Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **MEDIA BUREAU SEEKS COMMENT ON THE REGIONAL SPORTS NETWORK MARKETPLACE**	MB Docket No. 11-128

COMMENTS OF DIRECTV, INC.

William M. Wiltshire
Michael Nilsson
Kristine Laudadio Devine
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

Susan Eid
Executive Vice President,
Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
901 F Street, NW, Suite 600
Washington, DC 20004
(202) 383-6300

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SUMMARY

For nearly twenty years, Congress has entrusted the Commission with the responsibility for preventing dominant multichannel video programming distributors ("MVPDs") from using affiliated programming, including regional sports network ("RSN") programming, to harm their competitors. The Commission has exercised that responsibility in its program access rules and related merger conditions, ensuring the availability of this programming and promoting competition in the MVPD market.

The cable industry has argued recently that these safeguards are no longer necessary because of changes in the marketplace. The Commission should not allow itself to be lulled by such arguments. While much has changed in the past two decades, the need for Commission vigilance is as critical as ever. RSN programming remains some of the most popular programming on the market. As a consequence, it remains critical to any competitive MVPD offering. Just last year, the Commission concluded that RSNs deserve special treatment because they remain both extraordinarily popular and non-replicable.

The largest cable operators, moreover, still have every incentive to withhold, or raise the price of, this critical programming. Although cable as a whole has lost national market share, the largest operators have been able to maintain their dominant *regional* position through a strategy of system "clustering." Thus, to take one example, while the cable industry may have lost subscribers in Los Angeles, Time Warner Cable is more dominant in that market today than any cable operator has ever been. At least where large cable operators maintain large regional clusters, they possess much the same incentive to withhold or raise the price of RSN programming that concerned Congress twenty years ago.

The evidence also shows that cable operators are often able to use the leverage created by a cluster to secure the sports rights necessary to create *new* affiliated RSNs. As DIRECTV pointed out in the *Adelphia* proceeding, this phenomenon explains the existence of new cable-affiliated RSNs in Chicago, Northern California, and Cleveland. It also explains the creation of a Houston RSN affiliated with Comcast and a Los Angeles RSN affiliated with Time Warner Cable within the last year. And there is every reason to believe that the trend will continue as major cable operators consolidate additional systems, such as Time Warner Cable's proposal to extend its Cincinnati-area cluster through the acquisition of Insight Communications.

The Commission should view this trend with concern, particularly in light of expiring merger conditions and the cable industry's efforts to scale back program access protections. Cable operators' ability to withhold RSN programming has been constrained over the years by program access rules and by merger conditions, which have served as important counters to their continuing incentives to use RSN programming as a weapon. It would be a mistake for the Commission to conclude that the relative lack of overt anticompetitive behavior in the presence of these safeguards demonstrates that a more competitive MVPD marketplace has rendered such safeguards no longer necessary. The Commission must remain vigilant to ensure that RSN programming, which is critical to the competitive position of any MVPD, remains fully and fairly accessible to all.

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DIRECTV, Inc. ("DIRECTV") files the following comments in response to the public notice recently issued by the Media Bureau requesting information about the marketplace for regional sports networks ("RSNs").[1] While noting the upcoming expiration of the program access conditions imposed upon Time Warner Cable in connection with its acquisition of cable systems from Adelphia Communications Corporation,[2] the Media Bureau seeks comment on the RSN marketplace more generally.[3] DIRECTV appreciates the broad scope of the Commission's inquiry, as RSN programming remains some of the most popular and expensive on the market. As the Commission has repeatedly and recently recognized, the ability of a multichannel video programming distributor ("MVPD") to compete without this programming is questionable at

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1 *Media Bureau Seeks Comment on the Regional Sports Network Marketplace*, Public Notice, DA 11-1238, MB Docket No. 11-128 (rel. July 26, 2011) ("*Notice*").

2 *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd. 8203, 8836-39, Appendix B (2006) ("*Adelphia Order*"). The conditions imposed upon Comcast were recently extended as a condition of its acquisition of NBC Universal. *See Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, ¶¶ 50-54 (2011) ("*Comcast-NBCU Order*").

