REDACTED – FOR PUBLIC INSPECTION

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

FILED/ACCEPTED

JUN 22 2012

Federal Communications Commission
Office of the Secretary

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 DIRECTV, LLC

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June 22, 2012

SUMMARY

Five years ago, the Commission extended the ban on exclusive carriage arrangements between cable operators and cable-affiliated programmers based on the finding that, in the absence of an extension, competition and diversity in the distribution of video programming would not be preserved and protected. Much has changed in the last five years. Yet the concerns that justified extension in 2007 nonetheless remain valid today.

In determining whether to extend the prohibition, the Commission considers not only specific factual evidence of exclusionary conduct, but also economic theory and the application of its own predictive judgment. All three argue strongly for extension.

Factual Evidence. Cable-affiliated programmers continue to own some of the most highly rated and broadly distributed video programming networks, without which any MVPD would be at a serious competitive disadvantage. Because the cable exclusivity prohibition has been in force since 1992, there is little direct evidence of how cable-affiliated programmers would behave in its absence. However, the Commission has repeatedly confirmed over the last few years that cable operators continue to have the incentive and ability to withhold affiliated programming from competitors, to the detriment of competition and consumers. More generally, although cable's dominant *national* market share is diminishing, several factors point to an increased incentive and ability to act anticompetitively, including cable's continuing outsized *regional* market share. In addition, because of the increasing importance of bundling video with broadband and voice services, cable's market share in the majority of the country where

it does not face a wireline competitor is stabilizing, and may start to increase in the near future.

Economic Theory. As shown in the attached report submitted by Professor Kevin Murphy, economic theory also supports retention of the exclusivity ban. Practices that are widely used in contexts where market power is not a concern are generally presumed to be efficient. As he points out, however, national networks and RSNs that are not affiliated with cable (and therefore are not subject to the prohibition) rarely enter into exclusive carriage agreements. This is not surprising given the characteristics of the MVPD industry, but it undermines cable operators' assertions that programming exclusivity is efficient and procompetitive. Indeed, because vertical integration can achieve the alignment of incentives that underlies efficient exclusivity, cable-affiliated programmers should be *less* likely to withhold than are non-integrated programmers. Yet in practically every instance where a cable-affiliated RSN was not subject to the prohibition (because of terrestrial delivery), the programmer engaged in some form of withholding. The contrast could not be more stark, and clearly demonstrates that exclusivity in those cases resulted from something other than an efficiency-based motivation.

Extending the bargaining analysis he developed (and the Commission adopted) in the Comcast/NBCU proceeding and applying it to the available empirical evidence, Professor Murphy demonstrates that cable-affiliated programmers would be most likely to withhold where offering the programming on a non-exclusive basis would result in the best pricing outcomes for consumers—in other words, *precisely when withholding is most likely to do the most harm*. He concludes that there would be little (if any) loss of efficiency from extending the cable exclusivity prohibition, but doing so could provide competing MVPDs access to programming consumers value in precisely those cases that would have the largest benefits for consumers and competition.

Predictive Judgment. A straightforward application of the Commission's predictive judgment to these facts and the associated economic theory leads to one conclusion: in the absence of the cable exclusivity prohibition, cable-affiliated programmers will engage in exclusionary conduct that is not procompetitive, to the detriment of consumers. Accordingly, extension of that prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming.

That DIRECTV supports this conclusion is telling, because it is not only a competitor to cable, but also is subject to a merger condition that imposes the same exclusivity prohibition. Indeed, despite its far smaller market share and programming assets, the condition imposed upon DIRECTV has no expiration date and applies to both national and regional programming. Although DIRECTV itself owns three RSNs, it has never found this condition to be an impediment to vigorous competition, and is fully prepared to continue operating with this limitation (so long as it applies to cable). The fact that DIRECTV stands to benefit from a sunsetting of the rule yet still feels strongly that it should be extended demonstrates how important cable-affiliated programming remains for successful competition in the MVPD market. On the other hand, the fact that vertically integrated cable operators are so hostile toward the prohibition should raise warning flags.

