Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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**

COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

The Independent Telephone & Telecommunications Alliance ("ITTA")[1] hereby submits its Comments in response to the program access issues raised in the March 20, 2012 *Notice of Proposed Rulemaking* ("*NPRM*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceedings.[2]

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[1] ITTA's membership includes CenturyLink, Cincinnati Bell, Comporium Communications, Consolidated Communications, FairPoint Communications, Hargray Communications, HickoryTech Communications, SureWest Communications, and TDS Telecom.

[2] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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 Nos. 12-68, 07-18, 05-192, Notice of Proposed Rulemaking, FCC 12-30 (rel. Mar. 20, 2012) ("*NPRM*").

INTRODUCTION AND SUMMARY

As demonstrated below, the exclusive contract prohibition of the Commission's program access rules remains necessary to preserve and protect competition in the multichannel video programing distributor ("MVPD") marketplace. Although competition among video programming distributors has continued to increase since the Commission last extended the exclusive contract prohibition in 2007, incumbent and vertically-integrated cable operators remain the dominant providers in the MVPD marketplace. Access to vertically-integrated programming remains crucial for other MVPDs, particularly new entrant telco video providers like ITTA member companies, to be viable competitors with incumbent and vertically-integrated cable operators.

Access to vertically-integrated and other programming on reasonable terms and conditions also facilitates Commission policy goals relating to broadband availability and adoption. Research shows that telcos that offer video service as part of a bundle with data service have increased broadband subscribership. Thus, the ability for telcos to offer video service promotes the Commission's broadband adoption goals and furthers investment in broadband networks. Such investment, in turn, enables telcos to offer the additional and advanced services, including robust data services, that their subscribers desire.

Although the program access complaint process offers a potential alternative mechanism for the resolution of program access disputes, this process is not sufficient to protect MVPD competition. The slight modifications the Commission has made to its program access complaint procedures in recent years have not made the complaint process any more helpful to smaller or new entrant MVPDs. For such providers, the time and financial resources involved in bringing a program access complaint to remedy the immediate harm from lack of access to programming make pursuing such relief infeasible.

In addition to extending the exclusive contract prohibition for an additional five years or longer, the Commission should utilize this proceeding to address discriminatory pricing practices of vertically-integrated programmers, such as volume discounts and uniform price increases. With respect to volume discounts, it is clear that there are glaring disparities between what larger and vertically-integrated MVPDs pay for vertically-integrated programming in comparison to smaller and new entrant MVPDs and that these differences bear no relationship to legitimate differences in the costs of producing or distributing video services. With respect to uniform price increases, it is clear that such practices either have a disparate impact on or are unfair to non-vertically-integrated MVPDs and therefore should be considered discriminatory under the program access statute. The Commission should act quickly to address such practices because they put smaller and new entrant MVPDs at a competitive disadvantage in relation to entrenched video providers and impede or preclude their ability to offer desired programming to consumers.

I. THE EXCLUSIVE CONTRACT PROHIBITION REMAINS NECESSARY TO PRESERVE AND PROTECT COMPETITION IN THE MVPD MARKETPLACE

A. Vertically-Integrated Cable Operators Still Retain The Incentive and Ability to Discriminate Against Competing MVPDs

As further discussed below, access to video content is a key component for telco competition with incumbent and vertically-integrated cable operators.[3] While competition in the video distribution market has increased since the exclusive contract prohibition was introduced in 1992, telco video providers are relatively new to the marketplace and require additional time and the opportunity to mature in order to compete effectively with incumbent and vertically-

[3] *See* Section II, *infra*.

integrated cable operators. Notwithstanding the positive developments that have occurred in the video distribution area in the last several years, including the availability of video services from multiple providers (e.g., telco, DBS) and over multiple platforms (video-on-demand ("VOD"), over-the-top streaming, etc.), the exclusive contract prohibition remains vital to protecting and preserving competition among video distributors.

The fact of the matter is, incumbent and vertically-integrated cable companies have for decades been, and continue to remain, the dominant forces in the video distribution market. The number of subscribers attributable to cable operators since the exclusive contract prohibition was adopted remains virtually unchanged, and cable operators currently have nearly 60% market share for distribution of video services.[4] In comparison, wireline providers currently have less than 8 percent market share.[5]

Notably, the number of cable operators that own programming has increased since the exclusive contract prohibition was last extended in 2007,[6] and the majority of cable subscribers still get their programming from one of the four largest vertically-integrated MSOs.[7] Despite predictions to the contrary, vertically-integrated cable companies remain a formidable presence in the MVPD marketplace.[8] In some instances, such providers have increased their market share in the past few years.[9]

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[4] *NPRM* at Appendix A.

