

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

In the Matter of
Lafayette City-Parish Consolidated Government of
Lafayette, Louisiana, d/b/a Lafayette Utilities
System,
Complainant,
v.
National Cable Television Cooperative, Inc.;
CableOne, Inc.; Wide Open West; Comporium
Communications; NewWave Communications;
Atlantic Broadband; Suddenlink; Avenue Bb
Communications; GCI, Inc.; Charter
Communications; Armstrong Cable Services;
Wave Division Holdings; NPG Cable, Inc.; Eagle
Communications; Utilities Service Alliance, Inc.;
and Cox Communications,
Defendants.
File No. CSR-8357-P

ORDER

Adopted: May 25, 2011

Released: May 25, 2011

By the Chief, Media Bureau:

I. INTRODUCTION

1. On June 8, 2010, Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System ("LUS") filed a complaint with the Commission against the National Cable Television Cooperative, Inc. ("NCTC") and fifteen individual companies ("Company Defendants") (collectively, "Defendants").

1 See LUS, Complaint for Violations of Section 628 of the Communications Act and 47 C.F.R. § 76.1001 et seq., File No. CSR-8357-P (filed June 8, 2010) ("Complaint").

2 See Complaint at 1; see also 47 U.S.C. § 548, 47 C.F.R. § 76.1001 et seq.

3 We note that this is an interlocutory order and does not resolve LUS' complaint. Reconsideration or review of interlocutory orders prior to a decision on the merits is limited by Section 76.10 of the Commission's rules. See 47 C.F.R. § 76.10.

II. BACKGROUND

2. LUS is a municipal multichannel video programming distributor (“MVPD”), which states that it uses “state-of-the-art fiber-optic communications systems” to provide services including cable television, voice, and “ultra-high-speed Internet access.”⁴ NCTC is a non-profit Kansas corporation that facilitates its member cable operators’ purchase of programming and hardware.⁵ The Company Defendants each had an employee serving on NCTC’s Board of Directors (the “Board”) when LUS’ application for NCTC membership was denied.⁶

3. In late 2008, NCTC lifted a previously imposed “moratorium” on new members, and LUS subsequently submitted a membership application.⁷ In February 2010, NCTC denied LUS’ membership application without explanation.⁸ LUS and two other municipal MVPDs who had been denied NCTC membership, the City of Wilson, North Carolina (“Wilson”) and the Electric Power Board of Chattanooga, Tennessee (“Chattanooga”), served Defendants with a pre-filing notice and draft of the complaint on April 21, 2010.⁹

4. On April 30, 2010, NCTC filed suit in federal district court in Kansas City, Kansas, against LUS, Wilson, and Chattanooga.¹⁰ Among other things, NCTC’s district court complaint requested a declaratory judgment that NCTC and its Board members are not subject to Section 628(b) of the Act, which applies only to cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors.¹¹ After filing its district court complaint, NCTC made membership offers to Wilson and Chattanooga, but not to LUS.¹² According to LUS, the only significant difference between LUS and Wilson or Chattanooga is that LUS’ major competitor, Cox Communications, is NCTC’s largest member and has an employee serving on NCTC’s Board, whereas the major competitors of Wilson and Chattanooga are not NCTC members.¹³ By email dated May 19, 2010, in response to a request for clarification from LUS’ counsel, NCTC’s counsel stated that NCTC had “decided not to reconsider its prior rejection of [LUS’] application.”¹⁴ Accordingly, LUS filed its Complaint on June 8, 2010.

5. On June 21, 2010, LUS filed a motion to dismiss NCTC’s district court complaint for various reasons, “including that the court lacks subject matter jurisdiction and that the FCC has primary jurisdiction to address the relevant issues.”¹⁵ On November 23, 2010, the U.S. District Court for the District of Kansas issued a Memorandum and Order dismissing NCTC’s action against LUS for lack of

⁴ Complaint at 1.

⁵ See NCTC *et al.*, Answer and Motion to Dismiss, File No. CSR-8357-P, at 2 (filed June 28, 2010) (“Answer”).

⁶ See *id.*, Ex. 4 and 5.

⁷ See Complaint at 13 and n. 20 (indicating that LUS filed the NCTC qualification questionnaire on Jan. 9, 2009, and filed a membership application on July 24, 2009).

⁸ See *id.* at 14 n. 21 and Attachment C.

⁹ See *id.* at 14 and Attachment D.

¹⁰ See *id.* at 15 and Attachment E.

¹¹ See *id.*, Attachment E at 7.

¹² See *id.* at 15.