* * *

The Commission also seeks comment on whether two sets of alternative policies—a "partial" sunset under which the exclusivity prohibition would apply either only in certain markets or only to a subset of "must-have" or "marquee" programming, and reliance on the other, non-sunsetting provisions of the program access rules—could serve as substitutes for the exclusivity prohibition. They cannot. While they certainly could be strengthened, and DIRECTV urges the Commission to do so in any event, they cannot replace the exclusivity prohibition.

Partial Sunset. Applying the exclusivity prohibition in certain markets but not others would be extremely problematic. A market-by-market determination would be dysfunctional for a nationwide video service, such as the two satellite video providers. It is no solution at all to say that DIRECTV can offer its subscribers the USA Network in Washington, DC but not nearby Fairfax County, Virginia, when it offers and markets its programming packages on a nationwide basis.

Limiting the prohibition to certain "marquee" programming is equally problematic. With respect to terrestrially delivered programming, the Commission has distinguished between RSNs and other programming, and the D.C. Circuit has upheld this distinction. While RSNs are "must-have" programming, they are far from the only such programming. Individual national sports and entertainment networks are every bit as valuable, including networks such as HBO that the Commission has recognized as "marquee." As the Commission found in the *Comcast-NBCU* proceeding, moreover, multiple networks sold in a bundle by cable-affiliated programmers can be just as valuable in the aggregate as single, "must have" networks. In the end, the Commission will find it difficult to devise an objective method to identify individual networks to which the exclusivity prohibition should apply.

Other Program Access Provisions. Even less effective would be reliance upon the remaining program access provisions as a substitute for the exclusivity rules. Certainly, it would be wise for the Commission to improve these safeguards by, for example, applying a presumption of harm for RSNs and other "marquee" programming for complaints brought under the general "unfair practices" provision of Section 628(b), and clarifying that the antidiscrimination provision of Section 628(c)(2)(B) can apply to exclusive contracts. Yet, even with such augmentation, these provisions demand that MVPDs devote enormous amounts of time and money (more than *two years* for the recent AT&T and Verizon complaints against Cablevision) to prove harm. The record in this proceeding will demonstrate beyond legitimate doubt that, where cable-affiliated programmers engage in exclusive arrangements with cable operators, there is sufficient basis for the Commission to assume harm will occur. Under these circumstances, it would make no sense at all to require complainant MVPDs, many of whom would have very limited resources compared to their vertically integrated opponents, to demonstrate what the Commission already knows to be the case.

TABLE OF CONTENTS

Before the
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COMMENTS OF DIRECTV, LLC

DIRECTV, LLC ("DIRECTV") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking on whether to retain, sunset, or relax the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming, and on potential revisions to the Commission's program access rules.[1] Much has changed in the market for delivery of video programming since the exclusive contract prohibition was enacted by Congress in 1992, and even since it was last extended by the Commission in 2007. Notwithstanding these developments, however, the concerns that prompted Congress to create the program access regime persist in the

[1] *Revision of the Commission's Program Access Rules*, 27 FCC Rcd. 3413 (2012) ("*Notice*").

marketplace, and cable-affiliated programmers continue to have the incentive and ability to favor their affiliated cable operators over competitive multichannel video programming distributors ("MVPDs"), with the predictable result that competition and consumers would be harmed. Accordingly, the exclusive contract prohibition remains necessary to preserve and protect competition and diversity in the distribution of video programming, and it should be extended in its entirety for another five years.

In these Comments, we first briefly review the background of the cable exclusivity prohibition and the legal standard for determining the propriety of extending it yet again. We review developments affecting the multichannel video programming and distribution markets during the five years since the prohibition was last extended, demonstrating the continuing necessity of this important competitive safeguard. We present a theoretical framework for assessing exclusivity in the programming distribution market, to show that cable-affiliated programmers are most likely to withhold programming in precisely the cases where doing so does the most harm to consumers and competition. We review potential alternatives should the cable exclusivity prohibition be allowed to sunset in whole or in part, and find them problematic to implement and insufficient to preserve and protect competition in the program distribution market. We then discuss the potential impact of Commission action in this proceeding on the conditions placed on DIRECTV by the *Liberty Media Order*.