3 *Notice* at 4.

best.[4] To date, program access rules and related merger conditions have helped ensure the availability of this key programming and have thus promoted competition in the MVPD market.

Even so, however, DIRECTV notes the ongoing trend of cable-RSN affiliation in areas where the cable operator is or becomes dominant due to clustering.[5] In places like Chicago, San Francisco, Sacramento, Houston, and Los Angeles, cable operators have first used clustering to obtain regional dominance and only subsequently created a new local RSN, which can then be used as a weapon for maintaining or expanding that dominance. DIRECTV both expects this trend to continue and views it as a cause for Commission concern, particularly in light of expiring merger conditions and the cable industry's efforts to scale back program access protections.

I. CLUSTERING CAN INCREASE CABLE OPERATORS' INCENTIVE AND ABILITY TO WITHHOLD OR INCREASE THE PRICE OF RSN PROGRAMMING

For nearly twenty years, the Commission has operated under a congressional directive to prevent dominant cable operators from using affiliated programming for anticompetitive purposes in the multichannel video market.[6] More recently, the Commission has found it

4 *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, ¶ 39 (2010) ("*Terrestrial Loophole Order*") ("[I]n some cases the effect of denying an MVPD the ability to provide certain terrestrially delivered, cable-affiliated programming may be to significantly hinder the MVPD from providing video programming in general, including satellite cable programming and satellite broadcast programming, as well as terrestrially delivered programming. The result of this conduct may be to discourage MVPDs from entering new markets or to limit the ability of MVPDs to provide a competitive alternative to the incumbent cable operator. The reduction in robust competition in the video distribution market that results may allow cable operators to raise rates and to refrain from innovating, thereby adversely impacting consumers."), *aff'd in part and vacated in part sub. nom. Cablevision Systems Corp. v. FCC*, 10-1062, 2011 WL 2277217 (D.C. Cir. June 10, 2011); *id.*,¶ 52 (identifying RSN programming as "one class of programming that, as shown by both Commission precedent and record evidence in this proceeding, is very likely to be both non-replicable and highly valued by consumers").

5 *See Notice* at 4 (seeking comment on the number of RSNs affiliated with a cable operator).

6 47 U.S.C. § 548; *see also, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, Report and Order and Notice of

necessary to take further action to address aspects of media transactions deemed harmful to competition.[7] The cable industry recently suggested that the concerns underlying all of this activity are now "antiquated and moot" because of increased competition.[8] Yet preventing dominant MVPDs from withholding key programming from rivals or from raising the price for that programming by threatening to withhold it remains quite relevant today. Although the cable industry as a whole may have lost *national* market share over the years, the largest cable operators have regained *regional* market share in many areas through clustering, a trend that remains ongoing. For these large cable operators, RSNs remain a potential weapon for anticompetitive activity.

A. Anticompetitive Behavior Is Profitable Only to RSNs Affiliated With Dominant MVPDs.

At their core, the program access regime and related Commission merger orders address the possibility that dominant MVPDs could use affiliated marquee programming to harm competition.[9] As the Commission once described, anticompetitive behavior by cable-affiliated programmers is "a kind of 'investment,' in which an initial loss of profits from programming is

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Proposed Rulemaking, 22 FCC Rcd. 17791, ¶ 78 and Appendix B (2007) ("*2007 Exclusivity Extension Order*"), *aff'd sub nom. Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd. 12124, ¶ 73 (2002) ("*2002 Exclusivity Extension Order*").

7 *See generally, e.g.*, *Comcast-NBCU Order*; *Adelphia Order*.

8 Comments of the National Cable and Telecommunications Association at 4, MB Docket No. 07-269 (filed June 8, 2011) ("NCTA 2011 Video Competition Comments").

