Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

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 05-192

COMMENTS OF VERIZON

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Given the unique attributes of the video programming marketplace — namely, the lingering effects of cable incumbents' acquisition of critical programming at a time when they had exclusive franchises and before competition emerged, together with the fact that they have continued through the present to use their control over that critical and non-replicable programming to hinder competitors — the Commission should extend the ban on exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers.[2]

To be sure, the video marketplace has changed substantially over the last decade, with the emergence of competing wireline video distributors and a range of innovative, new over-the-top offerings. And, as a general rule, regulations should recede when competition develops. But the program access requirements and the video programming marketplace present a unique case.

[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc., and Verizon Wireless (collectively, "Verizon").

[2] *See* 47 C.F.R. § 76.1002(c)(1).

Because cable operators engaged in extensive vertical integration and obtained control of critical programming before the advent of meaningful competition, they continue to wield control over programming networks that are critical to effective competition in the multichannel video programming distributor (MVPD) marketplace. (They also continue to benefit from other advantages that linger from the time of exclusive franchises, including their ability to obtain more favorable terms even for unaffiliated programming.) Today, cable operators remain affiliated with some of the most popular national programming networks and roughly half of the regional sports networks (RSNs) broadcasting today. As recent cases before the Commission have shown, cable operators in fact have continued to use their control of critical and non-replicable programming to hinder competitors. As a result, the key facts that demonstrate the need for the exclusive contract prohibition have continued since the Commission last extended that prohibition. It would be well-justified in extending the prohibition, as a whole, once again.

At a minimum, the Commission should extend the prohibition on exclusive contracts for non-replicable programming — including, especially, regional sports programming. Both the Commission and the D.C. Circuit have long recognized that effective competition in the MVPD marketplace requires access to must-have regional sports programming. In the eyes of consumers, there is no substitute for the live broadcasts of popular local teams. For example, surveys have shown that more than 70 percent of pay television viewers with access to regional sports programming in high definition would be unlikely to switch to another MVPD that did not offer that programming.[3] More generally, surveys have shown that 54 percent of all viewers — and 77 percent of sports fans — indicated that the availability of regional sports channels in HD

[3] *See* Order, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, 26 FCC Rcd 13,145, ¶ 47 & n.224 (MB 2011) ("*Verizon 2011 Bureau Order*"); *see also* Verizon Reply Ex. 1 (Stella Decl.), Ex. A at 6, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, File No. CSR-8185-P (Oct. 22, 2010) ("Verizon 2010 Reply, Stella Decl.").

was an important factor in any decision whether to switch providers.[4] Yet cable operators continue to control roughly half of the RSN marketplace, and they have a demonstrated track record of continuing to leverage affiliated RSNs to hinder competition through the present.

Verizon and other wireline video providers have opened up new avenues of competition in the MVPD marketplace. But competition from these new entrants has developed within a framework of Commission rules that prevent cable operators from using their control of critical and non-replicable programming to hinder competition through exclusive contracts with affiliated programmers. As illustrated by the events leading to Verizon's successful program access dispute against Cablevision and its affiliated programming network MSG, cable operators continue to withhold programming as a means of discouraging competition.[5] For these reasons, the Commission should extend the exclusive contract prohibition in its entirety and, at an absolute minimum, should extend it as applied to non-replicable programming such as RSNs.

DISCUSSION

I. THE COMMISSION SHOULD EXTEND THE EXCLUSIVE CONTRACT PROHIBITION

Congress directed the Commission in 1992 to enact the exclusive contract prohibition because a unique combination of historical factors had left incumbent cable operators with an almost unassailable competitive position in the MVPD marketplace. For decades, cable operators enjoyed monopoly status as a result of exclusive local franchise agreements. This allowed cable operators to leverage their position in the video marketplace to obtain control over video programming, including the popular video programming that a would-be competitor would need in order to field a meaningful competitive offering to consumers. Even where cable

[4] *See* Verizon 2010 Reply, Stella Decl., Ex. A at 9.

