

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

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

**REPLY COMMENTS OF THE WALT DISNEY COMPANY, VIACOM, INC.,
NEWS CORPORATION, TIME WARNER INC., AND CBS CORPORATION**

The Walt Disney Company (“Disney”),¹ Viacom, Inc., News Corporation, Time Warner Inc., and CBS Corporation (collectively, the “Joint Commenters”) respectfully submit the instant reply comments in the above-captioned proceeding in which the Federal Communications Commission (“FCC” or “Commission”) seeks comment on, *inter alia*, whether to retain, sunset, or relax the cable-affiliated program exclusivity rules.² The Joint Commenters respond to

¹ Disney joins these reply comments on behalf of itself, as well as the following Disney-owned entities: ESPN (80% owned by Disney), Disney ABC Cable Networks Group, the ABC Television Network, and the ABC Owned Television Stations. The ABC Owned Television Stations are located in the following markets: New York (WABC-TV), Los Angeles (KABC-TV), Chicago (WLS-TV), Philadelphia (WPVI-TV), San Francisco (KGO-TV), Houston (KTRK-TV), Raleigh-Durham (WTVD(DT)), and Fresno (KFSN-TV).

² See *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*

isolated and extraordinary requests that the Commission expand the program access rules—including the anti-discrimination provision in Section 628(c)(2)(B) of the Cable Television Consumer Protection and Competition Act of 1992 (the “1992 Act”)³—to apply to all programming providers, regardless of whether such programmers are vertically integrated with a cable operator.⁴

As explained herein, the program access rules were promulgated in response to an unambiguous statutory directive—the prevention of unfair acts by vertically integrated cable operators. Specifically, Congress was concerned that vertically integrated cable operators might engage in unfair practices with respect to making affiliated programming available to their competitors. It would contravene the express language of Section 628 of the 1992 Act, as well as past Commission action in implementing Section 628,⁵ to expand the program access rules to apply to all programming providers. Moreover, the NPRM does not address expansion of the

Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., Notice of Proposed Rulemaking, MB Docket Nos. 12-68, 07-18, 05-192 (rel. Mar. 20, 2012) (“NPRM”).

³ See 47 U.S.C. § 548(b) (2012).

⁴ See Comments of Cox Communications, Inc. in MB Docket Nos. 12-68, 07-18, 05-192, at 3-4 (filed June 22, 2012) (“Cox Comments”); Comments of Mediacom Communications Corporation in MB Docket Nos. 12-68, 07-18, 05-192, at 17-21 (filed June 22, 2012) (“Mediacom Comments”); see also Comments of DIRECTV, LLC in MB Docket Nos. 12-68, 07-18, 05-192, at 22-23 (filed June 22, 2012) (“DIRECTV Comments”).

⁵ See, e.g., *In re Implementation of Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12158 ¶ 74 (2002) (finding that the record in that proceeding “provide[d] no support for statutory authority to expand the program access rules to include independent programmers within the exclusivity prohibition” and that “[s]uch an expansion would directly contradict Congress’ intent in limiting the program access provisions to a specific group of market participants”); *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359 ¶ 10 (applying the prohibition of Section 628(b) “consistent with the plain language”); see also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Time Warner Inc., Assignor/Transferor, and Time Warner Cable Inc., Assignee/Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 879, 890 ¶ 21 (MB, WCB, WTB, IB, 2009) (“Time Warner Order”).

program access rules to non-vertically integrated programming networks and therefore the Commission is barred by the Administrative Procedure Act from adopting any expansion.

Accordingly, such isolated requests must be rejected.

I. THERE IS NO STATUTORY OR POLICY BASIS FOR APPLYING THE PROGRAM ACCESS RULES TO NON-VERTICALLY INTEGRATED PROGRAMMING NETWORKS.