[5] *Id*.

[6] *NPRM* at Appendix B, Table 2.

[7] *See NPRM* at Appendix A.

[8] *Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010) (stating the court's anticipation that if the marketplace continued to develop at such a rapid pace, the Commission may be able to conclude that the exclusive contract prohibition is no longer necessary).

[9] For example, Cablevision has experienced a significant increase in subscribership since 2010. *Compare* "Top 25 Multichannel Video Programming Distributors as of Dec. 2011," *available at*:

Moreover, the rise in the number of MVPD competitors in the marketplace gives vertically-integrated cable operators additional motivation to discriminate against competitors with respect to affiliated programming since doing so would afford them a competitive advantage over their rivals. The growing presence of DBS and telco competition makes it even more enticing for vertically-integrated cable operators to withhold critical access to unique and desired programming that they alone can offer and that other MVPDs need to compete effectively.[10] Thus, despite changes in the video programming marketplace, vertically-integrated cable companies still have the incentive and ability to discriminate against competing MVPDs such that the need for program access protections and the exclusive contract prohibition remains.

B. Cable-Affiliated Networks, Particularly RSNs, Remain Must-Have Programming for Competing MVPDs

Cable-affiliated network programming is still considered to be must-have programming for competing MVPDs. The number of satellite-delivered national networks that are cable-affiliated is virtually the same as when the Commission last extended the exclusive contract prohibition five years ago. In 2007, there were 116 cable-affiliated satellite networks.[11] The

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http://www.ncta.com/Stats/TopMSOs.aspx *with* "Top 25 Multichannel Video Programming Distributors as of Sept. 2010," *available at*: http://blogs.indiewire.com/tedhope/top_25_multichannel_video_programming_distributors. While Comcast and Cox have experienced negligible subscriber losses in that same timeframe, they still remain firmly rooted, respectively, as the #1 (with 22.343 million subscribers) and #5 (with 4.761 million subscribers) MVPDs in the marketplace. *Id.*

[10] Although over-the-top distributors have emerged in the past several years, consumers view such services as added features or complementary to their traditional MVPD services and not as substitutes for such services. *See 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, ¶ 79 (2011). Therefore, such services should not be included in the Commission's program access analysis.

[11] *NPRM* at Appendix B, Table 1.

Commission's most recent figures indicate that there are 115 such networks today.[12] Moreover, with respect to the most popular programming, the number of satellite-delivered cable-affiliated networks has increased during this time period. The number of top-20 affiliated networks in terms of subscribership has increased from six to seven.[13] The most dramatic growth has been with respect to regional sports network ("RSN") programming. The number of RSNs that are cable-affiliated has increased from 18 to 57 over the past five years.[14]

Access to RSN programming as well as high-definition ("HD") versions of standard definition ("SD") networks is particularly important for competing MVPDs. As the Commission previously has recognized, "RSNs have no good substitutes, are important for competition, and are non-replicable."[15] Similarly, "HD programming is growing in significance to consumers and… consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content."[16] Thus, while it is important for competing MVPDs to carry both SD and HD versions of a particular network, HD networks are particularly valuable to subscribers who own HD televisions and want access to HD programming that will allow them to fully realize the enhanced picture quality and other benefits associated with such programming.

The delivery method for carrying cable-affiliated programming should be immaterial. Regardless of whether cable-affiliated network programming is available via satellite or terrestrial delivery should not matter for purposes of the Commission's analysis because it has no

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[12] *Id*.

[13] *Id*.

[14] *NPRM* at Appendix C, Table 1.

[15] *NPRM* at ¶ 28 (internal citations omitted).

