

**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 No. 05-192

REPLY COMMENTS OF VERIZON¹

The record in this proceeding confirms — and every competitive multichannel video programming distributor (MVPD) to submit comments agrees — that the Commission's exclusive contract prohibition remains essential to meaningful competition in the MVPD marketplace and should be extended.² While the video marketplace has developed substantially during the past decade, these commenters correctly recognize that the key facts underlying the exclusive contract prohibition, and the Commission's prior decisions extending that prohibition, have stayed largely unchanged. Cable incumbents continue to enjoy the fruits of their unique historical legacy of exclusive local franchises: today, they are vertically integrated with some of

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 generally American Cable Association Comments; Blooston Rural Video Service Providers Comments; CenturyLink Comments; DIRECTV Comments; DISH Comments; Free Press Comments; Joint Comments of Interstate Communications *et al.*; ITTA Comments; OPASTCO & NTCA Comments; United States Telecom Association Comments; Writers Guild of America Comments.

the most popular networks and control roughly half of the regional sports networks (RSNs) broadcasting.³ The record fully supports extending the exclusive contract prohibition once again.

Even if the Commission were not to extend the exclusive contract prohibition in full, at a minimum it should retain the ban on exclusive contracts for regional sports and other popular, non-replicable programming. As illustrated by the events leading to Verizon's successful — but more than two-year-long — program access complaint against Cablevision and its affiliate, MSG, regional sports programming remains critical to effective competition in the MVPD marketplace, and cable operators continue to withhold such programming as a means of discouraging competition.⁴ The Commission would be well-justified in even a partial extension of the exclusive contract prohibition.

A. There is no dispute about the nature and extent of cable operators' vertical integration with popular and non-replicable programming networks. Nonetheless, the handful of cable operators and affiliated programmers that oppose extending the exclusive contract prohibition offer up two inconsistent — and equally meritless — claims.

First, some cable incumbents assert that the prohibition on entering exclusive contracts for popular and non-replicable programming is unnecessary because, they claim, there is “no evidence” of any “significant likelihood” that cable-affiliated programmers would seek to withhold programming from other MVPDs.⁵ This assertion cannot be squared with the series of well-documented examples of vertically integrated programmers doing just that: withholding popular programming from the MVPDs with which they compete in order to make it more

³ See Verizon Comments at 1-5.

⁴ See *id.* at 2-3, 6-10.

⁵ National Cable & Telecommunications Association (NCTA) Comments at 13; *see also* Discovery Comments at 3-8; Madison Square Garden (MSG) Comments at 13-16.

difficult for those competitors to offer a service that consumers would consider a meaningful choice.⁶ Most recently, the Commission found that MSG withheld the HD feeds of its regional sports programming to benefit Cablevision and harm Verizon and AT&T.⁷ But even if it were true that cable-affiliated programmers have so little incentive to enter into exclusive contracts, there would be no reason to object to extending the exclusive contract prohibition — that the rule merely prohibits contracts that the programmers have no incentive to sign, while allowing those programmers and their affiliated cable operators to overcome that restriction in the supposedly rare case where exclusivity is economically rational by demonstrating the contract is in the “public interest.”⁸

Second, Cablevision and MSG assert that exclusive contracts are economically necessary and beneficial, whether to enable cable operators to differentiate their offerings from competitors or to enable niche channels to find an audience.⁹ While it is true that, in many contexts, exclusive agreements can benefit consumers, the cable incumbents have not shown that exclusive programming agreements with affiliates for popular, often non-replicable, programming generally has such an effect. Indeed, Cablevision and MSG made the same claim of pro-competitive product differentiation to justify withholding HD regional sports from Verizon and AT&T, yet the Commission found that those companies had “no evidence” to

⁶ See, e.g., Verizon Comments at 3-5, 9-10.

⁷ See *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, Order, 26 FCC Rcd 13145, ¶ 68 (MB 2011) (“*Verizon 2011 Bureau Order*”).

⁸ See 47 C.F.R. § 76.1002(c)(4)-(5); see, e.g., *New England Cable News Petition for Public Interest Determination*, Memorandum Opinion and Order, 9 FCC Rcd 3231 (1994) (granting exclusivity petition); *NewsChannel Petition for Public Interest Determination*, Memorandum Opinion and Order, 10 FCC Rcd 691 (1994) (granting exclusivity petition).