BACKGROUND AND LEGAL STANDARD

Because the *Notice* provides an extensive discussion of the program access regime created by Congress and implemented by the Commission,[2] we provide only an

[2] *See generally Notice*, ¶¶ 6-16.

abbreviated summary of the most salient aspects here. As part of the Cable Television Consumer Protection and Competition Act of 1992, Congress enacted a number of program access provisions designed to offset the market power enjoyed by incumbent cable operators and thereby promote competition and diversity in the distribution of video programming.[3] At issue in this proceeding is Section 628(c)(2)(D) of the Communications Act, which generally prohibits exclusive contracts for satellite-delivered cable programming or satellite-delivered broadcast programming between any cable operator and any cable-affiliated programming vendor in areas served by a cable operator.[4]

Unlike the broader prohibition in Section 628(b) against unfair acts based on a showing of harm, the cable exclusivity prohibition reflects Congress's determination that exclusive contracts between cable operators and satellite-delivered, cable-affiliated programmers are *implicitly* harmful. It therefore relieves a complaining MVPD of the burden of demonstrating harm.[5] Significantly, this prohibition is not absolute, as Congress gave cable-affiliated programmers the ability to petition the Commission for a determination that a particular exclusive contract would serve the public interest.[6] In this way, Congress crafted a regime in which cable-affiliated programmers would bear the burden of justifying exclusive arrangements with cable operators in all cases, while

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[3] *See generally* S. Rep. No. 102-92 at 28 (1992); Cable Television Consumer Protection and Competition Act of 1992, Pub L 102-385, § 2(a)(2) ("1992 Cable Act").

[4] *See* 47 U.S.C. § 548(c)(2)(D).

[5] *See Notice*, ¶ 7 and n.21 (citing cases).

[6] *Id.*

complainants would bear the burden of demonstrating that many other "unfair acts" result in sufficient harm to warrant their prohibition in specific instances.

Congress also recognized, however, that its legislative judgment with respect to the harmfulness of cable-affiliated exclusive arrangements might someday be overtaken by new market conditions. Thus, it provided that the provision would sunset in ten years unless the Commission found it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[7] The Commission has twice found that market conditions satisfy this statutory standard. In June 2002, it extended the exclusive contract prohibition for five years (through October 2007).[8] In September 2007, the Commission concluded based on a review of market conditions that the prohibition was still necessary, and extended it for an additional five years (through October 2012).[9] As before, the Commission has now undertaken to conduct a review of prevailing market conditions prior to October 2012 to determine whether the exclusive contract prohibition should be extended yet again.

Section 628(c)(5) instructs the Commission to extend the cable exclusivity prohibition if it finds "that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[10] In prior

7 *Id.*, ¶ 3 (*citing* 47 U.S.C. § 548(c)(5)).

8 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution*, 17 FCC Rcd. 12124 (2002) ("*2002 Extension Order*").

9 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791 (2007) ("*2007 Extension Order*), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("*Cablevision I*").

10 47 U.S.C. § 548(c)(5).

extension proceedings, the Commission has interpreted this mandate as entailing a determination of whether, "in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected."[11] If so, Section 628(c)(5) *requires* the Commission to extend the exclusive contract prohibition.[12]

Because the prohibition has been in place since 1992, there is limited direct evidence of anticompetitive foreclosure upon which to rely. Accordingly, in making its extension decision, the Commission considers not only "specific factual evidence" of foreclosure (*e.g.,* withholding of terrestrially delivered programming), but also "economic theory" and the Commission's "predictive judgment."[13]

For the reasons discussed herein, DIRECTV submits that the Commission has ample evidence justifying the extension of the cable exclusivity prohibition in its entirety. Moreover, the alternatives to extension would not satisfy the statutory mandate to preserve and protect competition and diversity in the distribution of video programming. Proposals for a partial sunset would be difficult to implement and ineffectual in practice, while other statutory safeguards remaining after a total sunset would not be sufficient to fill the resulting void. Accordingly, the Commission should extend the prohibition for another five years.