¹³ See *id.*

¹⁴ See *id.* at 15-17 and Attachment F.

¹⁵ See Letter from James Baller, Counsel to LUS, to Marlene H. Dortch, Secretary, FCC, File No. CSR-8357-P, at 1 (June 23, 2010).

subject matter jurisdiction.¹⁶

6. The Complaint filed before us alleges that Defendants' denial of NCTC membership to LUS violates Section 628(b) of the Act. Section 628(b) provides:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage 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 multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.¹⁷

The Commission has recognized that in Section 628(b) Congress provided the Commission with a broad grant of authority.¹⁸ By its terms, Section 628(b) applies explicitly to the unfair acts of three entities: cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors.¹⁹ The Commission has broadly defined what constitutes an "unfair act" under Section 628(b).²⁰ To violate Section 628(b), however, the purpose or effect of the challenged act must be to significantly hinder or prevent any MVPD from providing satellite cable programming or satellite broadcast programming.²¹

7. The parties disagree as to whether NCTC is a proper defendant to the Complaint. LUS claims that NCTC is subject to Section 628(b) because it "has acted as the agent of, and in collusion with, its member cable operators."²² Further, LUS notes that the Commission's rules define MVPDs to include cable operators, "as well as buying groups or agents of all such entities,"²³ and argues that NCTC has benefited from being treated as a buying group for the last 18 years.²⁴ LUS argues that NCTC acts as the

¹⁶ See *National Cable Television Cooperative, Inc. v. Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System*, 2010 WL 4868158 (D. Kan. 2010).

¹⁷ 47 U.S.C. § 548(b). The Commission has implemented this provision through Section 76.1001(a) of the Commission's rules, which provides as follows:

No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 C.F.R. § 76.1001(a). In this *Order*, we use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices."

¹⁸ See, e.g., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 748, ¶¶ 3-4 (2010) ("2010 Program Access Order"), appeal pending sub nom. *Cablevision Sys. Corp. et al. v. FCC*, Nos. 10-1062, 10-1088 (D.C. Cir.).

¹⁹ 47 U.S.C. § 548(b).

²⁰ See, e.g., *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20255-56, ¶¶ 43-44 (2007), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

²¹ 47 U.S.C. § 548(b).

²² Complaint at 18.

²³ *Id.* at 18 n. 26 (quoting 47 C.F.R. § 76.1000(e)).

²⁴ LUS, Reply of Lafayette Utilities System, File No. CSR-8357-P, at 4-5 (filed July 13, 2010) ("Reply").

agent of its member cable operators, and that as an agent, NCTC “is liable for its own active wrongdoing committed on behalf of its principals.”²⁵

8. In contrast, Defendants contend that NCTC is not a proper defendant in a claim brought under Section 628(b), because it is not one of the three entities covered by that section.²⁶ According to Defendants, NCTC does not meet the definition of a cable operator as set forth in Section 602(5) of the Act, because it does not provide cable service over a cable system, own any interest in a cable system, or otherwise control or have responsibility for the management and operation of a cable system.²⁷ NCTC states that “[t]he mere fact that it is an organization whose members are cable operators does not subject it to regulations that apply specifically to cable operators.”²⁸ Additionally, Defendants deny that NCTC meets the definition of a “buying group.”²⁹ Defendants further argue that even if NCTC did meet that definition, “buying groups” are listed among the potential *plaintiffs* for complaints under Section 628(c)(2)(B) of the Act (a statutory section not applicable here), but are not listed among the potential *defendants* for complaints under Section 628(b).³⁰ In response to LUS’ argument that NCTC acts as the agent of its member cable operators, Defendants state that the membership agreement between NCTC and its members “disclaims the existence of any agency relationship.”³¹ Further, Defendants maintain that NCTC’s management acts independently of its members in reviewing and making membership decisions, and that NCTC is not covered by the definition of the term “agent” in Section 76.1000(c) of the Commission’s rules.³²

9. On April 13, 2011, Media Bureau staff held a status conference with representatives of LUS, NCTC, and the Company Defendants to discuss the status of the Complaint. This interlocutory Order memorializes the issues resolved during this status conference.

III. DISCUSSION

A. Dismissal of NCTC and Utilities Service Alliance, Inc.

10. For the reasons discussed below, we dismiss NCTC as an improper defendant. There is no dispute that NCTC, which facilitates its members’ purchase of programming and hardware, does not itself meet the definition of a “cable operator,” nor does it meet the definition of one of the other entities covered by Section 628(b).³³ While LUS claims that NCTC meets the definition of a “buying group” and that it serves as an “agent” of its cable operator members, this is irrelevant because neither “buying groups” nor “agents” are listed among the potential defendants to a Section 628(b) complaint, whereas

²⁵ *Id.* at 5.