9 For example, the Commission has concluded that it was Congressional concern "with market power abuses exercised by cable operators and their affiliated programming suppliers that would deny programming to non-cable technologies" that led to the congressional mandate for program access rules in the Cable Act of 1992. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd. 3105, 3123 (1994). Even the cable industry seems to have recognized this. *See* NCTA 2011 Video Competition Comments at 1-2 (arguing that "Congress enacted a spate of regulatory provisions aimed [in part] at ensuring that cable operators did not abuse [their] single-provider status to the detriment of consumers and program providers").

incurred in order to achieve higher profits later from cable distribution."[10] The effectiveness of that "investment" depends critically on the affiliated MVPD's size, as a programmer affiliated with a non-dominant MVPD cannot profitably withhold programming from its affiliate's rivals. Thus, as the Commission has repeatedly found, "[t]he number of subscribers that a vertically integrated [MVPD] serves is of particular importance in calculating the benefits of withholding programming from rival MVPDs."[11] Without a sufficiently large MVPD subscriber base locked in, the affiliated programmer cannot risk even the possibility of failing to distribute to rivals.[12] This, of course, is one reason why Congress specifically identified affiliation with cable operators (the dominant MVPD) as the basis for its concern over program access.[13] And this is why every Commission economic model addressing program access-related merger issues has focused extensively on MVPD subscribership levels.[14]

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10 *2002 Exclusivity Extension Order*, ¶ 36; see *also, e.g., Comcast-NBCU Order*, Appendix B at ¶ 6 (explaining that the basic model for withholding "assumes that an integrated firm will foreclose a rival from access to an input if the increased profits it earns in the downstream market from foreclosure exceed the losses it incurs from the lost sales of the input to the rival firm").

11 *2002 Exclusivity Extension Order*, ¶ 38; *see also id.* ("The larger the number of subscribers controlled by the vertically integrated cable programmer the larger the benefits of withholding that accrue to that programmer. Other things being equal, then, as the number of subscribers rises, so does the likelihood that withholding would be profitable.").

12 *E.g.*, *2002 Exclusivity Extension Order*, ¶ 38 ("The larger the number of subscribers controlled by the vertically integrated cable programmer the larger the benefits of withholding that accrue to that programmer. Other things being equal, then, as the number of subscribers rises, so does the likelihood that withholding would be profitable.").

13 Chairman Tauzin, the author of the program access provisions, spoke of requiring "the cable monopoly to stop refusing to deal." Cable Television Consumer Protection And Competition Act Of 1992 138 Cong. Rec. H6487 (Thursday, July 23, 1992) ("The Tauzin amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs.").

14 In the *Comcast-NBCU Order*, for example, the Commission's economic analysis stated: "[I]f the vertically integrated firm withholds [the programming in question] from a rival MVPD, it stands to lose advertising revenues and retransmission consent fees from those consumers that remain with the rival MVPD but no longer watch the [programming]." *Comcast-NBCU Order*, Appendix B at ¶ 7. The "costs" of withholding are largely a function of the number of subscribers the MVPD has within the programming footprint. As an MVPD's market share grows, the amount that can be lost through withholding is correspondingly reduced. *Id.* As the Commission noted in the *Comcast-NBCU Order*,

Where a cable operator with a sufficiently large subscriber base and geographic footprint controls key programming such as regional sports, it has the incentive to engage in a variety of anticompetitive strategies in the absence of regulatory restrictions. The Commission is quite familiar with these strategies, which include both permanent and temporary withholding of such programming.[15] They also include the ability to raise prices by threatening to withhold such programming, as well as a variety of discriminatory tactics.[16]

B. Cable Operators Can Maintain and Extend Market Dominance Through Clustering.

The cable industry has recently argued that, in light of increased competition from DBS and other providers, cable operators no longer dominate their markets.[17] Thus, they seem to imply, withholding of and price increases for RSNs is no longer profitable and therefore regulatory safeguards are no longer necessary.[18]

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an MVPD's "footprint," or geographic scope" is also important. *Id.* Appendix B at ¶¶ 13-14 ("In the *News Corp.-Hughes* case, the Commission assumed that a vertically integrated DIRECTV could provide MVPD services to nearly every household in every DMA. This assumption cannot be maintained in analyzing the present transaction since Comcast does not operate in many DMAs and may have a limited geographic footprint in others in which it provides service. As a result, some fraction of foreclosed MVPD customers would not be able to switch to Comcast's cable system.").

