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

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
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.	)	MB Docket No. 05-192

JOINT COMMENTS OF INTERSTATE COMMUNICATIONS, OMNITEL COMMUNICATIONS, COMMUNICATIONS 1 NETWORK, INC., FARMERS MUTUAL TELEPHONE COOP OF SHELLSBURG, HUXLEY COMMUNICATIONS COOPERATIVE, HOSPERS TELEPHONE COMPANY, PREMIER COMMUNICATIONS, AND MARNE & ELK HORN TELEPHONE COMPANY

The following Joint Comments are hereby submitted on behalf of Interstate Communications, OmniTel Communications, Communications 1 Network, Inc., Farmers Mutual Telephone Coop of Shellsburg, Huxley Communications Cooperative, Hospers Telephone Company, Premier Communications, and Marne & Elk Horn Telephone Company (together, the "Joint Commenters") in response to the Federal Communications Commission's ("FCC" or "Commission") March 20, 2012 *Notice of Proposed Rulemaking* seeking comment on (i) whether to retain, sunset, or relax the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming ("Exclusive Contract Prohibition" or "ECP"); and (ii) potential revisions to the Commission's program access rules to better address alleged violations, including potentially discriminatory volume discounts and uniform price increases.[1] The Joint Commenters are all independent communications companies and multichannel video programming distributors (MVPDs) with subscribers in rural communities throughout Iowa. As discussed further herein, the Joint Commenters support the retention of the Exclusive Contract Prohibition for an additional five years and vigorously support the Commission's initiative to seek improvements to its program access rules, which have remained largely unchanged since their adoption in 1993, to address potentially discriminatory practices and other violations. In particular, the Joint Commenters maintain that the Commission's program access rules be modified to support a more open and transparent environment in which small and unaffiliated MVPDs may negotiate reasonable, market-based programming prices.

I. The Commission Should Retain the Exclusive Contract Prohibition for An Additional Five Years

The Commission must not allow the current prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming to sunset and should extend the existing rules for five additional years to afford continued protection to multichannel video programming distributors ("MVPDs") that are unaffiliated with programming suppliers. Current conditions in the video marketplace continue to stack the deck against small and rural MVPDs in favor of large MVPDs and their affiliated vertically integrated program suppliers, and the protections set forth in the exclusive contract prohibition are still needed. When the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") was enacted in 1992, Congress found that the increased horizontal concentration of cable operators combined with extensive vertical integration was creating an imbalance of power between cable operators and program vendors

[1] *Revision of the Commission's Program Access Rules et al.*, MB Docket No. 12-68, Notice of Proposed Rulemaking, FCC 12-30 (rel. March 20, 2012) ("*Program Access NPRM*").

and between incumbent cable operators and their multichannel competitors. Congress rightfully concluded that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, such as other cable systems, and satellite providers, and wireless cable operators. Today, this imbalance of power remains, a fact underscored by the Commission's decision to close the so-called "terrestrial loophole" and extend program access protections (albeit on a case-by-case basis) to terrestrially-delivered programming.[2]

The current MVPD marketplace has indeed changed since the 1992 enactment of the Cable Act. However, these changes have not sufficiently served to preserve and protect competition and diversity in the distribution of programming. For instance, as the Commission recognized, online distributors of video programming have emerged as a potential competitive threat to traditional MVPD service.[3] Indeed, Netflix, Inc., one of the most prominent online video programming distributors that only just launched its streaming video service in 2007, recently reported 23.4 million subscribers to its domestic streaming video service.[4] Nevertheless, the Commission also had concluded that consumers today do not perceive online distributors as a substitute for traditional MVPD service also noted that online distributors lack the similar array

---

[2] *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, FCC 10-17 (released January 20, 2010) ("Terrestrial Loophole Order"). This decision was subsequently affirmed in large part on appeal. *Cablevision Systems Corporation v. Federal Communications Commission*, No. 10-1062, 2011 U.S. App. LEXIS 11697 (D.C. Cir. June 10, 2011).

[3] *Program Access NPRM* at ¶ 25 *citing Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast/NBCU Order*").

