WILTSHIRE & GRANNIS LLP

August 29, 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, The DIRECTV Group, Inc., and Liberty Media Corporation,* MB Docket No. 07-18; *Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation,* MB Docket No. 05-192

Dear Ms. Dortch:

In this letter, DIRECTV, LLC ("DIRECTV") responds to a recent ex parte submission in which the National Cable & Telecommunications Association ("NCTA") argues that vertical integration no longer threatens video competition.[1] In particular, NCTA submitted two graphs to support its argument. The Commission should not be misled by either one.

One graph submitted by NCTA shows a decline in the percentage of national basic cable programming networks that are affiliated with a cable company. As the Commission has found both times that it extended the cable exclusivity prohibition, however, such evidence is largely irrelevant to the issue in this proceeding.

> What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace.[2]

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1 *See* Letter from Rick Chessen to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, and 05-192 (Aug. 23, 2012).

2 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Sunset of Exclusive Contract Prohibition,* 22 FCC Rcd. 17791, ¶ 37 (2007). *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of*

If anything, evidence that the number of unaffiliated programmers has skyrocketed is more indicative of the fact that vertical integration is not the necessary precondition to launching new and innovative programming networks that the cable industry asserts.

In this regard, attached hereto are two graphs that better capture the information identified as relevant by the Commission. The first one shows the number of national cable-affiliated networks each year,[3] and demonstrates that the number of such networks has more than doubled since 1994. The second one shows the number of cable-affiliated networks in the top 20 most popular national networks measured by total subscribership, and evidences that vertically-integrated programmers have been able to maintain a fairly consistent range (between 6 and 9) ever since 1996. Moreover, these graphs show that both the number and popularity of cable-affiliated national networks has increased since the last time the Commission extended the cable exclusivity prohibition in 2007. Given this evidence, there is no basis to reach a different conclusion and allow the prohibition to sunset in 2012.

The other graph submitted by NCTA shows the decrease in cable's share of the national MVPD market over time, reaching just under 60 percent in 2011. The clear implication is that pro-competitive safeguards are no longer necessary at this level of market share. Such an argument is flatly inconsistent with past Commission precedent. Specifically, when News Corporation acquired control of DIRECTV, the Commission imposed program access conditions – including a prohibition against exclusive carriage agreements between DIRECTV and any affiliated programmer – even though DIRECTV's national MVPD market share at the time was approximately 13 percent.[4] If an exclusivity prohibition is justified at 13 percent market share, it is clearly justified at more than four times that level.

Respectfully submitted,

/s/

William M. Wiltshire
Michael Nilsson

Competition and Diversity in Video Programming Distribution, 17 FCC Rcd. 12124, ¶ 33 (2002) (same).

[3] Because the Commission's video competition reports do not supply this data for the years from 2007-2011, there is a gap in the series (just as there was for the graphs submitted by NCTA).

[4] *See General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, ¶ 3 and Appendix F, Section II, second bullet (2004).

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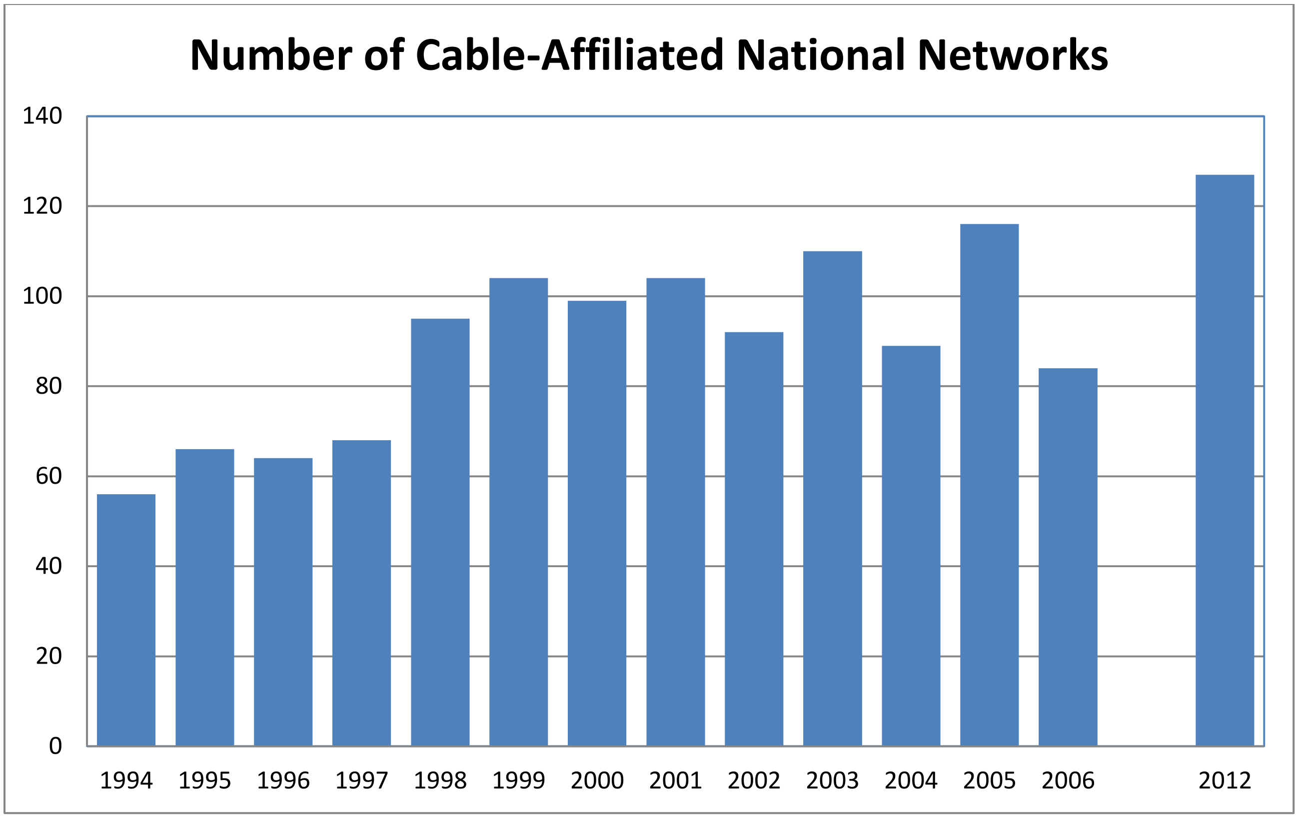