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11 *2002 Extension Order*, ¶ 14; *2007 Extension Order*, ¶ 13. The D.C. Circuit has affirmed the Commission's statutory interpretation, as well as the Commission's authority to implement further extension so long as the statutory standard continues to be satisfied. *Cablevision I*, 597 F.3d at 1313-14.

12 *See 2007 Extension Order*, ¶ 13 (finding that Section 628(c)(5) "requires the exclusive contract prohibition to be extended if we find that, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected").

13 *2002 Extension Order*, ¶¶ 16, 25; *2007 Extension Order*, ¶¶ 13-14.

DISCUSSION

I. CHANGES IN MARKET CONDITIONS SINCE 2007 HAVE NOT DIMINISHED THE NEED FOR THE EXCLUSIVE CONTRACT PROHIBITION

Five years ago, when it last extended the exclusive contract prohibition, the Commission conceded that the record in this area would necessarily always be somewhat incomplete. Because the prohibition has been in effect since 1992, it noted, "it is difficult to obtain specific factual evidence of the impact on competition in the video distribution market if the prohibition were lifted."[14] Nonetheless, it found "specific factual evidence that, where the exclusive contract prohibition does not apply, such as in the case of terrestrially delivered programming, vertically integrated programmers have withheld and continue to withhold programming from competitive MVPDs."[15] Specifically, the Commission discussed evidence from the recently decided *Adelphia* proceeding that the withholding of two cable-affiliated RSNs (Comcast SportsNet Philadelphia and Cox Channel 4 San Diego) had depressed DBS subscription rates by 40 percent in Philadelphia and 33 percent in San Diego.[16] In fact, in response to criticisms of the regression analysis used in *Adelphia*, the Commission revised its methodology and not only confirmed its original conclusion but actually strengthened it in some respects.[17]

In addition, the Commission conducted an analysis from which it concluded that cable subscribership "has not reached a point where withholding would be

[14] *2007 Extension Order*, ¶ 14.

[15] *Id.*, ¶ 29.

[16] *Id.*, ¶ 39.

[17] *Id.*, ¶ 40 and Appendix B.

unprofitable."[18] Revenues foregone by a cable-affiliated programmer due to withholding can be compensated by the increased revenue its cable affiliate earns from new subscribers, higher affiliation fees paid by noncompeting cable operators, and higher cable rates charged to all subscribers in the absence of robust competition.[19] The Commission calculated that withholding of some nationally distributed networks could be profitable if as little as 1.9 percent of non-cable subscribers were to switch to cable as a result, while withholding of RSN programming would be profitable in many DMAs with high cable market share.[20]

From all of this evidence, the Commission concluded that "withholding programming from rivals can be a profitable strategy for a vertically integrated cable programmer" and that "such practices, in turn, predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers."[21] In this proceeding, the Commission must determine whether market changes in the past five years have rendered its prior findings invalid and the prohibition unnecessary.[22]

The first place to look, of course, is at its own recent decisions in this area. The Commission should give significant weight to the conclusions it has reached based on empirical analysis of data presented in four proceedings over the last five years. Indeed, it must do so in order to fulfill its duty of reasoned decisionmaking. It should also once again examine more generalized data on the status of competition in the relevant markets,

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18 *Id.*, ¶ 52 and Appendix C.

19 *Id.*

20 *Id.*, Appendix C, ¶¶ 20-21.

21 *Id.*, ¶ 40.

22 *E.g., id.*, ¶¶ 16-28.

with particular emphasis on the extent to which any changes that have occurred since the prior consideration would make the prohibition more or less necessary. Such quantitative analysis should be expanded somewhat in this proceeding, however, to capture the full range of relevant market dynamics. This investigation will lead to the same conclusion as in 2007: extension of the exclusivity prohibition is necessary.