[4] Netflix, Inc., Form 10-Q Quarterly Report, Securities and Exchange Commission (filed April 27, 2012) *available at* http://files.shareholder.com/downloads/NFLX/1933286351x0xS1445305-12-1242/1065280/filing.pdf.

of programming needed to fully compete against traditional MVPDs.[5] The Joint Commenters agree that competition in the MVPD market has not sufficiently grown to justify sunset of the ECP and the protections it affords.

Though MVPD subscribers are increasingly less reliant on cable operators for programming, the four largest vertically integrated cable MSOs retain the lion's share of MVPD subscribers and this share is even greater than it was in 2002 when the Commission first granted its first five year extension of exclusive contract prohibition. Specifically, data provided in the Appendix A of the NPRM indicates that the numbers and percentages of MVPD subscribers attributable to cable operators were 68.98 million (78.11%) at the time of the 2002 ECP extension[6] and have since declined to 58.3 million (58.5%) as of September 2011.[7] However, as of September 2011, the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs (*i.e.*, Comcast, Time Warner, Cox and Cablevision) is 42.7%.[8] This percentage is higher than the 34% of subscribers receiving their video programming from one of the four largest vertically integrated cable MSOs at the time of the 2002 ECP extension.[9]

---

[5] *Program Access NPRM* at ¶ 25 *citing Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4269, ¶ 79 and 4272-73, ¶ 86 (2011) ("*Comcast/NBCU Order*").

[6] *See* Appendix A to *Program Access NPRM citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244 (2002) (containing data as of June 2001) ("*8th Annual Report*")).

[7] *See* Appendix A to *Program Access NPRM citing* SNL Kagan, U. S. Cable Subscriber Highlights, Sept. 30, 2011.

[8] *See Id*.

[9] *See* Appendix A to *Program Access NPRM citing 8th Annual Report*.

Small and rural MVPDs that offer satellite cable programming or satellite broadcast programming have a continuing need for the protections offered by the exclusive contract prohibition in Section 628(c)(2)(D) of the Act. Small and rural MVPDs that offer terrestrial programming already lack the benefit of *per se* prohibitions of unfair practices and, as further described below, the complaint process provided in the Commission's program access rules offers deficient protections for such providers. The sudden removal of the Exclusive Contract Prohibition's presumption of unfairness would merely wind the clock back to the pre-Cable Act market and would be devastating to the competitiveness of small and rural MVPDs.

II. Discriminatory Volume Discounts Should be Prohibited by the Program Access Rules to Level the Playing Field for Unaffiliated MVPDs

Pursuant to Section 76.1002(b)(3) of the Commission's rules, vendors are prohibited from discrimination in the prices, terms, and conditions of sale or delivery of programming, but vendors are allowed to establish different prices, terms, and conditions that "take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[10] Small MVPDs enjoy no benefit from volume discounts because of their small subscribership numbers. Moreover, small MVPDs and indeed their subscribers are harmed by the inherently discriminatory nature of volume discounts as such discounts are currently applied. In the Commission's recent proceeding on the Regional Sports Network Marketplace (which itself presents a microcosmic view of competition problems afflicting the MVPD market), the American Cable Association ("ACA") referenced reports vis-à-vis its members that smaller cable operators were paying

[10] *See* 47 C.F.R. § Section 76.1002(b)(3).

approximately 30% more for national cable programming than the largest MVPDs.[11] Unlike the largest cable operators and other large video program distributors, small and unaffiliated MVPDs have no leverage in negotiating carriage agreements and are strong-armed into arrangements that require them to pay substantially higher prices than their largest competitors. Programming agreements are essentially offered to small MVPDs on a "take-it-or-leave-it" basis. This process results in unreasonably high prices for small and unaffiliated MVPDs, which in turn harms their subscribers, who often are residents of rural communities.