²⁶ Answer at 3.

²⁷ *Id.* at 6. Section 602(5) defines a “cable operator” as “any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such cable system.” 47 U.S.C. § 522(5).

²⁸ Answer at 6.

²⁹ *Id.*

³⁰ *Id.* at 7.

³¹ NCTC *et al.*, Motion for Leave to Supplement the Record, File No. CSR-8357-P, at 4 (filed Aug. 31, 2010) (“Defendants’ Supplement”).

³² *Id.* at 5-6.

³³ See 47 U.S.C. § 522(5) (defining “cable operator”); 47 U.S.C. § 548(i) (defining “satellite cable programming vendor” and “satellite broadcast programming vendor”).

they are specifically listed as potential plaintiffs in certain claims filed pursuant to Section 628(c).³⁴ We disagree with LUS' contention that NCTC should be treated as a cable operator because its members are cable operators, and it acts as an agent of its members.³⁵ The agency theory put forth by LUS does not provide a basis for permitting a Section 628(b) claim to proceed against NCTC.³⁶ As LUS acknowledged, as an agent, NCTC "is liable for its *own* active wrongdoing committed on behalf of its principals."³⁷ LUS has offered no basis, however, on which agency theory would impute the "cable operator" status of NCTC's Board members to NCTC itself.³⁸ For the above reasons, we find that NCTC is not a proper defendant to the Complaint, and we dismiss NCTC as a defendant in this proceeding.

11. We also dismiss one of the Company Defendants in this proceeding, Utilities Service Alliance, as an improper defendant. In addition to filing the Complaint against NCTC, LUS included as Defendants fifteen companies that LUS alleges had an employee serving on NCTC's Board and thus are "legally and actually responsible for NCTC's policies and actions."³⁹ The Complaint generally alleged that the Company Defendants are all cable operators, and thus are expressly subject to Section 628(b).⁴⁰ In their Answer, however, Defendants explained that one of the Company Defendants, Utilities Service Alliance, is not a cable operator, but rather, is a cooperative of nuclear power plant operators, and thus is not subject to the Complaint filed under Section 628(b).⁴¹ Defendants state that Utilities Service Alliance does not operate any cable systems and is not an NCTC member.⁴² Instead, according to Defendants, Utilities Service Alliance employs an individual who served as an "outside director" of NCTC until his term expired in May 2010.⁴³ LUS has failed to raise any allegations to the contrary regarding the status of Utilities Service Alliance. Accordingly, we find that Utilities Service Alliance is not a proper defendant to the Complaint, because it is undisputed that it is not one of the entities subject to Section 628(b), and

³⁴ See 47 U.S.C. § 548(b), (c).

³⁵ LUS does not claim that NCTC is one of the other entities covered by Section 628(b), either a "satellite cable programming vendor in which a cable operator has an attributable interest" or a "satellite broadcast programming vendor."

³⁶ At the status conference, LUS argued that the Commission should "defer making a final decision on the agency issue until [LUS] has had an opportunity to conduct discovery and provide further briefing of that issue." See Letter from James Baller, Counsel to LUS, to Diana Sokolow, Media Bureau, FCC, File No. CSR-8357-P, at 1-2 (April 15, 2011). Defendants responded that the Bureau should not permit discovery and further briefing on the agency issue because the facts establish "that NCTC does not have an agency relationship with its members," and because "the law is clear that Section 628(b) . . . does not reach the actions of 'agents.'" See Letter from Seth A. Davidson, Counsel for National Cable Television Cooperative, Inc., to Diana Sokolow, Media Bureau, FCC, File No. CSR-8357-P, at 2 (April 25, 2011) (footnote omitted) ("Defendants' April 25 Letter"). We decline LUS's request for discovery and briefing on the issue of agency because, as explained above, agency theory would not as a matter of law provide a basis for a Section 628(b) claim against NCTC.

³⁷ Reply at 5 (emphasis added).

³⁸ We note that LUS did not raise other legal theories under which NCTC potentially could have been treated as a "cable operator" for purposes of a Section 628(b) claim, such as for example piercing the corporate veil. See Reply at 10 n. 13 ("Defendants suggest that, to the extent that LUS is claiming that the [Company] Defendants are liable simply by virtue of their membership in NCTC, that claim does not satisfy Kansas requirements 'for piercing the corporate veil.' . . . LUS is not making any such claim.").