Congress adopted Section 628 of the 1992 Act to provide the FCC with authority to address unfair acts by vertically integrated cable operators. Specifically, Section 628 applies to any “satellite cable programming vendor in which a cable operator has an attributable interest” and prohibits any such vertically integrated cable operator from engaging in acts, such as entering into exclusive contracts or discriminating in favor of affiliated programmers, that hinder the ability of competitive multichannel video programming distributors (“MVPDs”) to provide programming to their subscribers.⁶ As the Commission has long recognized, Section 628 was enacted to address concerns that “vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs.”⁷ Indeed, in promulgating Section 628, Congress expressly concluded that incumbent cable providers had an unfair advantage over their competitors due to, *inter alia*, extensive vertical integration of cable operators and programmers.⁸ To implement Section 628, the FCC adopted its program access rules—the rules that govern access by competitors to cable program networks that are vertically integrated with cable operators—consistent with this express statutory directive.⁹ Because of the

⁶ See e.g., NPRM ¶ 7; *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, MB Docket No. 07-198, 25 FCC Rcd. 746, 748 (2010) (“2010 Program Access Order”).

⁷ See 2010 Program Access Order, 25 FCC Rcd at 748 ¶ 3.

⁸ See NPRM ¶ 6; 2010 Program Access Order, 25 FCC Rcd at 753-54 ¶ 13.

⁹ See Cox Comments, *supra* note 4, at n.14 (acknowledging that “the program access rules relate only to vertically integrated programmers” and that programmers that are not vertically integrated “are not subject to the rules”).

clarity and precision with which Congress drafted these provisions, the Commission simply does not have the authority to expand the applicability of its corresponding regulations.

Notwithstanding the legislative mandate of Section 628, as implemented by the FCC in its program access rules, Mediacom Communications Corporation (“Mediacom”) asserts that the Commission should extend the program access rules to “programmers other than those that are vertically integrated with a cable operator.”¹⁰ Mediacom conveniently ignores that, as explained above, the program access rules were promulgated—and have always been intended—to implement the statutory mandate to curb unfair acts by vertically integrated cable operators. Absent legislative action to broaden the scope of Section 628, the Commission is bound by Congress’s unambiguous dictate.¹¹

Contrary to Mediacom’s claims, the Commission’s determination that Section 628 should apply to terrestrially delivered, cable-affiliated programming does not support extension of the rules to program suppliers that are not affiliated with a cable operator. Rather, interpretation of the statute, and thereby the program access rules, to apply to terrestrially-delivered programming was based on the need to ensure that vertically integrated cable operators could not circumvent rules that would otherwise apply to them merely based on the delivery method used for such programming.¹² In other words, the rule was intended to apply to all cable operators with

¹⁰ See Mediacom Comments, *supra* note 4, at 17; see also Cox Comments, *supra* note 4, at 3-4.

¹¹ See *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 799 (D.C. Cir. 2002) (holding that where “the FCC promulgates regulations that significantly implicate program content,” it cannot rely on its ancillary authority but rather must rely upon an affirmative grant of power from Congress).

¹² *2010 Program Access Order*, 25 FCC Rcd at 748-50 ¶¶ 3, 7 (explaining “the bases for [the FCC’s] conclusion that there is a need for Commission action to address such complaints: Cable operators have an incentive and ability to engage in unfair acts involving their affiliated programming; record evidence indicates that cable operators have engaged in unfair acts

affiliated program networks, regardless of the means used to distribute programming. Indeed, the FCC’s terrestrial loophole decision was premised entirely on the fundamental notion that “unfair acts involving cable-affiliated programming, regardless of whether that programming is satellite-delivered or terrestrially delivered, pose the danger of significantly hindering MVPDs from providing satellite cable programming or satellite broadcast programming, thereby harming competition in the video distribution market and limiting broadband deployment.”¹³ In short, the “terrestrial loophole” decision, as upheld by the D.C. Circuit, does not change the clear parameters of Section 628.

