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

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment And/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

REPLY COMMENTS OF AT&T INC.

Christopher M. Heimann
Gary L. Phillips
Peggy Garber
AT&T Inc.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036

July 23, 2012

TABLE OF CONTENTS

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

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment And/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

REPLY COMMENTS OF AT&T INC.

AT&T, Inc. respectfully submits these reply comments on behalf of itself and its operating company affiliates (collectively, "AT&T") pursuant to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. Introduction and Summary.

The overwhelming majority of commenters, representing a broad cross-section of the industry, strongly encouraged the Commission once again to extend the prohibition against

[1] *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; and 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. 12-68; MB Docket 07-18; and MB Docket 05-192, Notice of Proposed Rulemaking, FCC 12-30 (Rel. March 20, 2012) ("NPRM").

exclusive contracts involving satellite-delivered, cable-affiliated programming. Competitive MVPDs, including wireline video service providers (like AT&T, Verizon, Century Link, a variety of rural video service providers, USTelecom, OPASTCO/NTCA, and the Independent Telephone and Telecommunications Alliance), cable operators unaffiliated with programming providers (such as the American Cable Ass'n (ACA), and rural CATV providers) and the two national DBS providers (DISH and DIRECTV), in addition to Free Press, and the Writers Guild of America, West – in other words, everyone except vertically-integrated cable operators and their programming affiliates – demonstrated that the factors justifying the Commission's extension of that prohibition in 2002 and 2007 remain equally applicable today. Specifically, they showed that, while the video marketplace has in some respects changed substantially over the past decade (with the emergence and continued growth of competitive MVPDs), cable incumbents (like Cablevision, Time Warner Cable (TWC), and Comcast) continue to control some of the most popular national programming networks and approximately half of the regional sports networks (RSNs), access to which remains critical to preserve and promote competition and diversity in the distribution of video programming. They further showed that vertically integrated programmers continue to have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition to their down-stream cable affiliates by withholding popular programming from competing MVPDs. They thus demonstrated that the need for the exclusive contract prohibition is as great, if not greater, than it was when the Commission last extended that prohibition. Consequently, the Commission would be well-justified in once again extending the prohibition as a whole.

Not surprisingly, the only commenters to suggest otherwise are NCTA and a handful of vertically integrated cable operators and their programming affiliates. Predictably, they argue that intense competition has obviated the need for the exclusive access prohibition, and that the continued application of the prohibition would harm consumers by undermining incentives to innovate and invest in new programming. But rather than offering any evidence to support their claims, as requested by the Commission, they simply recycle arguments the Commission rejected in 2002, 2007, and 2010 (when it took action to close the so-called terrestrial loophole), and which Congress itself rejected when it adopted section 628 in 1992. Thus, rather than justifying repeal of the exclusive contract prohibition, their filings show that cable incumbents and their programming affiliates fully intend to deny essential programming to their competitors if the Commission were to allow them to do so. They therefore confirm further extension of that prohibition is necessary to ensure that popular programming continues to be competitively available, and thus essential to preserve and promote competition and diversity in the video programming distribution market, as well as broadband competition and deployment.

In its opening comments, AT&T anticipated and refuted the arguments offered by vertically integrated cable operators and programmers to support allowing the exclusive contract prohibition to expire, and will not repeat itself here. Instead, AT&T will limit these reply comments to address a few points raised in the comments.

II. Discussion.

a. Opponents of the Exclusivity Ban Fail to Show Its Sunset Would Benefit Consumers.

As noted above, none of the parties encouraging the Commission to allow the exclusivity ban to sunset offered any hard evidence to support their claims that the prohibition is no longer necessary to preserve and promote competition and diversity in video programming distribution, or that its repeal would benefit consumers by, for example, promoting innovation and investment in programming. Instead, they mechanically recite the generally acknowledged, procompetitive benefits of such arrangements under appropriate market conditions (conditions that prevail in many industries). While they offer some examples of exclusive arrangements that had such benefits (notably, AT&T's past exclusive arrangement with Apple for the iPhone),[2] the only examples they offer are exclusive arrangements between non-vertically integrated companies and none involve programmers vertically integrated with incumbent cable operators.