³⁹ Complaint at 18.

⁴⁰ *Id.*

⁴¹ Answer at 8 and Ex. 4 ¶ 1.

⁴² *Id.* at 8-9 and Ex. 4 ¶ 1.

⁴³ *Id.* at 9 and Ex. 4 ¶ 2. NCTC's bylaws define an "outside director" as a voting director, elected by the Board, who is not affiliated with an NCTC member.

we dismiss Utilities Service Alliance as a defendant in this proceeding.

B. Discovery

12. We believe that discovery may be useful on two factual issues before we address the merits of the Complaint: first, the issue of whether the remaining cable operator Company Defendants may be held responsible for the actions that allegedly violated Section 628(b) of the Act and the Commission's implementing rule ("Issue I"), and second, the issue of whether the decision to deny LUS membership has the purpose or effect that is prohibited by Section 628(b) ("Issue II"). For the reasons explained below, we set forth a schedule by which the parties may elect to engage in discovery on Issue I. If, after discovery and post-discovery briefing is complete, we conclude that the Complaint may proceed against the remaining Company Defendants, we will then set forth a schedule by which the parties may elect to engage in discovery on Issue II.

13. Regarding Issue I, before ruling on the merits of the Complaint, we must resolve the threshold issue of whether the Company Defendants, other than Utilities Service Alliance, may be held responsible for NCTC's denial of LUS' membership application. LUS claims that the NCTC Board members serve as representatives of their cable operator employers, as shown by the fact that a so-called "Member-Sponsored Director" cannot retain his or her Board membership upon cessation of employment with the "Sponsoring Member" or upon the "Sponsoring Member's" departure from NCTC.⁴⁴ LUS argues that the Company Defendants, as NCTC Board members, are "legally and actually responsible for NCTC's policies and actions."⁴⁵ Even if Board members were unaware of the initial decision to deny LUS' membership application in February 2010, LUS asserts that they "must surely have been involved in NCTC's decisions on how to proceed" after receiving the pre-filing notice.⁴⁶

14. In response, Defendants argue that NCTC's Board is composed of individuals serving in their individual capacity.⁴⁷ According to Defendants, no company has a reserved seat on the NCTC Board, or has the right to designate a director of its choosing.⁴⁸ Defendants explain that the individual Board members did not even know that LUS had applied for NCTC membership until they received the pre-filing notice of the Complaint in late April 2010,⁴⁹ and the individual Board members did not "legally and actually" control the membership decision at issue.⁵⁰ Rather, Defendants state that the membership

⁴⁴ Reply at 7-8. According to LUS, "only individuals who embrace their Sponsoring Member's corporate views and who are ready, willing and able to advance their employer's policies, will ever become members of the NCTC Board." *Id.* at 8.

⁴⁵ Complaint at 18.

⁴⁶ Reply at 9. According to LUS, "nowhere in their form declarations do members of the NCTC Board deny that they knew about and participated in NCTC's *second* and final decision to reject LUS's application for membership. . . . Thus, the Commission can reasonably assume that NCTC's Board endorsed NCTC's decision, which NCTC's counsel conveyed to LUS's counsel on May 19, 2010, to deny LUS membership. . . ." *Id.*

⁴⁷ Answer at 4, Ex. 4 ¶ 3, Ex. 5 ¶ 3.

⁴⁸ *Id.* at 9. Defendants state, "the fact that an individual must be affiliated with a member company in order to be qualified to serve as a 'Member-Sponsored' director does not mean that the individual is serving as a representative of its employer or that the company is entitled to name a replacement for that director if he or she ceases to be qualified to serve." Defendants' Supplement at 2 n. 2.

⁴⁹ Answer at Ex. 4 ¶ 4, Ex. 5 ¶ 4.

⁵⁰ *Id.* at 10.

decision was made by NCTC's President, with input from the NCTC management team.⁵¹

15. We believe that, under certain factual circumstances, the Complaint may be able to proceed against the individual cable operators that had directors on NCTC's Board when LUS' membership application was denied.⁵² Accordingly, we decline Defendants' request that we "reconsider whether any discovery at all is appropriate in this case."⁵³ "Cable operators" are expressly covered by the prohibition on "unfair acts" set forth in Section 628(b).⁵⁴ In the *2010 Program Access Order*, the Commission recently explained that a cable operator may be held responsible for the unfair acts of its affiliated programmer, "where the facts establish that the programmer is wholly owned by, controlled by, or under common control with" the cable operator.⁵⁵ We believe that discovery may be useful here to better develop the facts necessary to determine whether the cable operator Company Defendants may be held responsible for the membership decision of NCTC at issue here. Discovery may be particularly useful given that Issue I involves information that may be in the exclusive control of the Defendants.