A. Commission Findings in Recent Proceedings Confirm the Ongoing Need for Safeguards Against Exclusive Arrangements Involving Cable-Affiliated Programming

Substantial evidence generated over the last five years is available for the Commission's consideration in this extension proceeding. In particular, in four proceedings resolved within the last three years, the Commission consistently found evidence that cable-affiliated programmers continue to have the incentive and ability to withhold programming from rival MVPDs, to the detriment of competition and consumers.

1. Closing the Terrestrial Loophole

In the same order that extended the cable exclusivity prohibition of Section 628(c)(2)(D), the Commission also proposed to adopt rules under Section 628(b) that would apply to exclusive arrangements between cable operators and cable-affiliated programmers with respect to programming delivered terrestrially.[23] In 2010, the Commission adopted such rules in order to "provide competitors to incumbent cable operators with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer to subscribers, thereby promoting competition in

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[23] *2007 Extension Order*, ¶¶ 114-117.

the delivery of video to consumers."[24] In doing so, the Commission found three bases for its action: (1) cable operators' continuing incentive and ability to engage in unfair acts or practices involving their affiliated programming; (2) confirmation of this conclusion by real-world evidence that vertically integrated cable operators have withheld certain terrestrially-delivered, cable-affiliated programming from their competitors; and (3) the anticompetitive effects of such withholding.[25]

The record in that proceeding included substantial real-world evidence "that cable firms withhold affiliated programming from competitors when not barred from doing so."[26] Among other things, the Commission cited the withholding of RSN programming in Philadelphia and San Diego, HD RSN feeds in New York, news networks, and on-demand programming. The Commission also concluded that cable-affiliated programmers continue to have the incentive and ability to engage in anticompetitive acts because cable's national market share remained high (63.5 percent) and its regional market share was even higher (over 77 percent).[27] It found that such conditions would allow a vertically integrated cable operator the option to "raise the costs of its MVPD competitors by increasing the price of its affiliated programming or . . . [to] choose not to sell its affiliated programming to rival MVPDs."[28] Based on such evidence, the Commission adopted rules to close the "terrestrial loophole," including a presumption

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[24] *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶ 1 (2010) ("*2010 Program Access Order*").

[25] *Id.*, ¶ 25.

[26] *Id.*, ¶ 30.

[27] *Id.*, ¶¶ 26-28.

[28] *Id.*, ¶ 26.

that withholding terrestrially-delivered RSN programming has the illicit purpose or effect set forth in Section 628(b).[29]

As if to validate the Commission's action, Cox chose less than one year later not to renew its rights agreement with the San Diego Padres.[30] Obviously, DIRECTV was not party to this decision. Yet it seems reasonable to infer that part of the value of the prior arrangement was the "purpose or effect" of hindering competition, and that Cox was no longer interested in the arrangement once it could not withhold the affiliated RSN from its satellite rivals.

2. *Verizon v. MSG* and *AT&T v. MSG*

The first applications of the *2010 Program Access Order* involved two separate complaints brought by Verizon and AT&T against Cablevision and its Madison Square Garden affiliate for withholding the HD feed of two terrestrially-distributed RSNs, MSG HD and MSG+ HD.[31] Complainants in each case presented substantial evidence of the

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[29] *See id.*, ¶ 52.

[30] *E.g.*, J. Maffei, "Padres: Fox Sports San Diego Ready to Launch," NORTH COUNTY TIMES (Mar. 7, 2012) (*available at* http://www.nctimes.com/sports/baseball/professional/mlb/padres/padres-fox-sports-san-diego-ready-to-launch/article_243866d5-10fc-585e-82a1-bf42048df760.html). DIRECTV now has access to Padres games through its carriage of Fox Sports San Diego—an RSN not affiliated with any MVPD.