Even if the Commission had the authority to extend the program access rules to non-vertically integrated affiliated programmers, there is no policy basis to do so. Mediacom alleges that “[t]hrough their control of must-have programming, programmers can play competing MVPDs against one another” to the detriment of consumers and the public interest,¹⁴ but this argument neither is supported with any facts nor is it logical. Programmers that are not affiliated with cable operators do not have any incentive to favor a particular MVPD over another. Rather, their incentive is to negotiate with all MVPDs to obtain the widest possible distribution of their content. It is significant that Mediacom provides utterly no support for its assertion regarding non-cable affiliated programmers, other than a blanket statement about what programmers “can” do.¹⁵ Without any evidence of harm, there is no policy justification or reason to expand Congress’s clear directive to address unfair acts by vertically integrated cable operators.

involving certain terrestrially delivered, cable-affiliated programming; and these unfair acts have impacted competition in the video distribution market in certain cases”).

¹³ *See id.* at 759 ¶ 21.

¹⁴ *See* Mediacom Comments, *supra* note 4, at 18.

¹⁵ The Joint Commenters submit that this absence of any support is not surprising, in light of the considerable evidence to the contrary. For instance, many programmers have provided examples in the past demonstrating that no such discrimination or coercion exists. *See generally*

To the extent that Mediacom makes vague allegations about the alleged bundling practices of programmers, the Joint Commenters have responded to and refuted these specious allegations numerous times. In particular, the Joint Commenters have demonstrated that no cable operator or other MVPD is obligated to carry any other programming services as a prerequisite to carrying their most popular individual cable programming networks.¹⁶ Rather, in addition to offering each MVPD the option to carry the Joint Commenters' cable programming networks, the Joint Commenters also offer programming packages, which enable MVPDs to obtain both lower prices for the most popular cable programming networks and additional cable programming networks that drive substantially greater value for the MVPDs and their customers.¹⁷ Moreover, these options are made available to small and large MVPDs alike.

Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. in MB Docket No. 07-198, at 21-25 (filed Jan. 4, 2008) (“Fox 2008 Comments”); Comments of Viacom, Inc. in MB Docket No. 07-198, at 9-13 (filed Jan. 4, 2008) (“Viacom 2008 Comments”); Comments of The Walt Disney Company in MB Docket Nos. 07-29, 07-198, at 52 (filed Jan. 4, 2008) (“Disney 2008 Comments”).

¹⁶ See, e.g., Disney 2008 Comments, *supra* note 15, at 49-52; Fox 2008 Comments, *supra* note 15, at 21-25; Viacom 2008 Comments, *supra* note 15, at 9-15; see also Comments of Viacom in MB Docket No. 04-207, at 11 (filed July 15, 2004) (“Viacom 2004 Comments”); Letter from Michael G. Baumann, Senior Vice President, Economists Incorporated, to Marlene H. Dortch, Secretary, FCC filed in MB Docket No. 04-207 (Nov. 18, 2004); Comments of The Walt Disney Company in MB Docket No. 04-207, at 35-36 (filed July 15, 2004) (“Disney 2004 Comments”); Reply Comments of The Walt Disney Company in MB Docket No. 04-207, at 2 (filed Aug. 13, 2004).

¹⁷ See generally Michael G. Baumann & Kent W. Mikkelsen, Benefits of Bundling and Costs of Unbundling Cable Networks (2004), filed with Disney 2004 Comments, *supra* note 16, at Ex. 1; Jeffrey A. Eisenach, Economic Implications of Bundling in the Markets for Network Programming (2008), filed with Disney 2008 Comments, *supra* note 15, at Ex. A; Bruce M. Owen, Wholesale Packaging of Video Programming (2008), filed with Viacom 2008 Comments, *supra* note 15, at App. 2; Bruce M. Owen, Wholesale Packaging of Video Programming: Reply to ACA and Dish Network (2008), filed with Reply Comments of Viacom, Inc. in MB Docket No. 07-198, at App. 1; Bruce M. Owen & John M. Gale, Cable Networks: Bundling, Unbundling, and the Costs of Intervention (2004), filed with Viacom 2004 Comments, *supra* note 16, at Attachment 1; Bruce M. Owen & John M. Gale, Why a Box of Crayons Has Many Colors, And the “Cable Tax” Is Not a Tax; Why Contract Confidentiality Promotes Competition and Why the News Corp Retransmission Consent Conditions Don’t Apply to Other Broadcast

