asked the FCC to clarify the obligation of cable affiliated programmers to extend the same volume discounts to buying groups that they do to individual MVPDs. Both of these changes would put buying groups on the same competitive footing with large MVPDs by giving them increased leverage in negotiations with cable affiliated programmers, and would result in lower prices for small MVPDs. Given the increasing number of cable affiliated programmers and the impact that such vertical integration has on small

³ Pub. L 96-354, Findings and Purposes, Sec. 4, 126 Cong. Rec. S299 (1980).

⁴ Section 628(c)(2)(B) of the Cable Act

MVPD's ability to provide consumers with viable alternatives, Advocacy encourages the FCC to examine whether the Cable Act gives the FCC authority to adopt the above proposals to mitigate any anti-competitive behavior that could result from further industry consolidation.

Conclusion

Advocacy is pleased to be able to support small businesses by forwarding their concerns to the FCC. We would welcome any opportunity to provide assistance in conducting further outreach with small MVPDs on any of the issues discussed in this letter. Should you have any questions, please contact me or Assistant Chief Counsel Jamie Belcore Saloom at 202-205-6890.

Best regards,



Winslow L. Sargeant, Ph.D.
Chief Counsel for Advocacy



Jamie Belcore Saloom
Assistant Chief Counsel for Advocacy