15 *See, e.g.*, *Adelphia Order*, ¶¶ 140 *et seq.* (describing uniform price increases, temporary withholding, and "stealth discrimination").

16 *See, e.g., Comcast-NBCU Order*, ¶¶ 26-50, Appendix B at ¶¶ 26-28 (discussing a variety of potential anticompetitive activities).

17 *See, e.g.*, NCTA 2011 Video Competition Comments at 14; Comments of Comcast Corp. at 36-39, MB Docket No. 07-269 (filed June 8, 2011).

18 Arguments made previously by cable operators that RSN programming might not be sufficiently "marquee" to warrant special regulatory oversight have been repeatedly, and recently, rejected. *See, e.g.*, *Adelphia Order*, ¶¶ 145-51. The essential attributes that make RSNs "must have" programming have not changed. Such programming remains real-time, non-substitutable, and non-replicable. *See, e.g., Terrestrial Loophole Order*, ¶ 52, n.205-206 (citing earlier cases). Thus, excluding other factors that might make switching more or less difficult, subscribers should be expected to switch to obtain withheld RSN programming at the same levels today as in the past. The rate at which subscribers switch to obtain particular RSNs, however, can depend on factors other than the desirability of the programming itself. If, for example, a cable operator is the only provider of high-speed broadband service, a subscriber might not switch from that cable operator to obtain even highly desirable programming. *See, e.g., Comcast-NBCU Order*, Appendix B at ¶ 4 (discussing the effect on

This argument, however, ignores the fact that the largest cable operators have actually gained market share within the distribution areas of RSNs over the last five years. Cable operators can engage in "clustering" (the combining of large groups of contiguous cable systems) to obtain or enhance dominance within the footprint of an RSN, even if they lose overall market share to competitors.[19] By increasing the number of subscribers a cable operator controls and the potential subscribers it passes in the relevant geographic area, clustering increases that operator's ability to use affiliated RSN programming anticompetitively.[20] The Commission has specifically noted that its concerns over the use of such anticompetitive strategies "are more pronounced with respect to vertically integrated regional programming distributed within an affiliated cable operator's regional cluster," because the cable operator's higher market share reduces the affiliated programmer's potential losses from foregone distribution.[21]

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switching of "consumer inertia, perhaps due to long term contracts or other sources of switching costs").

19 *See 2002 Exclusivity Extension Order*, ¶ 4 (describing clustering and regional dominance); *Adelphia Order*, ¶ 127.

20 In this regard, because the profitability (and therefore likelihood) of a foreclosure strategy depends upon the rate at which the cable operator can capture switching subscribers, an increase in the size of the cable operator's service area (as reflected in its share of cable subscribers) translates into an increase in its ability to capture subscribers switching from DBS in search of RSN programming. *See* Surreply of DIRECTV, Inc. at 12, MB Docket No. 05-192 (filed Oct. 12, 2005) ("DIRECTV Adelphia Surreply").

21 *2002 Exclusivity Extension Order*, ¶ 54. Even a relatively small increase in a cable operator's market share makes satellite carriers more susceptible to a uniform or discriminatory price increase—perhaps the most likely form of anticompetitive conduct, since it is less susceptible to regulatory observation than outright withholding. Specifically, as a cable operator's footprint (i.e., its share of the cable retail market) expands, it can expect to claim more of the non-cable subscribers who switch MVPDs in order to have access to "must see" RSN programming. Thus, if a satellite carrier refuses to accede to a price increase imposed by a cable/RSN firm with an enhanced footprint, it stands to lose more subscribers in that footprint (and the cable operator stands to gain more). In this scenario, the satellite carrier may lose less by acceding to the price increase than it would by refusing to carry the RSN programming at a higher price. Moreover, once a satellite carrier accedes to the price increase, other cable operators in the RSN footprint no longer have the luxury of refusing carriage without penalty since their subscribers would then have a source for obtaining the RSN programming.