The Commission's rules contemplate a program access complaint process to challenge a vendor's application of discriminatory pricing. However, small MVPDs are disinclined to pursue such a costly and burdensome process while at the same time jeopardizing the continued carriage of programming for their subscribers. Even if small MPVDs endeavored to file a complaint as their primary channel for recourse, complaint proceedings can remain pending for years without resolution.[12] Because the details of programming deals are shrouded behind non-disclosure clauses imposed by vendors, there is a dearth of publicly available information and systematic data regarding the economic justification supporting and the need for volume discounts in the marketplace. This lack of information frustrates efforts by small MVPDs to conduct reasonable carriage negotiations with vendors, let alone be able to establish *prima facie* cases of discrimination.

---

[11] *See The Regional Sport Network Marketplace*, MB Docket No. 11-128, Comments of the American Cable Association, 8 (September 9, 2011) ("*ACA Comments*").

[12] *See The Regional Sport Network Marketplace*, MB Docket No. 11-128, Reply Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies; The National Telecommunications Cooperative Association; The Independent Telephone and Telecommunications Alliance; The Western Telecommunications Alliance; and the Rural Independent Competitive Alliance, 3 (September 25, 2011).

Worse yet, programming vendors would simply produce a standard price sheet with lower per subscriber rates at increasingly higher number of subscribers served by an MVPD and claim that such pricing was non-discriminatory because the same price sheet is offered to all MVPDs regardless of size. Without Commission guidance on this issue, vendors would not even be required to provide a strict cost justification for the structure of such standard volume-related factors as long as they identify any "non-cost economic benefits related to increased viewership."[13]

In practice, vertically-integrated programmers will always be able to claim that there is a volume-related justification to charge smaller competitors discriminatory prices by claiming that there are benefits attributable to attracting MVPDs with a large enough number of subscribers to support the cost of producing, launching and maintaining the programing service. While there is some truth in this, programming is somewhat different than other goods and services in that the purchase and consumption of programming by one or more MVPDs does not diminish the amount of the same programming available for purchase by others or the ability of the programmer to sell the same product to an unlimited number of buyers. Thus, once program production costs are covered by the sale of programming to larger (and often affiliated) MVPDs, programmers are free to force unaffiliated smaller MVPDs to pay higher prices for the same programming and effectively subsidize the profits the programmer forgoes in its pricing to large MVPDs. This result is inherently discriminatory against small MVPDs and their customers, despite the existence of any "standard" uniformly applied price sheet.

[13] 47 C.F.R. § 76.1002(b)(3) .

The Joint Commenters agree that the lack of publicly available systematic data about the degree of volume discounts in the marketplace and the lack of any real requirement that would force programmers to justify charging smaller MVPDs so much more than larger MVPDs for a product which can be resold an unlimited number of times without any diminution in supply or appreciable increase in cost make the Commission's existing program access complaint procedures an inadequate vehicle for dealing with the problem of discriminatory pricing. The Joint Commenters ask the Commission to consider amending its program access rules to place the burden on program suppliers to justify charging small MVPDs substantially higher per subscriber rates than their larger counterparts for exactly the same product.

III. Conclusion

For the foregoing reasons, the Commission should extend the Exclusive Contract Prohibition for an additional five years and ensure that small MPVDs are afforded the protections of *per se* prohibitions of unfair practices. Additionally, the Joint Commenters urge the Commission to modify its program access rules permitting volume discounts by requiring programmers to fully disclose their discounting practices and fully justify rate structures that charge small MVPDs higher per subscriber rates than those charged to large cable operators for the same product.

Respectfully submitted,

INTERSTATE COMMUNICATIONS
OMNITEL COMMUNICATIONS
COMMUNICATIONS 1 NETWORK
FARMERS MUTUAL TELEPHONE COOP OF SHELLSBURG
HUXLEY COMMUNICATIONS COOPERATIVE
HOSPERS TELEPHONE COMPANY
PREMIER COMMUNICATIONS
MARNE & ELK HORN TELEPHONE COMPANY

By: */s/ Howard S. Shapiro*

Howard S. Shapiro
Robert A. Silverman
Bennet & Bennet, PLLC
6124 MacArthur Boulevard
Bethesda, MD 20816
(202) 371-1500

Its Attorneys

Dated: June 22, 2012