



WILTSHIRE  
& GRANNIS LLP

August 10, 2012

**BY ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

Re: *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

Dear Ms. Dortch:

On August 9, 2012, representatives of DIRECTV met with Commission staff to explain why extension of the cable exclusivity ban in the Commission's program access rules is necessary to preserve and protect competition and diversity in the video marketplace. Present on behalf of DIRECTV were Stacy Fuller, Professor Kevin Murphy of the University of Chicago, Professor Thomas Hubbard of Northwestern University, and undersigned counsel. Present on behalf of the Commission were David Konczal, Steven Broecker, Jonathan Levy, and Kathy Berthot.

DIRECTV first pointed out that, 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. Just last year, the Commission conducted an empirical analysis of confidential data submitted in the *Comcast-NBCU* proceeding, determining that the transaction would "create[] 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." *Comcast Corp., General Electric Co.*

Marlene H. Dortch  
August 10, 2012  
Page 2 of 2

*and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 29 (2011). The record in this proceeding provides no basis for the Commission to reach a different result.

Professors Murphy and Hubbard emphasized that, even if the cable industry’s overall market share has decreased (a process that shows signs of slowing, if not reversing), the key question here is not whether market share has changed but whether *competitive constraints in the market* have changed. In this regard, they noted that cable’s increased ability to offer bundled services—and the higher margins a vertically integrated cable operator can thus expect from withholding—has made exclusivity an even more attractive strategy for cable operators than it was five years ago. They also explained why the incentive of vertically integrated programmers to withhold programming is greatest in the cases where wider access to the programming would cause the greatest competitive benefit in terms of lower prices and better service. And they observed that exclusive arrangements for programming *not* subject to the exclusivity prohibition are exceedingly rare, which strongly suggests that exclusive programming arrangements are rarely economically efficient. By contrast, cable-affiliated programmers have demonstrated that they will engage in exclusionary conduct where allowed to do so.

DIRECTV also reviewed First Amendment arguments raised by some cable operators. It argued that, if the Commission finds extension of the exclusivity ban to be necessary to preserve and protect competition, such a finding is *a fortiori* an “important” governmental interest. Moreover, the D.C. Circuit has previously found the exclusivity prohibition does not burden substantially more speech than necessary to further that interest. (The Commission could tailor the ban more narrowly yet by adopting suggestions to streamline the process for approving requests for exclusivity.) The Commission can also reach the same result by rejecting cable’s “forced speech” claim out of hand. The exclusivity prohibition neither forces a vertically integrated programmer to say anything it doesn’t want to say nor risks any possibility that listeners might confuse the programmer’s message with some other message. In such circumstances, courts have routinely found no “forced speech” and thus no cognizable First Amendment interests at all.

Respectfully submitted,

/s/

---

William Wiltshire  
Michael Nilsson

cc: David Konczal  
Steven Broeckaert  
Jonathan Levy  
Kathy Berthot