[31] *Verizon Tel. Companies and Verizon Svcs. Corp. v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13145 (MB 2011) ("*Verizon HD Access Order*"), *aff'd*, 26 FCC Rcd. 15849 (2011) ("*Verizon HD Access Review Order*"); *AT&T Svcs. Inc. and Southern New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13206 (MB 2011) ("*AT&T HD Access Order*"), *aff'd*, 26 FCC Rcd. 15871 (2011) ("*AT&T HD Access Review Order*"). Although defendants initially filed petitions for review of both proceedings before the Second Circuit, those appeals were subsequently withdrawn.

anticompetitive effects of such withholding, including survey evidence demonstrating the importance of local sports programming to consumers.[32]

Based upon this evidence, the Commission in each proceeding reiterated its prior finding that "an exclusive arrangement harms competition when the network withheld is 'popular' and 'established' and when other MVPDs have expressed an interest in carrying the network."[33] It found substantial evidence that the withholding in question was designed to harm Cablevision's rivals.[34]

By contrast, MSG was unable to show that the asserted procompetitive effects of exclusivity were sufficient to offset the demonstrated anticompetitive impact of withholding, though that assertion had been placed squarely at issue in the proceedings.[35] To the contrary, while defendants claimed that exclusivity had increased their incentives to invest in the programming, they "put forth no evidence demonstrating that this theory motivated their withholding strategy" and "put forth no evidence demonstrating that this withholding strategy has resulted in increased investment in the networks or that it has improved the quantity and quality of programming on the networks."[36]

3. Comcast-NBCU Transaction

Most recently, in connection with Comcast's proposed acquisition of control over the programming assets of NBC Universal, the Commission reached a similar set of

32 *Verizon HD Access Review Order*, ¶ 7; *AT&T HD Access Review Order*, ¶ 7.

33 *Verizon HD Access Order*, ¶ 28; *AT&T HD Access Order*, ¶ 29.

34 *See Verizon HD Access Order*, ¶ 25 (citing Cablevision advertisements highlighting rivals' lack of HD RSN programming); *AT&T HD Access Order*, ¶ 26 (same).

35 *Verizon HD Access Order*, ¶ 37; *AT&T HD Access Order*, ¶ 38.

36 *Verizon HD Access Order*, ¶ 33; *AT&T HD Access Order*, ¶ 34.

conclusions with respect to an even broader array of programming.[37] Based on its empirical analysis of confidential data in the record of that proceeding, the Commission determined that the proposed transaction "creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the JV would come to control or raise programming costs to its video distribution rivals."[38]

This would be possible, it found, because "the 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."[39] Further, it found that "successful exclusion (whether involving complete foreclosure or cost-raising strategies) of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power."[40]

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In each of these recent proceedings, the Commission's review of empirical evidence led to the conclusion that cable-affiliated programmers continue to have the incentive and ability to withhold programming from competitive MVPDs, and that such withholding would injure competition and consumers. Absent dramatic new evidence in

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[37] *Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238 (2011) ("*Comcast/NBCU Order*").

[38] *Id.*, ¶ 29.

[39] *Id.*, ¶ 37.

[40] *Id.*, ¶ 39.

the record, it would be difficult for the Commission to reach a different conclusion here consistent with its obligation to engage in reasoned decisionmaking.[41]

B. Market Structure Developments Since 2007 Further Validate the Commission's Recent Findings

Though the Commission could rely solely on its recent decisions in order to find that its 2007 conclusions remain relevant, it has once again undertaken a broader examination of current market structure. In 2007, while recognizing the procompetitive developments in the MVPD market since its last extension of the cable exclusivity prohibition, the Commission concluded that such developments had not been "significant enough for us to reverse the Commission's previous conclusion that cable operators have market dominance of sufficient magnitude that, in the absence of the prohibition, they would be able to act in an anticompetitive manner."[42] The result here should be the same.

The Commission has prepared a series of summary tables reflecting data from four time periods relevant to the passage and extension of the exclusive contract prohibition.[43] For each of these periods, the Commission sets forth the kinds of data it examined in 2007, such as the number of subscribers attributable to each type of MVPD and the number of satellite-delivered national and regional programming networks

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41 *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding that, while an "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," it must do so "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy," and continuing that, in such cases "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy").

42 *See 2007 Extension Order*, ¶ 50 and n.269 (providing tables (1) as of 1994 (from the *First Annual Report*); (2) as of June 2001 (from the *Eighth Annual Report*); (3) as of June 2005 (from the *Twelfth Annual Report*); and (4) as of the most recent period available).