As AT&T has acknowledged, and economists, regulators and Congress agree, under the right conditions, the procompetitive benefits of exclusive access arrangements significantly outweigh any potential anticompetitive effects by encouraging innovation and investment in new technologies, products, and services. We further agree with parties like Madison Square Garden (MSG) that the wireless industry, and the development of the smart phone segment of the hand set market, exemplifies these benefits. Wireless carriers often negotiate with equipment manufacturers for the exclusive right to sell a new handset in return for promoting the sale of that handset through advertising, discounted pricing, and other means. Exclusivity in that case encourages both parties to invest in new and unproven technologies and products by sharing the risk of that investment and ensuring that both reap the rewards if those investments are successful in the marketplace, and thus significantly increases consumer welfare. As MSG correctly observes, this dynamic and its benefits to consumers, are exemplified by AT&T's former exclusive arrangement with Apple for the iPhone, which spurred innovation and investment in the smart handset segment of the market by both consumer electronics manufacturers and wireless providers.[3] The result was the explosion of the smart-phone segment

---

[2] *See* Comments of Madison Square Garden (MSG) at 18-22.

[3] *Id.* at 21-22.

of the market, and a plethora of smart handsets, such as handsets using Microsoft's mobile operating platform, like Nokia's Lumia, and Google's Android phones.

But these exclusive arrangements have such procompetitive effects because wireless providers do not own or control the handset manufacturers with which they negotiate exclusivity arrangements, and both entities are subject to robust competition in both the upstream handset and downstream wireless markets. Moreover, neither party controls essential, but non-replicable inputs. As the development of the smart handset segment of the market confirms, many firms have the technology and wherewithal to produce a competitive device. In this context, there simply is no risk that exclusive arrangements are anticompetitive in purpose or effect.

But, as Congress recognized in 1992 when it enacted the exclusivity ban for vertically integrated programming, and the Commission recognized in 2002 and 2007 when it extended that ban, the factors that make exclusivity arrangements procompetitive in the wireless handset and other markets are virtually always absent in the case of exclusivity arrangements involving programming and networks controlled by dominant cable incumbents. Unlike exclusivity arrangements typically found to be procompetitive, negotiations for exclusive programming arrangements do not occur at arm's length between unaffiliated parties. Consequently, there is no reason to assume, as in the case of negotiations between non-vertically integrated parties, that such arrangements are intended or necessary to increase output to the benefit of consumers. To the contrary, as AT&T's and Verizon's disputes with MSG and Cablevision showed, such arrangements are intended to restrict output (the polar opposite of the benefits that typically justify exclusivity arrangements) by denying competitors access to programming in order to prevent competition in downstream video distribution markets.

In addition, unlike exclusive handset and other procompetitive exclusivity arrangements, in which the parties are subject to competition and neither controls essential inputs, the exclusive programming contracts at issue here involve cable incumbents, which remain dominant in the distribution of multichannel video programming, and non-replicable programming assets that are critical to promote competition and investment in the distribution of multichannel video programming. These contracts thus continue to bear all the hallmarks of anticompetitive exclusivity arrangements, and thus the need for further extension of the exclusive programming contract prohibition.

It is telling that no one other than vertically integrated cable operators support allowing the exclusive contract prohibition to sunset. If exclusive deals were so integral to development and innovation in programming market, economic forces would have driven independent programmers (those unaffiliated with cable incumbents) to enter such arrangements, as they have in the mobile handset market. But, as noted in our opening comments, that has not been the case. One searches in vain for exclusive programming contracts involving unaffiliated programmers. At the same time, there are more programming networks and programming available today than ever, strongly suggesting that the ban has not impeded development and innovation in the programming marketplace. Thus, the benefits of retaining the ban clearly outweigh the costs.

b. The FCC Should Not Narrow the Scope of Entities Deemed "Affiliated."