Clustering does more than enable a cable operator to withhold (or raise the price of) affiliated RSN programming. It also facilitates the acquisition of sports rights in the clustered area necessary to create new affiliated RSNs. By increasing their retail market shares within the footprints of existing RSNs, cable operators can entice sports teams to move their games to new, cable-affiliated RSNs by offering a share of monopoly rents. As the Commission found in the *Adelphia Order*:

> To the extent that Applicants believe that their acquisition of cable systems in markets where they do not already own an RSN is unrelated to the incentive or ability to gain sports distribution rights in those markets, we disagree. It is the combination of RSN ownership and MVPD market share that makes anticompetitive strategies possible. Where Comcast's and Time Warner's cable systems, post-transaction, reach a sufficient percentage of any DMA that is home to a sports team, the potential gains from these strategies could be sufficient to justify the costs of employing them, including the cost to acquire the sports programming rights.[22]

Clustering thus can set the stage for a wide variety of strategic behaviors in connection with existing and new RSNs.[23]

II. CONTINUED CLUSTERING BY CABLE OPERATORS WOULD PRESENT A CONCERN IN THE ABSENCE OF REGULATORY SAFEGUARDS.

A. Cable Operators Continue to Obtain RSN Rights by Clustering.

In the *Adelphia* proceeding, DIRECTV noted the potential for cable operators to use clustering as a means of obtaining and abusing RSNs. DIRECTV cited instances in which Comcast had first acquired cable clusters in Chicago, Sacramento, and San Francisco, acquired the rights to local sports programming in order to create RSNs in those areas, and then used the programming to execute a variety of anticompetitive strategies.[24] It warned that, left unchecked,

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[22] *Adelphia Order*, ¶ 128.

[23] Indeed, Comcast is the subject of several antitrust suits based on its clustering of cable systems. *See, e.g.*, *Behrend, et al. v. Comcast Corp., et al.*, No. 03-6604 (E.D. Pa.).

[24] *See, e.g.*, Comments of DIRECTV at 16, MB Docket No. 05-192 (filed July 21, 2005) (describing permanent withholding strategy by Comcast in Philadelphia); *id.* at 20 (describing uniform

the clustering proposed in that transaction would permit further anticompetitive activities. The Commission discussed these and other strategies and adopted safeguards in the *Adelphia Order* designed to protect competing MVPDs against such anticompetitive effects for a period of six years.[25] Nonetheless, the pattern of cable clustering and RSN creation has continued.

Comcast's New Houston RSN. Just after the *Adelphia* transaction was consummated, Time Warner Cable and Comcast dissolved their joint venture in Texas. As a result of that dissolution, Comcast obtained approximately 790,000 video subscribers in the Houston, Texas Designated Market Area ("DMA") and became by far the largest cable operator in that region.[26] Continuing the pattern of RSN creation following clustering, Comcast has announced the creation of Comcast SportsNet Houston, which will carry the National Basketball Association's Houston Rockets starting this fall, and Major League Baseball's Houston Astros starting next summer.[27] The network was formed after the Astros and the Rockets terminated their relationship with FOX, an entity unaffiliated with any MVPD. Although the two teams had reportedly discussed partnering with FOX, DIRECTV, and AT&T, the lure of Comcast's Houston subscriber base—which permitted Comcast to offer guaranteed distribution to a large share of the potential audience in this area—apparently proved too attractive for the teams to pass up.

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overcharge pricing by Comcast's Chicago RSN after clustering); *id.* at 23-24 (describing "stealth discrimination" by Comcast's Sacramento RSN after clustering).

25 *See Adelphia Order*, ¶¶ 297-300 and Appendix B.

