

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
)	MB Docket No. 11-128
Media Bureau Seeks Comment on the)	
Regional Sports Network Marketplace)	
)	

COMMENTS OF DISH NETWORK L.L.C.

I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. (“DISH Network”) submits these comments in response to the Media Bureau’s request for input on issues related to regional sports network (“RSN”) access and carriage.¹ In short, the RSN access provisions of the *Adelphia Order*² continue to be relevant and important in limiting the ability of vertically-integrated RSN programming providers to leverage their position to the advantage of affiliated multichannel video programming distributors (“MVPDs”). Independent MVPDs like DISH Network face challenges in obtaining access to RSNs, and the Commission should retain all available tools to ensure that consumers are not harmed. Even with recent developments such as the Comcast/NBCU merger conditions and the elimination of the so-called “terrestrial loophole,” vertically integrated RSNs continue to find ways to leverage their position to the disadvantage of both independent MVPDs and consumers alike. The *Adelphia Order* conditions thus still have a role to play in ensuring

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

² See generally 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*”).

robust MVPD competition, and the Commission should extend them beyond their current 2012 sunset.

II. INDEPENDENT MVPDs SUCH AS DISH NETWORK CONTINUE TO FACE CHALLENGES IN ACCESSING VERTICALLY-INTEGRATED RSNs

When it established the RSN access requirements in the *Adelphia Order*, the Commission recognized the dangers to the MVPD market posed by vertical integration between video programming providers and their distributors.³ The Commission affirmed this view last year when it noted that “[c]able operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market.”⁴ And this anti-competitive incentive persists, as the Commission recognized just this year when it ordered RSNs affiliated with the combined Comcast-NBCU entity to comply with *Adelphia*-like program access conditions.⁵

³ See *id.* ¶ 122 (“We find that the transactions would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called ‘stealth discrimination,’ or by permanently or temporarily withholding programming.”).

⁴ Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd. 746, 783-84 ¶ 52 (2010) (“*Terrestrial Program Access Order*”), *aff’d in part and vacated in part sub. nom. Cablevision Systems Corp. et al. v. FCC*, No. 10-1062 et al., ___ F.3d ___ (D.C. Cir. June 10, 2011).

⁵ Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4254 ¶ 37 (2011) (“*Comcast-NBCU Order*”) (“[T]he record evidence supports a finding that without Comcast-NBCU’s suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast, substantially harming those MVPDs that compete with Comcast in video distribution.”).

Today, RSN programming continues to be “must-have” and has been characterized by the Commission as “non-replicable and highly valued by consumers.”⁶ Without it, MVPDs face a significant competitive disadvantage. Although marquee sporting events continue to have a substantial and expanding draw nationwide, access to one’s local sports franchise has a significant impact within a local market. For example, the Philadelphia Phillies baseball team averaged a 7.2 rating in for the first half of the 2010 season on Comcast SportsNet Philadelphia, while the Minnesota Twins and the St. Louis Cardinals averaged ratings of 7.85 and 9.7, respectively, on their local RSNs for the same period.⁷ The Commission recognized the central role that RSNs play in a household’s decision to subscribe to a particular MVPD when it recently found that the loss of “marquee programming” such as RSN “would harm rival video distributors,” and that “such programming is important to . . . competitors and without good substitutes from other sources.”⁸ Because of the central role that RSNs play in attracting and retaining subscribers, lack of access to RSNs can undermine an MVPD’s ability to compete in key markets.

As DISH Network has experienced time and again,⁹ vertically integrated cable operators withhold key products like RSNs in order to undermine DBS competition. Prior to the

⁶ See *Terrestrial Program Access Order*, 25 FCC Rcd. ¶ 52 (“Other evidence supports the conclusion that RSNs typically offer non-replicable content and are considered ‘must have’ programming by MVPDs.”).

⁷ John Ourand, *Red Sox Lose RSN Ratings Lead*, SportsBusinessDaily (July 26, 2010), available at <http://www.sportsbusinessdaily.com/journal/issues/2010/07/20100726> (last accessed Sept. 9, 2011).

⁸ *Comcast-NBCU Order*, 26 FCC Rcd. ¶ 36.

⁹ See, e.g., DISH Network Corporation and EchoStar Corporation, Petition to Deny at 14-15, 31-33, filed in Applications of General Electric Co. and Comcast Corp. for Consent to Transfer of Control of Licenses, MB Docket No. 10-56 (filed June 21, 2010); DISH Network L.L.C., Reply to Petitions to Deny and Response to Comments at 8-11, filed in Applications of General Electric Co. and Comcast Corp. for Consent to Transfer of Control of Licenses, MB Docket No. 10-56 (file Aug. 19, 2010).