43 *Notice*, Appendix A.

affiliated and not affiliated with a cable operator. We review each of these in turn, as well as what the Commission may anticipate in the future.

In this regard, it is important for the Commission to recognize that consumers increasingly demand broadband Internet access and voice service along with their video services—a factor that was not even considered in past extension analyses. Such "triple play" offerings have had an enormous effect on MVPD market dynamics, including cable's market share. DBS operators, who do not have their own broadband facilities, increasingly find themselves at a distinct disadvantage, especially in the limited areas where telco providers have deployed fiber and in the much more extensive areas where cable operators have deployed capacity-enhancing technology such as DOCSIS 3.0. Not surprisingly, in areas outside the limited telco video footprint where DBS is the primary competition, cable's share of total TV households has declined much more slowly since the last Commission review in 2007. Specifically, between 2007 and 2011, cable's market share declined by 11.4 percent in areas where wireline-based competitors entered, compared with a decline of only 4.3 percent in areas where they did not. The corresponding changes since 2008 are 9.6 percent and 1.5 percent.[44] Thus, in the majority of the country where telco systems do not offer service, cable's market share has largely stabilized. As broadband service continues to gain importance, cable operators will increasingly be able to use the advantage of bundled services to slow or even reverse losses in video subscribership.

44 Centris National Tracking Study, 2007q1-2011q1.

Overall, the data show that changes in the marketplace once again "present[] a mixed picture."[45] This is exactly the situation in which conclusions based on the Commission's predictive judgment and technical analysis are not only appropriate, but critical. Taken as a whole, the data show that the cable exclusivity prohibition is still necessary under current market conditions.

1. Cable Market Share and Concentration

In both 2002 and 2007, the Commission found the high market share of cable operators in general, and the high concentration among the largest cable multiple system operators ("MSOs") in particular, supported the conclusion that extension of the cable exclusivity prohibition was necessary.[46] While the Commission's summary of national cable market share and concentration metrics in Appendix A is useful to such an analysis, DIRECTV believes that it could be revised to reflect additional salient information.

Set forth in Table 1 below is a slight variation on Appendix A. It essentially replicates the last two rows of the table in Appendix A, with four revisions. First, in order to achieve a more consistent timeline relevant to market conditions at the time the cable exclusivity prohibition has been considered, it uses data as of June 2006 from the *Thirteenth Annual Report*. Second, it uses NCTA data as of the end of 2011 for the "Most Recent" column.[47] Third, it shows data not only for the top 4 cable MSOs, but for the top 2 and top 3 MSOs as well. Fourth, it combines the last two rows of Appendix A

[45] *Cablevision I*, 597 F.3d at 325.

[46] *2002 Extension Order*, ¶ 45; *2007 Extension Order*, ¶ 50.

[47] Figures for individual cable operators were obtained from National Cable & Telecommunications Association, "Top 25 Multichannel Video Programming Distributors as of Dec. 2011" (*available at* http://www.ncta.com/Stats/TopMSOs.aspx). The market share was then calculated using the same estimated number of total MVPD subscribers (99.645 million) as the Commission did. *See Notice*, Appendix A, n.17.

to reflect the market share of the top MSOs that are vertically integrated if that figure is different from the overall market share.

National Market Share and Concentration. As Table 1 shows, the combined national market share held by all cable operators continues to decrease at a slow pace. Nonetheless, cable operators continue to hold a dominant share of MVPD subscribers nationwide (58.5 percent), though this is less than the share considered by the Commission in 2007 (67 percent) and 2010 (63.5 percent).

# of MVPD subscribers receiving video from one of the:	**First Annual Report[48]**	**Eighth Annual Report[49]**	**Thirteenth Annual Report[50]**	**Most Recent**
Top 2 MSOs **(VI, if different)**	37.28%	30.79% (23.88%)	39.05%	34.53%
Top 3 MSOs **(VI, if different)**	42.36%	40.32% (30.86%)	45.22% (44.69%)	39.30%
Top 4 MSOs **(VI, if different)**	47.18%	47.67% (34.26%)	50.86% (47.89%)	43.64%

Table 1. Cable Share of Nationwide MVPD Subscribership

However, the market share of the largest individual cable operators (*i.e.*, national cable *concentration*) is not materially different from concentration levels in 1994, 2001,

48 *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, Appendix G, Table 1 (1994).