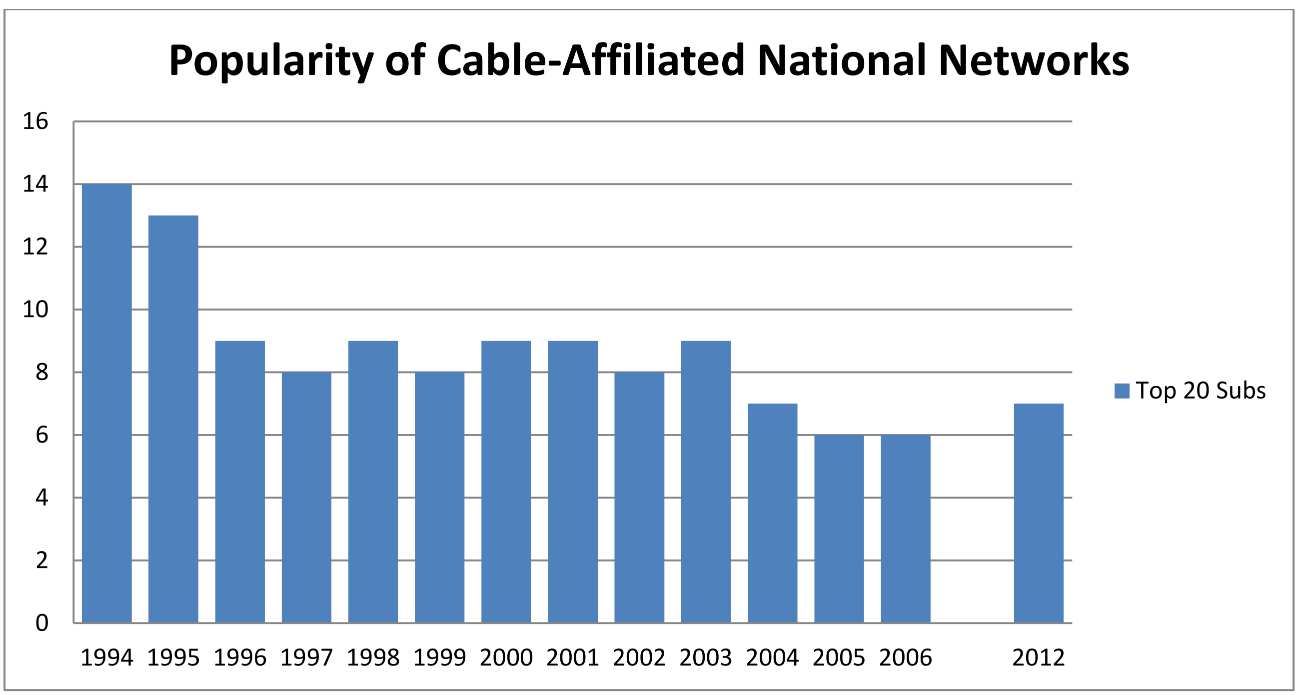

Source: FCC Video Competition Reports