⁹ See Cablevision Comments at 2, 7-9; MSG Comments at 3, 17-22.

support that assertion.¹⁰ More generally, Cablevision and MSG can find only a handful of exclusive deals between competitive MVPDs and *unaffiliated* programmers, again undermining the argument that such agreements are more likely to have a pro-consumer, rather than anticompetitive, effect.¹¹ The fact that such contracts are so rare among unaffiliated MVPDs and programmers — and far more commonly seen between a cable operator and its affiliated programmer — confirms that such contracts are rarely pro-competitive.¹² In those cases where exclusive programming contracts are pro-competitive, of course, a cable operator and its affiliated programmer can seek an exception on the ground that an exclusive contract is in the “public interest.” The fact that no such petition has been filed in 14 years — despite numerous exclusive deals between cable operators and their affiliated programmers — is telling.¹³

B. The record continues to support the Commission’s well-established view that access to RSNs, in particular, is necessary for effective competition in the MVPD marketplace. The claim advanced by Cablevision and MSG that regional sports are no longer important to competition runs contrary to the weight of established authority and evidence — as well as the record evidence on which the Commission ruled for Verizon in its program access dispute with Cablevision and MSG.¹⁴

MSG now argues that it “would have no interest in an exclusive arrangement whereby it would sacrifice programming revenue for the benefit of Cablevision’s . . . video programming

¹⁰ *Verizon 2011 Bureau Order*, ¶ 17.

¹¹ *See* Cablevision Comments at 5; MSG Comments at 9-10.

¹² *See* DIRECTV Comments at 26-34 & Ex. A (citing evidence that exclusive contracts among unaffiliated MVPDs and programmers are “exceedingly rare” and offering economic research explaining why “the efficiency-enhancing rationales for exclusivity are unlikely to motivate exclusive programming arrangements with MVPDs”).

¹³ *See id.* at 26-27.

¹⁴ *See* Cablevision Comments at 5; MSG Comments at 22-27.

distribution business.”¹⁵ But the Commission found that MSG engaged in precisely this sort of behavior for the benefit of Cablevision by withholding programming from Verizon: “[B]y foregoing licensing fees and advertising revenue by withholding MSG HD and MSG+ HD from Verizon, MSG LP [was] acting counter to its economic interests in order to support Cablevision’s product differentiation strategy,” and there was “no evidence of any ‘value and consideration’ that MSG LP has received from this arrangement.”¹⁶ The record also showed that Cablevision sought to leverage MSG’s withholding of programming to gain a competitive edge over Verizon. Cablevision focused much of its advertising on the fact that it could offer MSG’s local sports programming in HD while Verizon could not; a top executive at Cablevision, meanwhile, told industry analysts that Verizon’s lack of HD sports programming would “impede Verizon from obtaining new subscribers” and “cause Verizon to lose subscribers it had already gained.”¹⁷

Survey evidence submitted in the proceeding confirmed that consumers have strong preferences to watch their hometown professional sports teams. More than 70 percent of pay television subscribers with access to local sports programming in HD would be unlikely to switch to another MVPD that did not offer that programming, and more than half of all viewers — and 77 percent of sports fans — identified the availability of regional sports programming in HD as an important factor in weighing whether to switch providers.¹⁸ The Commission credited

¹⁵ MSG Comments at 14; *see also* Discovery Comments at 3-8; NCTA Comments at 13-14.

¹⁶ *Verizon 2011 Bureau Order* ¶ 17. As Verizon noted during the proceeding, MSG’s conduct continued even after it was spun off to become a publicly traded corporation. *See id.* ¶ 17 n.88.

¹⁷ Verizon Comments at 7-8.

¹⁸ *See id.*

the survey evidence as “additional support for [its] conclusion that such networks are non-replicable and critically important to consumers and competition.”¹⁹

Against the weight of such evidence, MSG simply points to a handful of examples of competitive MVPDs that do not carry certain RSNs and argues that “[c]hanges in the marketplace have overtaken the Commission’s previous view that RSNs are ‘must have’ services that must be shared with rival MVPDs for competition in video markets to survive.”²⁰ The Commission rejected a similar argument — which was based on assertions of Verizon’s “general success” despite being denied access to MSG’s regional sports programming in the HD format that consumers demand — when MSG and Cablevision raised it in defense against Verizon’s program access complaint.²¹ The Commission concluded, rather, that the MSG RSNs were sufficiently important that their withholding “significantly hinder[ed]” Verizon as a competitor to Cablevision.²² The Commission’s decision there cannot be reconciled with MSG’s argument here that access to regional sports programming is no longer necessary to effective competition. MSG’s specific examples, moreover, may illustrate nothing more than the difficulty many competitive MVPDs face in obtaining access to cable-affiliated RSN programming. To take just two examples, DISH is currently engaged in an ongoing program access dispute with MSG,²³ and DIRECTV declined to carry Cox Sports Television because the Cox-affiliated RSN

¹⁹ *Verizon 2011 Bureau Order* ¶ 47.

²⁰ MSG Comments at 22; *see id.* at 22-27.

²¹ *See Verizon 2011 Bureau Order* ¶ 61 (“Defendants’ evidence purporting to demonstrate Verizon’s general success in the New York DMA fails to isolate the impact of the lack of MSG HD and MSG+ HD on the willingness of consumers to choose Verizon.”).

²² *See id.* ¶ 42.