II. THE NPRM DOES NOT PROVIDE INTERESTED PARTIES THE OPPORTUNITY TO COMMENT ON THE POTENTIAL EXTENSION OF THE PROGRAM ACCESS RULES.

The NPRM initiates the Commission's third review of the necessity for the exclusive contract prohibition, which will sunset on October 5, 2012, unless the Commission finds that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."¹⁸ Accordingly, in the NPRM, the FCC seeks comment on two specific issues. First, the FCC asks a number of questions relating to whether it should retain, sunset, or relax its prohibition on exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor, as set forth in Section 628(c)(2)(D).¹⁹ Second, the Commission asks whether it should revise its program access rules "to the extent they bear on [its] consideration of whether to allow the exclusive contract provision to sunset."²⁰ In other words, contrary to Mediacom's assertions, the NPRM is focused solely on the exclusive contract prohibition and considers modifications, expansion, or repeal of the program access rules, including those addressing pricing and discrimination, only to the extent such actions are necessary to complement its ultimate decision regarding the exclusive contract prohibition. Moreover, the NPRM does not discuss or seek comment on whether the FCC should—in contradiction to its established precedent—subject non-vertically integrated programming suppliers to the program access rules or whether it even

Networks (2004), filed with Reply Comments of Viacom, Inc. in MB Docket No. 04-207, at Attachment 1.

¹⁸ See 47 U.S.C. § 548(c)(5). Congress originally provided that the exclusive contract provision would cease to be effective on October 5, 2002. *Id.* However, after reviewing the prohibition in June 2002, the Commission found that it continued to be necessary and retained the prohibition for five years, until October 5, 2007. See NPRM ¶ 3. In September 2007, after a second review, the Commission concluded that the exclusive prohibition still remained necessary, and thus retained the prohibition for another five years, this time until October 5, 2012. *Id.*

¹⁹ See generally NPRM.

²⁰ See *id.* ¶ 7; see also *id.* ¶ 1.

has the jurisdictional authority to do so. Rather, the NPRM is directed explicitly at the program access rules solely as they relate to cable-affiliated programmers.²¹ Because the NPRM does not seek comment on extending the program access rules to non-cable affiliated programming networks, it would be contrary to the Administrative Procedure Act for the FCC to adopt such a proposal without giving sufficient notice such that “interested [parties have] an opportunity to participate in the rulemaking.”²² Therefore, requests to expand the program access rules to non-cable affiliated programming networks in the instant proceeding must be rejected.

III. CONCLUSION

The legislative mandate of Section 628 makes clear that the program access rules are intended specifically to address unfair acts by vertically integrated cable operators. Neither Section 628 nor the program access rules were intended to regulate access to, or carriage of, programming networks generally. Rather, the program access regime has the specific purpose of curbing anticompetitive behavior by vertically integrated cable operators, which were deemed by Congress and the FCC to have both the incentive and ability to withhold programming from rival MVPDs. There is no such incentive for non-vertically integrated programming suppliers. Consequently, requests to expand the program access rules (or to adopt new rules) to apply to non-cable affiliated programming networks must be rejected. This is especially the case given that the Commission did not seek comment on the application of the program access regime to non-vertically integrated programmers and therefore did not afford interested parties with sufficient notice of the issue.

²¹ *See id.* ¶¶ 98-100.

²² *See* 5 U.S.C. § 553(c).

Respectfully submitted,

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