Commission’s recent action to close the terrestrial loophole, for example, Comcast deliberately and systematically withheld key sports programming from DISH Network, DIRECTV, and other MVPDs. In the *Terrestrial Program Access Order*, the Commission cited its own recent analysis that concluded that “Comcast’s withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been,” and that “Cox’s withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than it otherwise would have been.”¹⁰

III. THE ADELPHIA ORDER CONDITIONS CONTINUE TO PLAY AN IMPORTANT ROLE IN PROMOTING COMPETITION AMONG MVPDs

A. The *Adelphia Order* Conditions Remain Relevant Even After the Comcast/NBCU Merger

Despite recent efforts to address access to RSNs through the *Terrestrial Program Access Order* and the conditions placed on Comcast-NBCU, the *Adelphia Order* conditions – and in particular the arbitration remedy – remain relevant and important tools in independent MVPDs’ ongoing efforts to remain competitive. Although the Comcast/NBCU merger order adopted a new set of RSN-related conditions that apply to Comcast and its affiliated RSNs, the *Adelphia Order* conditions continue to apply to Time Warner Cable (“TWC”). TWC is currently affiliated with two RSNs in New York, one of which has rights to carry the New York Mets, and is seeking to expand its reach into regional sports. Most recently, TWC inked a twenty-year deal with the Los Angeles Lakers for exclusive TV rights beginning next season and is creating two

¹⁰ See *Terrestrial Program Access Order*, 25 FCC Rcd. ¶ 32.

RSNs specifically to carry those games.¹¹ As Melinda Witmer, the Executive Vice President and Chief Programming Officer of TWC, reported to the *Los Angeles Times*, the company is “looking at all available sports in the marketplace” so that TWC can “control [its own] economic destiny.”¹² TWC’s actions to enter the regional sports programming market confirm the contribution that access to RSNs plays in an MVPD’s competitiveness. The *Adelphia Order* conditions could offer important tools to ensure robust competition among MVPDs in these markets in the future.

B. The *Adelphia Order* Conditions Go Beyond the General Program Access Requirements

For RSNs subject to the *Adelphia Order* conditions, an aggrieved MVPD can elect commercial arbitration of its dispute. This is not the case with vertically integrated RSNs not subject to special conditions. Rather, under the standard program access rules, aggrieved MVPDs must pursue a complaint with the Commission.¹³ In choosing to provide MVPDs with a commercial arbitration remedy, the Commission recognized the unique advantage of the arbitration process in allowing parties to resolve their dispute in a comparatively expeditious fashion.¹⁴ The arbitration process is subject to stringent timelines, including set timelines for Commission review of the arbitrator’s order.¹⁵ The relative certainty of a decision rendered within a timeframe at least approximating the commercial negotiation period can both deter potential disputes and promise reasonable redress of injuries.

¹¹ Joe Flint, *Time Warner Cable, Lakers Strike 20-Year Deal*, *Los Angeles Times*, Feb. 12, 2011, available at <http://articles.latimes.com/2011/feb/14/sports/la-sp-0215-lakers-time-warner-20110215> (last accessed Sept. 9, 2011).

¹² *Id.*

¹³ See 47 C.F.R. § 76.1003.

¹⁴ *Adelphia Order*, 21 FCC Rcd. at n.532.

¹⁵ See *id.* at Appendix B.

Just as important, the *Adelphia Order* conditions capture a broader swath of anti-competitive behavior than do the program access rules, even as modified under by the *Terrestrial Program Access Order*. For RSNs subject to the *Adelphia Order* conditions, exclusive contracts, discrimination, and undue influence involving the relevant RSNs are *per se* prohibited without the need for any showing as to whether the purpose or effect of the unfair act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming.¹⁶ In contrast, for RSNs subject only to the *Terrestrial Program Access Order*, such behavior is prohibited only if the complainant can show that the behavior has the purpose or effect of hindering the delivery of programming. Although complaints involving terrestrially-delivered RSNs under the *Terrestrial Program Access Order* enjoy a presumption that such acts hinder the delivery of programming, the presumption can be rebutted, and therefore there is no *per se* prohibition on any particular conduct.¹⁷

IV. CONCLUSION

For the foregoing reasons, DISH Network urges the Commission to extend the *Adelphia Order* program access conditions for RSNs beyond their currently scheduled 2012 sunset.

Respectfully submitted,

/s/

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¹⁶ *Id.*

¹⁷ See *Terrestrial Program Access Order*, 25 FCC Rcd. ¶ 46.