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 DISH NETWORK L.L.C.

July 23, 2012

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I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. ("DISH") agrees with the majority of commenters – including rural service providers, DBS operators, the large incumbent telecommunications companies, small telecommunications providers, an assortment of public interest groups, and small cable operators – that the Commission should not lift the program access exclusivity ban. Only the large multiple system operators ("MSOs") and their affiliates support lifting the ban, but they fail to adequately show that doing so would yield any public benefits. The advent of online video distribution, touted by two MSOs in favor of lifting the ban, is in fact a reason to retain it. Exclusive rights to key programming would give vertically integrated MSOs a powerful weapon, allowing these MSOs to crush the threat from independent online distributors in their incipiency. Equally important, no MSO provides persuasive evidence of benefits that exclusivity would produce and that would counter-balance the competitive risks. Madison Square Garden envisions a supposedly "virtuous cycle" where one distributor would respond to another's exclusive programming by obtaining its own exclusive rights to other programming. Even if this were to happen, it would be a consumer's nightmare rather than a "virtuous cycle." Consumers would not be able to choose based on price among comparable offerings, and might have to subscribe to two or three MVPDs for access to all the programming they want.

DISH also agrees with many commenters that the Commission should take steps to strengthen the program access rules. Specifically, the Commission should create a presumption that bundling requests are unfair and that bundling involving a Top 20 cable network significantly hinders competition. The Commission should clarify that volume discounts cannot be applied in a discriminatory manner (for example, in such a manner as to produce a significant price disparity for small differences in volume), and should require programmers to disclose their volume discount schedule to distributors upon request.

II. A BROAD GROUP OF COMMENTERS, INCLUDING SOME CABLE OPERATORS, CALLS FOR THE COMMISSION TO MAINTAIN THE BAN

A diverse group of commenters joins DISH in asking the Commission to retain the program exclusivity ban.[1] The ban is necessary because cable operators still have the incentive and ability to use exclusivity in an anticompetitive manner. This conclusion is also supported by all of the economic analyses submitted for the record.[2]

[1] ACA Comments at 2-11; AT&T Comments at 6-28; Blooston Rural Video Service Providers at 6-7; CenturyLink Comments at 5-21; DIRECTV Comments at 6-34; DISH Comments at 3-14; Free Press Comments at 8; ITTA Comments at 3-8; Joint Rural Telco Comments at 2-5; Rural Trade Associations Comments at 3-6; USTA Comments at 15-23; Verizon Comments at 3-5; Writer's Guild Comments at 4-9.

[2] Report of Kevin Murphy, MB Docket Nos. 12-68, 07-18, 05-192, at 30-33 (June 22, 2012) (attached to DIRECTV Comments); William Rogerson, Proposed Revision to Program Access Rules to Better Address the Potential Competitive Harms Created by Cable-Affiliated

Tellingly, even some cable operators oppose lifting the ban, even though the ban is directed at cable-affiliated programmers. The American Cable Association warns: "Without this protection, competition and diversity in the market for MVPD services would be harmed because many small and medium-sized cable operators and their customers would likely lose access to critical programming."[3] Mediacom, for its part, seeks to have the Commission strengthen program access protections by regulating bundling practices, banning discriminatory volume-based discounts, and requiring disclosure of programming rates.[4] And the Blooston Video Service Providers urge the Commission to "do everything possible" to ensure that competition "is not disrupted or distorted by tactics such as the use by large CATV MSOs of their national market power to obtain unwarranted competitive advantages via exclusive contracts that deprive competitors in certain local markets of desirable entertainment and sports channels."[5]

The only support for lifting the ban comes from a few large cable operators, their trade association, and a couple of cable-affiliated programmers. Even this support seems lukewarm. Notably, none of the ban's opponents offer any expert economic analysis supporting the purported lack of need for the ban or benefits from lifting it.

III. LIFTING THE BAN WILL NOT UNLEASH ANY PUBLIC BENEFITS

A. New Programming Is Not Foreclosed by the Exclusivity Ban

Though parties in favor of lifting the ban dwell on whether the ban is necessary to preserve and protect competition, these proponents of exclusivity are largely silent on the

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Programmers, MB Docket Nos. 12-68, 07-18, 05-192, at 1 n.2 (June 22, 2012) (attached to ACA Comments); Expert Report of Simon Wilkie, MB Docket Nos. 12-68, 07-18, 05-192, at 2-3 (June 22, 2012) (attached to DISH Comments).

[3] ACA Comments at 3.

[4] Mediacom Comments at 4-21.

[5] Blooston Rural Video Service Providers at 6-7.

benefits that exclusivity would supposedly generate. Understanding whether an exclusive is procompetitive and beneficial is a necessary component of analyzing whether the prohibition on exclusives remains "necessary to preserve and protect competition and diversity in the distribution of video programming."[6] If an exclusive does not have any redeeming benefits, all that remains are its anticompetitive harms.