26 Comcast, Press Release, *Comcast and Time Warner Announce Completion of Distribution of Assets of Texas and Kansas City Cable Partnership*, Jan. 2, 2007, *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=18,

27 David Barron, *Astros, Rockets finalize deal to launch TV network*, Houston Chronicle, Oct. 29, 2010, *available at* http://www.chron.com/sports/rockets/article/Astros-Rockets-finalize-deal-to-launch-TV-network-1710865.php.

Time Warner Cable's New Los Angeles RSN. As part of the *Adelphia* transaction, Time Warner Cable obtained over 1.6 million Los Angeles subscribers previously served by Adelphia and Comcast.[28] Earlier this year, Time Warner Cable entered into an "unprecedented" 20-year deal to distribute the NBA's Los Angeles Lakers.[29] The new RSN will have exclusive rights to all locally-available Lakers games, and will launch next fall. Significantly, this launch will occur immediately after the program access conditions imposed on Time Warner Cable by the *Adelphia Order* expire.[30]

Time Warner Cable's Proposed Purchase of Insight. Time Warner Cable recently announced that it seeks to purchase Insight Communications.[31] This deal will reportedly gain Time Warner Cable more than 700,000 subscribers in Kentucky, Indiana, and Ohio, which will add to Time Warner Cable's already substantial operations in those states (which itself was partially the result of the *Adelphia* transaction).[32] Many of these cable systems are in the territory of FOX Sports Ohio, home of Major League Baseball's Cincinnati Reds and the National Hockey League's Columbus Blue Jackets. As these teams' affiliations with FOX expire, we fully expect that Time Warner Cable will attempt to affiliate with those teams (as it

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[28] *See Adelphia Order*, ¶ 12.

[29] Dave McMenamin, *Lakers, Time Warner Cable agree to deal*, ESPNLosAngeles.com, Feb. 15, 2011, *available at* http://sports.espn.go.com/los-angeles/nba/news/story?id=6122681.

[30] *Adelphia Order*, Appendix B.1.d (exclusivity), B.7 (arbitration). In each case, the condition is scheduled to expire six years after adoption of the *Order*, or July 13, 2012.

[31] Joe Flint, *Time Warner Cable Solidifies Hold on Midwest by Buying Insight Communications*, L.A. Times, Aug. 16, 2011, *available at* http://articles.latimes.com/2011/aug/16/business/la-fi-ct-twcable-20110816.

[32] *Id.; see also Adelphia Order*, ¶ 12.

did to a lesser degree with the Cleveland Indians several years ago in the formation of the SportsTime Ohio RSN[33]).

B. The Program Access Rules and Related Merger Conditions Have Helped Address Potential Exercises of Market Power Involving Cluster-Related RSN Creation.

In each of these cases, acquisition of RSN programming by the dominant regional MVPD has created (or, in the case of Time Warner Cable's proposed acquisition of Insight, may soon create) the potential for anticompetitive conduct. The ability of cable-affiliated RSNs to engage in such conduct, however, has been substantially constrained by the program access rules and by conditions imposed in merger proceedings. While far from perfect,[34] these restrictions at the very least prevent the most egregious instances of withholding and discrimination.

Any doubts on this score can be erased by contrasting the historical behavior of Comcast SportsNet in Philadelphia with that of RSNs owned by Comcast and similarly dominant cable operators elsewhere. For years, Comcast successfully argued that the prohibition on exclusive arrangements contained in Section 628(c) of the Communications Act did not apply to terrestrially delivered Comcast SportsNet Philadelphia, and that it was therefore free to withhold this key programming from satellite rivals. Based on the evidence and arguments before it at the time, the Commission staff agreed.[35] The Commission subsequently chose not to apply the

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[33] SportsTime Ohio was launched in 2006 by the Cleveland Indians, in cooperation with Time Warner Cable. At the time of launch, Time Warner Cable held an option to purchase a large percentage of the channel after Commission review of the then-ongoing *Adelphia* proceeding, at what appeared to be below-market prices. *See, e.g.*, Letter from William M. Wiltshire to Marlene H. Dortch, MB Docket No. 05-192 (April 13, 2006).