[5] *See generally Verizon 2011 Bureau Order*.

companies could not acquire control over the programming, they could use their monopoly status to demand favorable terms from programmers. By 1990, the Commission found that increasing vertical integration between cable operators and programmers had effectively foreclosed competition in the MVPD marketplace.[6] Vertically integrated cable operators had gained the ability to deny competitors access to cable programming, and there was "considerable anecdotal evidence that some have used this ability in anticompetitive ways."[7]

Congress targeted this unique legacy in the 1992 Cable Act.[8] As the Commission has recognized, Congress was motivated out of a "deep concern with the cable industry's 'stranglehold' over programming," which created "unfair hurdles" for new competitors "attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public."[9] In order to prevent cable operators from misusing their unique status by virtue of their control of critical programming to hinder competition, Congress required the Commission to enact regulations directed at "unfair methods of competition" by cable operators and their programming affiliates.[10] Among those regulations is the exclusive contract prohibition, which was focused specifically on preventing

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[6] *See* Report, *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, ¶¶ 13, 77 (1990).

[7] *Id.* ¶ 13.

[8] *See* 47 U.S.C. § 548; *see generally* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[9] Second Report and Order, *Implementation of Section 302 of the Telecommunications Act of 1996*; *Open Video Systems*, 11 FCC Rcd 18,223, ¶ 189 (1996) (quoting 138 Cong. Rec. H6540 (daily ed. July 23, 1992) (statement of Rep. Eckart)).

[10] *See* 47 U.S.C. § 548(b). The mandate also extends to satellite broadcast programming vendors, which are not relevant here. *See id.*

cable operators from using the control they obtained over critical programming prior to the emergence of competition to hinder competitors.[11]

Cable operators today continue to exert extensive control over critical video programming, building upon a legacy of vertical integration that predates the rise of competition. Cable operators are now affiliated with 115 national programming networks.[12] These cable-affiliated programming networks, moreover, account for some of the most popular and significant programming in the marketplace, including seven of the top 20 networks, ranked by subscribership or by prime time ratings.[13] Cable operators are also vertically integrated with 57 RSNs — meaning that they control roughly half of all RSN channels.[14] The Commission has recognized that, if "cable-affiliated programming continues to represent some of the most popular and significant programming available today," cable operators have the ability to deny access to competitive MVPDs and "adversely affect competition in the video distribution market."[15] Cable operators also continue to benefit from favorable rates and terms from both affiliated and unaffiliated programmers, as a legacy of their former monopoly status. It is clear that the unique historical considerations that motivated Congress to mandate the exclusive contract prohibition in the first place continue, and the rule remains necessary at this time to provide some level of protection to nascent video competitors given the lingering effects of this legacy on the programming marketplace.

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[11] *See id.* § 548(c)(2)(D).

[12] *See* Notice of Proposed Rulemaking, *Revision of the Commission's Program Access Rules, et. al*, 27 FCC Rcd 3413, at App. B (2012) ("NPRM").

[13] *Id.*

[14] *Id.* at App. C.

[15] Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17,791, ¶ 37 (2007) ("*2007 Program Access Order*").

II. THE COMPETITIVE SIGNIFICANCE OF NON-REPLICABLE PROGRAMMING SUCH AS REGIONAL SPORTS WARRANTS AT LEAST PARTIAL EXTENSION OF THE EXCLUSIVE CONTRACT PROHIBITION

At a minimum, the Commission should preserve the exclusive contract prohibition for non-replicable programming, and in particular for regional sports programming. As the Commission has stated, "cable programming — be it news, drama, sports, music, or children's programming — is not akin to so many widgets."[16] Instead, there is a "continuum of vertically integrated programming," which includes programs for which there are "imperfect substitutes" and programs for which there are "no close substitutes at all."[17] In particular, the Commission has long recognized that live, local college and professional sports programming is highly valued by consumers, critical to competition, and impossible to replicate.[18]

Access to non-replicable programming — and regional sports programming in particular — remains essential to a competitive MVPD marketplace. As the D.C. Circuit observed in

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[16] Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*; *Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*; *Sunset of Exclusive Contract Prohibition*, ¶ 33 (2002).