²³ *See generally DISH Network L.L.C. v. Madison Square Garden, Inc.*, File No. CSR-8367-P (MB filed Sept. 16, 2010).

demanded that it be distributed to all subscribers within 350 miles of New Orleans but would only allow broadcast of Hornets basketball games within a 75-mile radius.²⁴

The D.C. Circuit acknowledged in *Cablevision II* that 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.”²⁵ The competitive significance of RSN programming has been recognized in a long string of Commission decisions²⁶ — including in the recent program access disputes brought by Verizon and AT&T against MSG and Cablevision.²⁷ Because RSNs are “non-replicable and valuable to consumers,” the Commission has recently reaffirmed that “no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace.”²⁸ MSG and Cablevision offer no reason to reconsider the soundness of any of these decisions.

C. The Commission can extend the exclusive contract prohibition consistent with the First Amendment, contrary to the arguments raised by some in the cable industry.²⁹ The D.C.

²⁴ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 146 n.502 (2006).

²⁵ *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (“*Cablevision II*”).

²⁶ See Verizon Comments at 6 & n.18; see also *Fourteenth Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, FCC 12-81, ¶ 372 (rel. July 20, 2012) (“Major sporting events . . . consistently generate the highest ratings of any programming among viewers who are demographically desirable to advertisers”).

²⁷ See generally *Verizon 2011 Bureau Order; AT&T Servs., Inc. v. Madison Square Garden, L.P.*, Order, 26 FCC Rcd 13206 (MB 2011).

²⁸ *Verizon 2011 Bureau Order* ¶ 29 (internal quotation marks omitted).

²⁹ See NCTA Comments at 17-18.

Circuit has already upheld the rule once under First Amendment scrutiny,³⁰ and its analysis in *Cablevision II* indicates that it would do so again — based on cable operators’ “special characteristics” and their “unique ability to impact competition,” a continuing consequence of their legacy position.³¹

For the same reasons, a partial extension of the exclusive contract prohibition for non-replicable programming such as regional sports would pass First Amendment review under clear D.C. Circuit precedent. As a threshold matter, regulations targeting such programming will be reviewed under intermediate scrutiny — not, as some commenters argue, under strict scrutiny.³² In *Cablevision II*, the D.C. Circuit held that regulation specifically targeting regional sports programming — in that case, the adoption of rebuttable presumptions that applied only to unfair acts involving RSNs — is “subject only to intermediate scrutiny.”³³ The D.C. Circuit explained that, even though the presumptions were “triggered by whether the programming at issue involves sports,” strict scrutiny was inappropriate because “there [was] absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas.”³⁴ To the contrary, the “undisputed evidence” showed that the Commission’s rules regarding RSNs were motivated only by “that programming’s economic characteristics, not . . . its communicative impact.”³⁵ The same logic would require that intermediate scrutiny

³⁰ See *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 977-79 (D.C. Cir. 1996) (per curiam).

³¹ See *Cablevision II*, 649 F.3d at 710-13; see generally Verizon Comments at 11-12.

³² See MSG Comments at 27-28; Time Warner Cable Comments at 2, 19-21.

³³ *Cablevision II*, 649 F.3d at 717-18.

³⁴ *Id.* at 717.

³⁵ *Id.* at 718.

apply to any decision by the Commission to extend the ban on exclusive contracts for regional sports or other non-replicable programming.

On the merits, a partial extension would easily survive intermediate scrutiny. *Cablevision II* upheld the Commission’s rebuttable presumptions as a “narrowly tailored effort to further the important governmental interest of increasing competition in video programming” in light of the “record evidence demonstrating the significant impact of RSN programming withholding.”³⁶ The same rationale would apply here: because RSNs are popular and non-replicable, and therefore uniquely important to competition in the MVPD marketplace, a regulation specifically targeting exclusionary behavior involving RSNs would survive intermediate scrutiny. Even the dissent in *Cablevision I* acknowledged that the unique characteristics of “*regional* video programming networks, particularly regional sports networks,” would justify such a “targeted restraint” under the First Amendment.³⁷

D. Finally, none of the alternatives proposed in the NPRM to an extension of the exclusive contract prohibition would be practical to implement.³⁸ Allowing the exclusive contract prohibition to sunset on a market-by-market basis, for instance, would pose considerable practical difficulties: many carriage agreements are national in scope, and even regional agreements are rarely defined in terms of individual markets. The Commission should not depart from the framework set up by Congress in the 1992 Cable Act, which established general rules that apply across the board to cable operators and their affiliates, and included a mechanism for

³⁶ *Id.*

³⁷ *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1326 n.6 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (“*Cablevision I*”).

³⁸ *See Revision of the Commission’s Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413, ¶¶ 69-71 (2012).

case-by-case exemption for exclusive contracts that are in the “public interest.”³⁹ Whether the Commission extends the exclusive contract prohibition in full or only for non-replicable programming such as regional sports, the same framework should apply.

Respectfully submitted,

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July 23, 2012

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³⁹ See generally 47 U.S.C. § 548(c); 47 C.F.R. § 76.1002(c).