[16] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, 25 FCC Rcd 746, ¶¶ 54-55 (2010).

bearing on whether a cable operator has the incentive or ability to withhold such programming for its own competitive advantage. Vertically-integrated programmers are just as likely to discriminate against competing MVPDs with respect to providing access to terrestrial-delivered programming as they are satellite-delivered programming if it is programming that consumers want, and competing MVPDs therefore need. The exclusive contract prohibition should apply to both types of programming networks equally.[17]

The program access protections also should accommodate additional types of programming other than linear and VOD programming. Content is content and can be critical to offering a competing video product, regardless of how it is made available to viewers by a competing MVPD. New entrants like ITTA member companies and other telco providers are not in a position to launch new programming networks like established cable operators. That situation is unlikely to change in the near future. Access to vertically-integrated programming networks therefore will remain important to protect their ability to compete in the video distribution marketplace.

In sum, the Commission should extend the exclusive contract prohibition for an additional five years or longer to ensure that MVPDs have access to vertically-integrated programming on reasonable terms and conditions. The prohibition should apply with respect both satellite-delivered and terrestrial-delivered programming, and to content made available by competing MVPDs over other platforms in addition to linear and VOD. The Commission also should recognize that while the exclusive contract prohibition is important with respect to all vertically-integrated programming, certain programming is particularly valued and considered

[17] Although the Commission adopted rules providing for the processing of complaints alleging that an "unfair act" involving terrestrially-delivered, cable-affiliated programming violates Section 628(b) of the Act, as explained in Section III below, the complaint process is not a viable means for smaller and new entrant MVPDs to seek relief from such conduct. *See id*.

non-replicable by viewers – *i.e.*, RSN and HD network programming. Programmers who wish to enter into exclusive arrangements will continue to be able to submit a "Petition for Exclusivity" to the Commission for approval where circumstances may warrant.[18]

II. THE PROGRAM ACCESS RULES ARE IMPORTANT TO ADVANCING THE COMMISSION'S BROADBAND DEPLOYMENT AND ADOPTION GOALS

Video is an important component of the service suite offered by ITTA member companies and other telcos in the markets they serve. Research demonstrates that the availability of video service drives broadband deployment and that investment in broadband networks and the provision of advanced services is greatly improved by telco providers' access to video content. In other words, program access protections that allow MVPDs to obtain non-discriminatory access to programming should allow telco video providers to keep their costs down, thus facilitating their continued investment in broadband facilities.

In a 2009 study, the National Exchange Carrier Association found that members offering Internet along with a video component had broadband adoption rates nearly 24 percent higher than those companies offering Internet without access to subscription video services.[19] Thus, ITTA member companies' and other telco video providers' provision of video services in addition to their voice and data offerings delivers a huge public benefit in the form of increased broadband subscribership, and increased subscribership provides the incentive necessary to expand broadband infrastructure deployment.

ITTA members are often the newest entrant in the areas where they provide video service to subscribers, and they therefore have a disproportionately limited amount of bargaining power in comparison to vertically-integrated programmers and other MVPDs. Nonetheless, consumers

[18] *See* 47 C.F.R. § 76.1002(c)(5).

[19] *See* NECA comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009).

have come to expect access to voice, data, and video services from their choice of provider, and ITTA member companies must do what is necessary to provide "triple play" voice, video, and broadband bundles to their customers. ITTA member companies that cannot offer a competitive video product face the prospect of losing subscribers to competitors and lacking the revenues necessary to invest in networks to offer additional and advanced services desired by customers. The exclusive contract prohibition remains necessary to ensure reasonable access to vertically-integrated programming and to guard against such outcomes.

III. THE PROGRAM ACCESS COMPLAINT PROCESS IS INSUFFICIENT TO PRESERVE AND PROTECT MVPD COMPETITION

Reliance on the Commission's existing program access complaint procedures absent the exclusive contract prohibition would be insufficient to preserve and protect competition in the MVPD marketplace. The Commission's existing program access complaint process, which is inadequate even for large, well-financed MVPDs, is virtually unusable for smaller and new entrant MVPDs who cannot devote the substantial time and resources required to pursue such relief.[20] While the Commission has adopted nominal reforms and alterations to its program access complaint procedures, these changes have done little to alleviate the issues that make the process an unrealistic means for smaller and new entrant MVPDs to seek relief.