The only plausible economic rationale in support of exclusivity is that the flexibility to enter into exclusives allows the creation of programming that otherwise would not be produced at all. The record does not support a conclusion that this would, or even could, be the case here. None of the ban's opponents demonstrate (or even assert) a single instance where the ban on exclusivity has prevented any new innovative programming from being produced.

Discovery and Madison Square Garden suggest that there may be "indirect" benefits to exclusivity where rivals react by taking steps to offer exclusives of their own.[7] Madison Square Garden touts the one-time exclusive arrangement between AT&T and Apple for the iPhone and DISH's offering of international programming as examples.[8] But there is no evidence that exclusive agreements for video programming have spurred a "virtuous cycle" (as Madison Square Garden dubs it) of other competitors developing and offering their own exclusives, or that consumers would benefit from such a cycle. On the contrary, DIRECTV's exclusive package of NFL programming has not precipitated the creation of a substitute football league or other substitutable programming. Moreover, even if one accepted the premise that the ability of cable-affiliated programmers to enter into exclusives with cable operators will result in

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[6] 47 U.S.C. § 548(c)(5). The standard enunciated by the Cable Act for the Commission's ten-year review is whether the "prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."

[7] Discovery Comments at 11; MSG Comments at 19-22.

[8] MSG Comments at 21-22.

independent MVPDs making their own exclusives, this race towards exclusivity would not benefit consumers. To the contrary, consumers would no longer be able to choose on price between comparable MVPD offerings because of the resulting disparities in programming. Finally, the limited exclusive arrangements that DISH has entered into are inapposite because of DISH's lack of affiliation with any must-have cable networks.[9]

B. The Exclusivity Ban Permits Exclusivity in the Limited Instances Where It May Serve the Public Interest

It is also not necessary to lift the ban to accommodate any of the "limited instances" where, in Discovery's view, exclusivity is beneficial.[10] The Cable Act does this today through the safety valve of the public interest determination.[11] Cablevision suggests its investments in terrestrially delivered local news and high school sports channels provide examples of beneficial exclusives and asserts that it would not have made the investments if it would have been forced to share the programming.[12] But Cablevision would not have been forced to share the programming under the ban even if it were not terrestrially delivered, provided of course that the benefits cited by Cablevision are real. The very *New England Cable News* decision that Cablevision cites to prove the public interest benefits of exclusivity actually establishes that, where "local origination programming . . . may rely heavily on exclusivity to generate financial support" and where such channels "could be economically unfeasible absent an exclusivity agreement," the exclusivity agreements will be approved under Section 628(c)(2)(D) of the

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[9] *See* DISH Network, Annual Report (Form 10-K), at 20 (Feb. 23, 2012).

[10] *See* Discovery Comments at 10.

[11] 47 U.S.C. § 548(c)(4); *see* New England Cable News, *Memorandum Opinion and Order*, 9 FCC Rcd. 3231 (1994) ("*New England Cable News*"); NewsChannel, *Memorandum Opinion and Order*, 10 FCC Rcd. 691 (1994).

[12] Cablevision Comments at 7-9.

Cable Act if they are reasonably tailored and essential for the programmer's financial survival.[13] Thus, the Commission today has the tools to permit exclusives in the "limited instances" where affiliated exclusivity may serve the public interest.

C. Online Video Distribution Justifies Maintaining the Ban, Not Sunsetting It

Some commenters argue that Internet-based video from a variety of sources reduces the need for the exclusivity ban.[14] But while Cablevision suggests this new competitive threat to cable's dominance is "real and growing,"[15] NCTA admits that the new forces merely represent "potential competitors."[16] The Commission agreed with NCTA when it recognized just last week that the emergence of new online video distributors ("OVDs") may at some point be a viable commercial alternative to cable by providing more programming choices, viewing flexibility, technological innovation, and lower prices.[17] But lifting the ban would actually provide a powerful weapon for cable to suppress this new source of potential competition. Cable's dominance gives it "the incentive and ability to discriminate against, thwart the development of, [and] otherwise take anticompetitive actions against OVDs."[18] This is why the Commission imposed OVD program conditions on last year's Comcast-NBCU transaction; it is also another reason why the Commission should not lift the exclusivity ban. Consistent with

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[13] *New England Cable News*, 9 FCC Rcd. at 3236 ¶¶ 37-39; Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992, *First Report and Order*, 8 FCC Rcd. 3359, 3385 ¶ 65 (1993) ("*1993 Program Access Order*").

[14] Cablevision Comments at 6; NCTA Comments at 10; Comcast Comments at 7-9.

[15] Cablevision Comments at 6.

[16] NCTA Comments at 10.