49 *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 17 FCC Rcd. 1244, Appendix C, Table C-3 (2002).

50 *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 24 FCC Rcd. 542, Appendix B, Table B-3 (2009). All figures in this column combine Adelphia's market share with that of Comcast and Time Warner Cable, which is consistent with the approach taken by the Commission in 2007. *2007 Extension Order*, ¶ 54.

and 2006. More than one in three MVPD subscribers continues to receive video programming from the two largest cable MSOs, both of which are vertically integrated. This reflects greater concentration (and far greater concentration within the top vertically integrated MSOs) than was the case when the Commission extended the cable exclusivity prohibition in 2002. Nearly four in ten subscribers receive service from the three largest cable MSOs, all of which are vertically integrated. Here again, this level is nearly the same as in 2002, and the concentration among the top vertically integrated MSOs is much higher today.

The continued dominant position of cable is particularly significant because cable operators can leverage their market power collectively through "cable-only" exclusives.[51] Incumbent cable operators do not compete against each other, as they operate in separate franchise areas. As the Commission has recognized, a cable-affiliated programmer has the incentive to withhold programming from non-cable rivals while selling it to other cable operators with which it does not compete.[52] Cable-only exclusives increase the feasibility of withholding programming by decreasing the number of foreclosed entities. Thus, even if no single cable operator possesses sufficient market power to make an exclusive arrangement profitable, groups of the largest cable operators may well possess sufficient market power.

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[51] Technically, a cable-only exclusive is merely a series of contracts between a programmer and multiple cable operators, each providing exclusivity within a cable operator's franchise area.

[52] *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 120 (2006) ("*Adelphia Order*") ("Because cable operators serve discrete franchise areas and generally do not compete against each other within franchise areas, a cable operator could narrowly target a foreclosure strategy to harm only its rivals by crafting exclusive distribution agreements that permit adjacent, non-rival cable operators to carry the affiliated programming and that exclude the programming only from rival firms competing in the cable operator's service areas.").

In this regard, it is worth noting that such coordinated activity among incumbent cable operators has become increasingly prevalent. For example, as part of a transaction in which they are selling Advanced Wireless Services licenses to Verizon Wireless, Comcast, Time Warner Cable, Cox, and Bright House agreed to create an Innovation Technology Joint Venture to pool their resources in order to develop ways to integrate wireline and wireless services.[53] These same MSOs, joined by Cablevision, also recently announced CableWiFi, a collaborative effort under which they will allow each other's customers access to all of their WiFi hotspots.[54] As such joint initiatives become more common, coordination in the form of cable-only exclusives becomes easier to execute.

Regional Market Share. In addition, as the Commission notes, regional concentration in many major metropolitan areas (including New York, Boston, Philadelphia, and Washington, DC) remains much higher, with market share in the 80 percent range in some cases.[55] This high level of regional concentration reflects the continued trend of cable system "clustering." Cable's continued regional concentration is more important than its decrease in nationwide concentration with respect to incentives for regional and local programming.[56] Moreover, the ability to deliver or deny distribution for national programmers in some of the nation's largest urban areas gives clustered cable operators significant leverage in that arena as well.

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[53] *See, e.g.,* Press Release, "Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for $3.6 Billion" (Dec. 2, 2011) (*available at* http://www.cmcsk.com/releasedetail.cfm?ReleaseID=629615).

[54] *See, e.g.*, Press Release, "Major U.S. Cable Companies Join Forces on WiFi," YAHOO! FINANCE (May 21, 2012) (*available at* http://finance.yahoo.com/news/major-u-cable-companies-join-100000756.html).

[55] *See Notice*, ¶ 24.

[56] *See Comcast/NBCU Order*, Appendix C, ¶¶ 7-20.