Some vertically integrated cable programmers contends that the blanket ban on exclusive programming contracts is overly broad, and sweeps in programmers that purportedly have no incentive or ability to favor their affiliated cable operators over other, unaffiliated MVPDs.[4]

[4] MSG Comments at 13-17; Discovery Comments at 6 (arguing that the theory underlying the ban incorrectly assumes that "affiliated" programmers and cable operators are always part of the same enterprise).

MSG, for example, claims that "the definition of 'cable-affiliated' includes programmers like MSG, whose affiliation with a cable operator is only nominal," even though, "as an entity spun off from its former cable operator parent (*i.e.*, Cablevision) as a separate public company, MSG would have no interest in an exclusive arrangement whereby it would sacrifice programming revenues for the benefit of Cablevision's (or any other distributor's) video programming distribution business,"[5] and its fiduciary and other responsibilities prevent it from doing so.[6] Thus, it asserts, the ban incorrectly deems programmers like MSG to be "cable-affiliated" even though no cable operator can "exert control over the programmers' licensing decisions."[7]

While MSG here loudly protests its independence from Cablevision, and thus the purported overbreadth of the exclusivity ban, its statements to investors tell a very different story. In the "risks" section of its Form 10-KT (Annual Transition Report), filed with the SEC on August 26, 2011, MSG noted that the Dolan family, which owns a controlling share of Cablevision, owned all of its Class B common stock (which is entitled to elect 75 percent of MSG's board of directors) and 70 percent of the total voting power of MSG's outstanding common stock.[8] MSG stated that it thus was "Controlled by the Dolan Family," and, as such, had "elected not to comply with the corporate governance rules of NASDAQ requiring: (i) a majority of independent directors on [its] Board and (ii) an independent corporate governance and nominating committee."[9] Likewise, in its Proxy Statement, MSG informed investors that, as

[5] MSG Comments at 14.

[6] MSG Comments at 14-15.

[7] *Id.* at 15.

[8] Madison Square Garden Co., Form 10-KT (Annual Transition Report) at 35-36 (filed Aug. 26, 2011), available at: http://files.shareholder.com/downloads/ABEA-3W02GE/1975793582x0xS1193125-11-234219/1469372/filing.pdf, last visited July 23, 2012.

[9] *Id.* at 36.

a result of the spin off, "Cablevision no longer holds a common stock ownership interest in us. However, both Cablevision and we continue to be under the control of Charles F. Dolan, members of his family and certain related family entities."[10] It further stated:

> Our Executive Chairman, James L. Dolan, also serves as the President and Chief Executive Officer of Cablevision and our President and Chief Executive Officer, Hank J. Ratner, serves as Vice Chairman of Cablevision. Eight of the members of our Board (including James L. Doaln) also serve as directors of Cablevision, and several of our directors serve as officers and/or employees concurrently with their service on our Board. . . . Therefore, these officers and directors may have actual or apparent conflicts of interest with respect to matters involving the Company [*i.e.*, MSG] on the one hand, and Cablevision or AMC Networks, on the other hand. . . . In addition, certain of our officers and directors own Cablevision and/or AMC stock, or stock and options to purchase Cablevision and AMC Networks stock, as well as cash performance awards with any payout based on Cablevision's performance. These ownership interests could create actual, apparent or potential conflicts of interest when these individuals are faced with decisions that could have different implications for the Company and Cablevision or AMC Networks.
>
> . . . [T]he Company's Amended and Restated Certificate of Incorporation provides that in certain circumstances our directors and officers will not have liability to the Company or its stockholders for breach of any fiduciary duty by reason of the fact that any such individual directs a corporate opportunity to Cablevision . . . Our Amended and Restated Certificate of Incorporation also expressly validates certain contracts, agreements, arrangements and transactions (and amendments, modifications or terminations thereof) between the Company and Cablevision . . . and will provide that, to the fullest extent permitted by law, the actions of the overlapping directors and officers in connection therewith are not breaches of fiduciary duties owed to the Company or its stockholders.[11]

So much for MSG's "fiduciary and other responsibilities" preventing it from "sacrifice[ing] programming revenues for the benefit of Cablevision's (or any other distributor's) video

---

[10] Madison Square Garden Co., Form 14A (Definitive Proxy Statement) at 65 (filed Oct. 13, 2011), available at: http://files.shareholder.com/downloads/ABEA-3W02GE/1975793582x0xS1193125-11-269725/1469372/filing.pdf, last visited July 23, 2012.