Indeed, the Commission's recent resolution of two complaint proceedings initiated by AT&T and Verizon, the two largest telco video providers, after a two-year delay underscores just

[20] *See* Reply Comments of the Independent Telephone & Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Rural Independent Competitive Alliance, and the Western Telecommunications Alliance, MB Docket No. 11-128 (Sept. 26, 2011), at 3.

how time-consuming and expensive this process is.[21] Smaller and new entrant MVPDs lack the resources to engage in such prolonged proceedings.[22] Moreover, any relief to which they may be entitled at the end of this process would come too late to be meaningful or effective. At that point, the damage in terms of subscriber losses, decreased market share, and other harms would already be done. Thus, eliminating the exclusive contract prohibition of the Commission's program access rules would leave smaller and new entrant MVPDs with no practical remedy to ensure they have reasonable access to vertically-integrated programming they must carry to compete.

IV. THE COMMISSION SHOULD UTILIZE THIS PROCEEDING TO ADDRESS DISCRIMINATORY PRICING OF CABLE-AFFILATED PROGRAMMING

Cable-affiliated programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs due to volume discounts, which are based on the number of subscribers the MVPD serves. One study indicates that "small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs."[23] In the experience of ITTA member companies, fees paid for RSN programming in particular are as much as 50% higher for smaller MVPDs than for larger providers. However, program production and acquisition costs are sunk, and the transmission and administrative costs associated with delivery of programming are the same for

[21] *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, File No. CSR-8185-P, Order, DA 11-1594 (rel. Sept. 22, 2011); *AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, File No. CSR-8196-P, Order, DA 11-1595 (rel. Sept. 22, 2011).

[22] An additional shortcoming from which the current rules suffer is the uncertainty regarding access to programming while disputes are pending.

[23] *See* Comments of the American Cable Association, MB Docket No. 07-269 (June 8, 2011), at 9.

all MVPDs, regardless of size. Thus, volume discounts or other pricing methods that favor larger or vertically-integrated providers are not reflective of marketplace considerations or the cost of doing business, placing smaller providers at an unreasonable competitive disadvantage vis-à-vis their larger rivals.

The Commission's rules contemplate that an MVPD may file a program access complaint challenging volume-based pricing in certain circumstances.[24] However, one of the primary reasons that the Commission has not seen complaints filed on this issue is because, as noted above, the existing program access complaint process is too costly and time-consuming for smaller and new entrant MVPDs to utilize to pursue relief for price discrimination.[25] The Commission must take action to address this issue in a manner that would provide such providers meaningful relief.

Similarly, the Commission must take appropriate steps to address situations where a vertically-integrated programming distributor uses uniform price increases to gain a competitive advantage over its smaller rivals by charging all distributors, including itself, a higher rate for affiliated programming than it would normally charge a non-vertically-integrated distributor. While the vertically-integrated programming distributor could treat that higher price as an internal transfer it can disregard when setting its own prices, competing MVPDs would be forced to pay more for that programming, increase retail rates for subscribers, or forgo purchasing the programming altogether.

Thus, while a uniform price increase may appear facially neutral in that it applies to all MVPDs equally, this practice clearly constitutes discrimination that is actionable under Section 628 because it has a disparate impact on MVPDs that are not affiliated with the vertically-

[24] 47 U.S.C. § 548(c)(2)(B)(iii).

[25] *See* Section III, *supra*.

integrated MVPD.[26] Alternatively, it qualifies as an "unfair act" that significantly hinders or prevents a competing MVPD from providing programming to consumers.[27] As with volume discounts, the Commission must take action to address uniform price increases in a manner that would provide non-vertically-integrated MVPDs a meaningful avenue to seek relief from such conduct.

Without non-discriminatory access to must-have content under reasonable terms and conditions, smaller and new entrant MVPDs face an unfair competitive disadvantage that will impede their ability to compete or deter them from entering the video marketplace altogether. The Commission must utilize this proceeding to address discriminatory pricing of cable-affiliated programming to prevent such outcomes.

[26] 47 U.S.C. § 548(c)(2)(B).

[27] 47 U.S.C. § 548(b).

CONCLUSION

For the foregoing reasons, the Commission should extend the exclusive contract prohibition of the program access rules for an additional five years or longer in order to preserve and protect competition in the MVPD marketplace. The Commission also must act quickly to address discriminatory pricing practices with respect to cable-affiliated programming to ensure that smaller and new entrant MVPDs can compete effectively against incumbent and vertically-integrated MVPDs and provide programming that subscribers desire.

Respectfully submitted,

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