[17] *Id.*

[18] *See, e.g., id.*, ¶ 32 (noting importance of "sought-after and non-duplicable regional sports programming"); Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, 21 FCC Rcd 8203, ¶ 189 (2006) ("*Adelphia Order*") ("[T]he programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated."); Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, ¶ 133 (2004) ("*Hughes Order*") (stating that "the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game"); First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 52 (2010) ("*2010 Program Access Order*") (identifying RSNs 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").

Cablevision II, there are "compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market."[19] For consumers, "there is no good substitute for watching their local and/or favorite team play an important game,"[20] and the Commission has found "substantial evidence that a large number of consumers will refuse to purchase [a competitive MVPD's] service if the provider cannot offer an RSN."[21] The D.C. Circuit similarly expressed "doubt that Philadelphia baseball fans would switch from cable to an alternative MVPD if doing so would mean they could no longer watch Roy Halladay, Cliff Lee, Roy Oswalt, and Cole Hamels take the mound."[22]

Survey evidence that Verizon submitted in its recent program access dispute with Cablevision and MSG reveal the same strong consumer preferences to watch their hometown professional sports teams. For example, one survey found that more than 70 percent of pay television subscribers in the New York and Buffalo metropolitan areas with access to MSG and MSG+ channels in HD — which show games of the Knicks, Rangers, Sabres, and other local teams —would not be likely to switch to a competing MVPD that lacked that programming.[23] Other survey evidence showed that 54 percent of all viewers — and 77 percent of sports fans —

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[19] *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) ("*Cablevision II*").

[20] *Hughes Order*, ¶ 133.

[21] *Adelphia Order*, ¶ 151.

[22] *Cablevision II*, 649 F.3d at 708.

[23] *See Verizon 2011 Bureau Order*, ¶ 47 & n.224; *see also* Verizon 2010 Reply, Stella Decl., Ex. A at 6, 9.

identified the availability of regional sports channels in HD as an important factor in any decision about switching providers.[24]

Other evidence submitted in those proceedings further confirmed that RSNs offer must-have, non-replicable programming, and that exclusive contracts undermine competition among MVPDs. For example, the record showed that Cablevision focused much of its advertising on the fact that it had access to all of the local teams' games in HD, but Verizon at the time did not.[25] Cablevision's decision to spend what is likely millions of dollars in marketing to focus on this singular difference leaves no doubt that Cablevision considers such programming valuable enough to influence consumers' choice of video provider. Likewise, industry analysts recognize that cable television packages missing premium HD sports networks "will ultimately appeal to a minority of households," and the majority of households that "remain deeply loyal to sports . . . will likely shape the dynamic of competition going forward" by demanding access to these networks.[26] A Cablevision top executive made the same point to market analysts, identifying the company's "refusal to sell MSG HD and MSG+ HD to Verizon [as] one factor that would not only impede Verizon from obtaining new subscribers, but would also cause Verizon to lose subscribers it had already gained."[27]

Moreover, while an MVPD might be able to replicate some other forms of regional programming, such as local news or community programming, it would be practically impossible

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[24] *See* Verizon 2010 Reply, Stella Decl., Ex. A at 9.

[25] *See* Memorandum Opinion and Order, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, 26 FCC Rcd 15,848, ¶ 18 (2011) ("*Verizon 2011 FCC Order*"); *see also Verizon 2011 Bureau Order* ¶ 53.

[26] Nomura Equity Research, US Telecom, Media & Internet, *T.M.I. – Paging Miss Cleo*, Sept. 30, 2011, at 82.