16. The Commission's program access rules provide for party-to-party discovery.⁵⁶ Before proceeding to rule on the merits of the Complaint, we direct LUS and the remaining Company Defendants to file with the Commission (and serve on the other party) by June 6, 2011, either requests for discovery or a letter stating that the party elects not to request discovery. To the extent a party files a discovery request, and the responding party opposes one or more of these discovery requests, the responding party shall file with the Commission (and serve on the party requesting discovery) an opposition by June 16, 2011. To the extent an opposition is filed, the party filing the discovery request may file with the Commission (and serve on the responding party) a reply by June 21, 2011. To the extent there are any disputes pertaining to discovery, we direct the parties to meet and confer to resolve those disputes. We also direct the parties to file with the Commission a joint filing by July 1, 2011, containing the following information: (i) a statement that the parties have reached an agreement as to what information will be exchanged; (ii) an explanation of what information will be exchanged and by when; (iii) proposed dates for supplemental briefs and reply briefs that will allow LUS and the remaining Company Defendants each to address information exchanged during discovery; and (iv) to the extent any discovery disputes remain, a description of those disputes and what discovery issues LUS and the Company Defendants are asking the Bureau to resolve. We decline to "narrow the scope of the phase one discovery" as requested by the Defendants until the parties have filed discovery requests and have attempted to settle any differences with respect to discovery.⁵⁷

17. Regarding Issue II, as part of its claim, LUS would need to prove that the decision to deny LUS membership in NCTC has the purpose or effect of hindering significantly or preventing LUS from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. LUS would have the burden of demonstrating that the alleged unfair act has the prohibited

⁵¹ *Id.* Defendants elaborate that "[t]hose involved in this process do not share information about an application for membership, including the identity of the applicant, with the individuals who serve as NCTC's directors (other than the President himself), with the companies that employ those individual directors, or with any NCTC member company." *Id.* at 11.

⁵² See, e.g., *2010 Program Access Order*, 25 FCC Rcd at 786, ¶ 57 (stating that a "cable operator . . . can appropriately be held responsible for the discriminatory acts of its program supplier affiliate because it controls the supplier and the supplier's unfair actions are designed to benefit these entities.").

⁵³ See Defendants' April 25 Letter at 2.

⁵⁴ See 47 U.S.C. § 548(b).

⁵⁵ *2010 Program Access Order*, 25 FCC Rcd at 786, ¶ 57.

⁵⁶ See 47 C.F.R. § 76.1003(j).

⁵⁷ See Defendants' April 25 Letter at 3.

purpose or effect. Such an inquiry could be fact-intensive.⁵⁸ While discovery may be useful on this second factual issue, we believe it is appropriate first to complete discovery on the first factual issue, which is a threshold matter pertaining to whether the named cable operator Company Defendants may be held responsible for the denial of LUS' membership application. If, after discovery and supplemental briefing as to Issue I have concluded, we determine that the Complaint may proceed against the cable operator Company Defendants, then we will set forth a schedule for additional discovery on other issues in dispute, including the issue of "purpose or effect."

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 548, and Sections 76.1000-76.1003 of the Commission's rules, 47 C.F.R. §§ 76.1000-76.1003, National Cable Television Cooperative, Inc. and Utilities Service Alliance, Inc. are **DISMISSED** as defendants to LUS' above-captioned complaint.

19. **IT IS FURTHER ORDERED** that, with respect to the issue of whether the Complaint may proceed against the Company Defendants, LUS and the remaining Company Defendants **SHALL FILE** with the Commission (and serve on the other party) by **June 6, 2011**, either requests for discovery or a letter stating that the party elects not to request discovery.

20. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁵⁹

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

⁵⁸ See, e.g., *2010 Program Access Order*, 25 FCC Rcd at 785, ¶ 56 ("The evidence required to satisfy this burden will vary based on the facts and circumstances of each case . . ."). We further note that the *2010 Program Access Order* left open the issue of whether a "purpose" without an "effect" can violate Section 628(b). See *id.* at 781 n. 197 ("We leave for another day the question whether some additional showing analogous to that required under the antitrust standard should be required when a complainant under Section 628(b) alleges only a prohibited purpose to hinder or prevent competition, and not a prohibited effect.").

⁵⁹ 47 C.F.R. § 0.283.