[34] *See, e.g.*, DIRECTV Adelphia Surreply at 15-17 (arguing that the program access rules would not prevent a variety of anticompetitive strategies).

[35] *See, e.g.*, *DIRECTV, Inc. v. Comcast Corp.*, Memorandum Opinion and Order,13 FCC Rcd. 21822, ¶ 32 (1998); *DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 22802, ¶ 13 (1998), *aff'd sub nom EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

Adelphia Order merger conditions to that RSN.[36] As a result, Comcast SportsNet Philadelphia refused to sell to competitors DISH Network and DIRECTV under any conditions and for any price. It did so openly and unapologetically.[37] As the Commission found, DBS penetration in the Philadelphia market was 40 percent lower than it would have been absent such withholding.[38] By using its RSN to weaken its chief competitors, Comcast enjoyed a huge and unfair advantage in Philadelphia.

Likewise, Cox refused to consider making available to rival MVPDs its Channel 4 San Diego, a terrestrially delivered RSN with rights to Major League Baseball's San Diego Padres.[39] The effects in San Diego were similar to those in Philadelphia: the Commission estimated that lack of access to RSN programming caused a 33 percent reduction in the households subscribing to DBS service.[40] More recently, cable-affiliated RSNs have denied the high definition feeds of their programming to rival MVPDs in order to gain an advantage with sports fans.[41] Presented with such evidence demonstrating the significant degree to which the "terrestrial loophole" impaired competition among MVPDs, the Commission finally closed this avenue for circumvention last year.[42]

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[36] *Adelphia Order*, ¶ 163.

[37] *See, e.g.* Letter from Ryan G. Wallach, Willkie, Farr & Gallagher, to Marlene Dortch, MB Docket No. 07-198 (Jan. 13, 2010) (arguing that Comcast's refusal to provide CSN Philadelphia to its rivals served the public interest).

[38] *See Adelphia Order*, ¶ 149 and Appendix D; *2007 Exclusivity Extension Order*, ¶¶ 39-40 and Appendix B.

[39] *See* AT&T Services, Inc. *et al.*, Program Access Complaint, File No. CSR-8066-P (filed Sept. 11, 2008).

[40] *See Adelphia Order*, ¶ 149 and Appendix D; *2007 Exclusivity Extension Order*, ¶¶ 39-40 and Appendix B.

[41] *See* Verizon Telephone Companies *et al*., Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009); AT&T Services, Inc. *et al.*, Program Access and Section 628(b) Complaint, File No. CSR-8196-P (filed Aug. 13, 2009).

[42] *See generally Terrestrial Loophole Order*.

Merger conditions, such as those applied to Comcast and Time Warner Cable in the *Adelphia Order*, have provided an additional safeguard against anticompetitive use of RSN programming by the nation's two largest cable operators for the last five years. Those conditions enhance the program access rules by providing a right to invoke arbitration in the event of a negotiating impasse and to continue carrying the RSN during the pendency of such arbitration. This requirement was recently extended with respect to Comcast,[43] but expires next summer for Time Warner Cable. It will be interesting to see whether the expiration of this condition will lead Time Warner Cable to accelerate its clustering and RSN creation strategy, or to use affiliated RSNs to gain an unfair advantage over MVPD rivals.

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43 *See Comcast-NBCU Order*, ¶¶ 50-54.

According to the cable industry, there is no need for the Commission's program access rules or any similar restrictions on a cable-affiliated programmer's prerogatives. That assertion runs directly counter to the Commission's consistent findings with respect to RSN programming, confirmed as recently as last year. Moreover, the ongoing pattern of cable clustering followed by the acquisition of local sports rights demonstrates that the concerns underlying such regulatory safeguards remain highly relevant. These concerns may become even relevant as cable operators continue to divide up the country in order to concentrate their respective areas of operation.

Respectfully submitted,

/s/

Susan Eid
Executive Vice President,
Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
901 F Street, NW, Suite 600
Washington, DC 20004
(202) 383-6300

William M. Wiltshire
Michael Nilsson
Kristine Laudadio Devine
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

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