[27] *Verizon 2011 Bureau Order* ¶ 25.

for an MVPD to create its own sports league.[28] Indeed, as the Commission has noted, "no amount of investment can duplicate the unique attributes of such programming."[29] An MVPD that has been denied access to RSN programming "has no ability to formulate a viable competitive response . . . to compete for the many subscribers that highly value these networks."[30]

Cable operators continue to control a substantial share of regional sports programming — including, in many cases, interests that were acquired before the advent of meaningful competition. Cable operators are now affiliated with 57 of the 109 RSNs nationwide, accounting for more than half of the RSN marketplace.[31] And vertically integrated cable operators continue to add to their control of non-replicable programming. For example, Time Warner Cable ("Time Warner") recently acquired the rights to televise L.A. Lakers games, which have been carried by an unaffiliated RSN, Fox Sports West.[32] Time Warner plans to launch the two new vertically integrated RSNs in October.[33]

Cable operators have a long history that continues through the present day demonstrating that they will in fact use their control over RSN programming to harm competitors when they perceive that they can get away with it.[34] The disputes the Commission recently resolved in favor of Verizon and AT&T, and against Cablevision and MSG, are only the latest examples of

[28] *See 2010 Program Access Order*, ¶ 51 n.200.

[29] *Verizon 2011 FCC Order*, ¶ 32 (internal quotations omitted); *see also Verizon 2011 Bureau Order* ¶ 29 (internal quotations omitted).

[30] *Id.*

[31] *See* NPRM, at App. C.

[32] *See* Joe Flint, Time Warner Cable steps up its game with 2 new sports channels, L.A. Times, at 1 (May 10, 2012).

[33] *See id.*

[34] *See 2010 Program Access Order* ¶ 30.

cable operators and vertically integrated programmers attempting to use their power over critical programming to exclude competition, and they confirm that these parties would continue to pursue exclusionary strategies if the Commission were to discontinue the exclusive contract prohibition.[35]

III. THE COMMISSION CAN EXTEND THE PROHIBITION ON EXCLUSIVE CONTRACTS CONSISTENT WITH D.C. CIRCUIT PRECEDENT

The Commission can extend the prohibition — whether for all programming or limited to non-replicable programming such as regional sports programming — consistent with the D.C. Circuit's decisions in *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("*Cablevision I*"), and *Cablevision II*.

In *Cablevision I*, in which the court upheld the Commission's 2007 extension of the exclusivity prohibition, the court recognized that, although the MVPD marketplace had grown more diverse since passage of the 1992 Cable Act, "the transformation present[ed] a mixed picture."[36] The court noted that cable operators were "still vertically integrated with six of the top 20 national networks, some of the most popular premium networks, and almost half of all regional sports networks."[37] Based on these factors, the court deferred to the Commission's conclusion that "the ability and incentive for vertically integrated cable companies to withhold 'must-have' programming remains substantial enough to require the further extension of the exclusivity prohibition."[38]

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[35] *See id.*; *see also 2007 Program Access Order*, ¶ 51 (noting that examples pertaining to terrestrially delivered programming "are . . . significant because they demonstrate that, absent a prohibition, cable-affiliated programmers will engage in withholding of programming from competitive MVPDs")

[36] *Cablevision I*, 597 F.3d at 1314.

[37] *Id.*

[38] *Id.*

The key factors the court relied upon in *Cablevision I* remain practically unchanged today: cable operators are vertically integrated with *seven* of the top 20 national networks, and control roughly half of all regional sports networks.[39] Just as in 2007, data showing that cable operators continue to be in a position to handicap competitors and deny consumers meaningful competitive choices by denying access to popular programming support an extension of the exclusive contract prohibition.[40] In fact, history shows that, where cable incumbents have perceived that they are permitted to withhold such programming — such as in the case of terrestrially-delivered RSNs, before the Commission reiterated that its rules apply in that context — they will do so.

More recently, *Cablevision II* affirmed the Commission's recognition that the withholding of valuable programming by cable operators, even where that programming happens to be delivered terrestrially, may violate Section 628(b) of the Act. Although *Cablevision II* did not directly address the exclusive contract prohibition, the court reaffirmed its conclusion from *Cablevision I* that the record justified continuing program access requirements for cable-affiliated programming.[41] Among other things, *Cablevision II* rejected a First Amendment challenge to the Commission's program access regulations — even under intermediate scrutiny, a standard that the court described as "substantially more demanding than arbitrary and

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[39] *See* NPRM at Apps. A, B, C.