[17] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269, *Fourteenth Report*, FCC 12-81 ¶ 239 (rel. July 20, 2012); *see also* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4268-69 ¶ 78 (2011) ("*Comcast-NBCU Order*").

[18] *Comcast-NBCU Order*, 26 FCC Rcd. at 4268-69 ¶ 78.

Section 628(c)(4)(B) of the Cable Act, the Commission has a duty to consider the potential negative effects that exclusivity would have on "competition from multichannel video programming distribution technologies other than cable," whether those technologies be satellite, telco, or Internet-based OVDs.[19] The ban should not be lifted while this emerging category of new entrants is still in such a nascent stage.

D. The Program Access Rules Should Be Strengthened, Not Weakened

The Commission also seeks comment on how the program access rules can be improved, especially in light of marketplace developments and experience with the rules over the past two decades.[20] DISH agrees with several commenters that there are steps the Commission should take to strengthen the program access rules, but such steps are not a substitute for the exclusivity ban. As Mediacom, Cox, and others point out, there are a number of practices that the Commission can and should take pursuant to its authority under Section 628(b) of the Cable Act – the catch-all unfair practices provision.[21] Bundling practices and discriminatory volume-based discounts are issues that could, and should, be addressed using the Commission's program access authority.

1. Bundling

As Mediacom notes, it has been common practice for programmers to establish wholesale rate structures that compel MVPDs to purchase and package a bundle of program networks together even when doing so impedes consumer and MVPD choice, increases the costs of

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[19] 47 U.S.C. § 548(c)(4)(B).

[20] Revision of the Commission's Program Access Rules, MB Docket No. 12-68, *Notice of Proposed Rulemaking*, FCC 12-30 ¶ 96 (rel. Mar. 20, 2012).

[21] Mediacom Comments at 4-21; Cox Comments at 4-6; ACA Comments at 15-43; Blooston Rural Video Service Providers at 3-6; ITTA Comments at 10-12; Joint Rural Telco Comments at 5-8; Rural Trade Associations Comments at 11-13.

subscription service, and otherwise produces the very public interest harms that Section 628 of the Cable Act was designed to prevent.[22]

DISH and its subscribers have fallen victim to the harms of bundling. As just one example, DISH was forced to drop the popular MSG Network in 2010 when Madison Square Garden, under common control with Cablevision, required the bundling of the MSG Network with fuse, a program channel with limited subscriber value.

The Commission should curb bundling practices by creating two presumptions: it should create an non-rebuttable presumption that bundling demands are unfair; and is should also create a rebuttable presumption that bundling involving a cable-affiliated network that is also one of the Top 20 cable networks has the effect of significantly hindering competition. These presumptions would parallel the rules the Commission has adopted in its proceeding regarding terrestrially delivered programming. There, the Commission similarly established a two-grade system. It ruled that withholding a cable-affiliated, terrestrially delivered network is an unfair act. It also established a presumption that the withholding of a regional sports network ("RSN") has the effect of significantly hindering competition, thus fulfilling the "purpose or effect" element of Section 628(b).[23] Likewise here, the Commission should view all bundling demands as unfair, and should treat the bundling of key programming as presumptively anticompetitive.

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[22] Mediacom Comments at 4.

[23] Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd. 746, 761-775 ¶¶ 26-40 (2010).

2. Volume Discounts

Many commenters ask the Commission to address potentially discriminatory volume discounts.[24] While not all volume discounts are illicit and the Cable Act clearly provides that they can be a legitimate justification for rate disparities in some instances,[25] the Commission should not permit the volume discount justification to be used as a sham.

To curb abuses in the application of volume discounts, DISH recommends that the Commission take two actions. First, the Commission should clarify that volume discounts cannot be applied in a discriminatory manner. Specifically, a volume discount should not produce a disproportionate price disparity for small differences in volume when that lack of proportion benefits the programmer's cable affiliate (either directly or indirectly by hurting its competitors). Second, programmers using volume discounts should be required to disclose their volume discount schedules to a distributor upon request.[26]

IV. CONCLUSION

The record assembled in this proceeding confirms that the need for the exclusivity ban continues. No public benefits would accrue from lifting the ban, while the risks to competition of which Congress was mindful in 1992 would remain, with a new risk added – that of crushing nascent online video distributors. If anything, the record demonstrates that the program access rules should be strengthened, not weakened.

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[24] Blooston Rural Video Service Providers at 3-4; Cox Comments at 4-6; ITTA Comments at 10-12; Joint Rural Telco Comments at 5-8; Mediacom Comments at 9-17; Rural Trade Associations Comments at 11-13.

[25] 47 U.S.C. § 548(c)(2)(B)(ii, iii).

[26] *See* Mediacom Comments at 11.

Respectfully submitted,

/s/

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