[11] *Id.* at 69. Moreover, both Cablevision and MSG are represented by the same counsel in this proceeding, further demonstrating the lack of independence between them.

programming distribution business."[12] In any event, the proof is in the pudding. As the Commission found in its recent decision granting AT&T's complaint against Cablevision/MSG, MSG not only has an incentive to sacrifice programming revenues by withholding MSG/MSG+ HD programming from AT&T in order to benefit Cablevision, it actually did so, to the detriment of competition and consumers. Thus, there is little doubt that the current prohibition against exclusive programming contracts between vertically affiliated programmers and cable operators is not overly broad.

c. The Commission Unquestionably Can Extend the Exclusivity Prohibition.

Notwithstanding the claims of vertically integrated cable operators and their programming affiliates, the Commission can extend the exclusivity ban consistent with judicial precedent and the First Amendment.[13] In 2010, when it upheld the Commission's 2007 extension of the exclusivity ban, the D.C. Circuit acknowledged that the downstream market for distribution of video programming had become more competitive since Congress adopted that ban in 1992, but found that the "four largest cable operators are 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."[14] The court further observed that, as a consequence, "[t]he Commission believes the ability and incentive for vertically integrated cable companies to withhold "must-have" programming remains substantial enough to require the further extension

[12] MSG Comments at 14.

[13] *See, e.g.,* Comcast Comments at 9-10; NCTA Comments at 17-18 (arguing that the First Amendment bars any further extension of the exclusivity ban); MSG Comments at 2; Cablevision Comments at 10-11; Time Warner Comments at 17-21.

[14] *Cablevision Systems Corp. v. FCC,* 597 F.3d 1306, 1314 (D.C. Cir. 2010) (*Cablevision I*).

of the exclusivity prohibition," and held "[w]e must defer to the Commission's analysis."[15] And in 2011, the D.C. Circuit rejected a First Amendment challenge to the Commission's program access rules, holding that, "to survive intermediate scrutiny in this facial challenge, the Commission need show only that vertically integrated cable operators remain dominant in *some* video distribution markets, that the withholding of highly desirable . . . cable programming, like RSNs, inhibits competition in those markets, and that providing other MVPDs access to such programming will "promot[e] . . . fair competition in the video marketplace," which it had.[16]

As discussed above, despite the growth in competition in the video distribution market, each of the factors on which the Commission relied to extend the exclusive contract prohibition in 2007, and on which the D.C. Circuit relied in upholding that extension, remain true today. In opening comments, we and other proponents of extending that prohibition submitted extensive evidence showing that vertically integrated cable operators remain dominant in most, if not virtually all, video distribution markets; they continue to control highly desirable programming, the withholding of which inhibits competition in downstream video distribution markets; and providing other MVPDs access to that programming remains necessary to promote fair competition in the video marketplace. In contrast, and notwithstanding the Commission's request that parties submit evidence to support claims in their comments, vertically integrated cable operators and their programming affiliates submitted no evidence that these factors no longer apply, or that cable-affiliated programmers no longer retain the incentive and ability to withhold highly desirable programming from competitive MVPDs in order to significantly hinder competition to their down stream cable affiliates. As a consequence, there is little doubt

[15] *Id.*

[16] *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 712 (D.C. Cir. 2011) (*Cablevision II*), citing *Cablevision I*, 597 F.3d at 1314, and *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996).

that a further extension of the exclusive contract prohibition not only is warranted but also would survive judicial scrutiny in the face of a statutory and/or First Amendment challenge.

III. Conclusion.

For the foregoing reasons, and those articulated in AT&T's opening comments, the Commission should grant a further extension of the prohibition against exclusive contracts involving satellite-delivered, cable-affiliated programming.

Respectfully submitted,

/s/ Christopher M. Heimann

Christopher M. Heimann
Gary L. Phillips
Peggy Garber
AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-3058 – phone
Attorneys for AT&T Inc.

July 23, 2012