[40] Nothing in *Cablevision I* indicates that the D.C. Circuit would refuse to defer to the Commission's judgment on the basis of such evidence. Although it is true that the court suggested, in *dicta*, that the Commission might "soon" allow the exclusive contract prohibition to sunset, this statement was couched in express conditional terms — applying only "*if* the market continues to evolve at . . . a rapid pace." *Cablevision I*, 597 F.3d at 1314 (emphasis added). The marketplace has seen many changes since 2007, but the key facts relevant to retaining the rule have not changed.

[41] *Cablevision II*, 649 F.3d at 712-13.

capricious review of agency action."[42] Relying upon the court's earlier decision in *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 977-79 (D.C. Cir. 1996), the D.C. Circuit held that the Commission's regulations were justified by data showing that cable operators "can in fact withhold terrestrially delivered programming to limit the market share of rival MVPDs."[43] Significantly, *Cablevision II* upheld the constitutionality of regulations targeted at cable operators in particular, explaining that the regulations were warranted because of cable operators' "special characteristics and their unique ability to impact competition," based on their control of critical, must-have programming.[44] In short, *Cablevision II* surveyed a landscape virtually identical to that which exists today and found that it justified Commission regulation — even under the more demanding standard of intermediate scrutiny.

The key factors underlying the exclusive contract prohibition remain firmly in place. To be sure, the past five years have witnessed dramatic innovation and development in the marketplace for video services, including many online delivery services that did not exist in 2007. But cable operators continue to control some of the most popular and unique programming that they acquired at a time before competition developed. Cable companies also continue to benefit from favorable terms with both affiliated and unaffiliated programmers that derive from their prior monopoly status. The ban on exclusive contracts and other program access rules provide competitors with some counterweight to the continuing effects of that legacy status. Given all of this, the Commission can again extend the exclusive contract prohibition, consistent with both the D.C. Circuit's prior decisions.

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[42] *Id.* at 713, *see generally id.* at 710-14.

[43] *Cablevision II*, 649 F.3d at 712.

[44] *Id.* at 713 (internal quotations omitted).

For the same reasons, the Commission would unquestionably be acting lawfully if it extends the exclusive contract prohibition specifically for non-replicable programming such as regional sports. The D.C. Circuit has held that the exclusive contract prohibition satisfies intermediate scrutiny because there is an "important government interest" in promoting "fair competition in the video marketplace"; the prohibition is based on concerns about competition, not content; and because the prohibition does not "burden substantially more speech than is necessary."[45] The D.C. Circuit reaffirmed that holding in *Cablevision II*.[46] Even as it recognized the "transformation" that had occurred in the MVPD marketplace, the court upheld continuing program access requirements for vertically integrated programming based on the "mixed picture" of persistent cable control over critical programming.[47] The court also relied on Commission analysis showing that cable operators had, in fact, withheld access to RSNs in the Philadelphia and San Diego markets "to limit the market share of rival MVPDs."[48] Even Judge Kavanaugh, though more skeptical of the exclusive contract prohibition than his colleagues on the D.C. Circuit, has recognized the unique competitive significance of "*regional* programming networks, particularly regional sports networks" and suggested that this "might justify a targeted restraint on . . . regional exclusivity arrangements."[49]

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[45] *Time Warner*, 93 F.3d at 978-79 (internal quotations omitted).

[46] *See Cablevision II*, 649 F.3d at 700-14 (upholding Commission regulation of terrestrially delivered, cable-affiliated programming).

[47] *Id.* at 712.

[48] *Id.* at 712-13.

[49] *Cablevision I*, 597 F.3d at 1324 n.3 (Kavanaugh, J., dissenting).

CONCLUSION

For the foregoing reasons, the Commission should extend the exclusive contract prohibition or, at a minimum, extend the exclusive contract prohibition for non-replicable programming such as regional sports.

Respectfully submitted,

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