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September 11, 2012

VIA ECFS – EX PARTE

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

Re: *Revision of the Commission's Program Access Rules,*
MB Docket Nos. 12-68, 07-18, 05-192

Dear Ms. Dortch,

Time Warner Cable Inc. (“TWC”) takes this opportunity to respond to several recent filings in the above-captioned dockets that continue to focus on the supposed harms to competition arising from vertical integration between cable operators and cable-affiliated programmers.¹ The premise of these arguments is that vertical integration results in competitive harm and that the alleged incentives of cable operators flowing from vertical integration constitute an adequate justification for the Commission to continue its categorical ban on exclusive contracts involving “satellite cable programming vendors” that are affiliated with a cable operator. But the core premise of these arguments is both unsupported and unsupportable. The vertical integration theory is substantially under- and over-inclusive as a measure of potential harm to competition, and vertical integration thus is a fatally flawed—and arbitrary and capricious—tool for evaluating the public interest implications of extending the exclusivity ban.

The focus on vertical integration as the justification for the continued ban on exclusive arrangements involving cable-affiliated programming is over-inclusive because there are numerous vertically integrated programming services that lack market power under any conceivable measure. Exclusivity arrangements involving such programmers would not harm competition, as a matter of fact and law, regardless of vertical integration. For example, the

¹ See, e.g., Letter from William M. Wiltshire, counsel to DIRECTV, Inc., to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, and 05-192 (filed Aug. 29, 2012); Letter from William M. Wiltshire, counsel to DIRECTV, Inc., to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, and 05-192 (filed Aug. 10, 2012); Letter from Kevin G. Rupy, Coalition for Competitive Access to Content, to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, and 05-192 (filed Aug. 9, 2012); Reply Comments of Verizon, MB Docket Nos. 12-68, 07-18, and 05-192 (filed July 23, 2012).

Commission recognized in its 2010 order extending program access requirements to terrestrially delivered programming services that cable operators' affiliated news services deliver many benefits to consumers without posing any significant threat to competition.² Indeed, such services enable cable operators to differentiate their services and thus *promote* competition among MVPDs and other video distributors.³ The Commission therefore observed that a program access complaint based on a vertically integrated cable operator's withholding of such programming would be highly unlikely to state a claim for relief under Section 628(b) of the Act.⁴ Yet if a cable operator's affiliated news service were satellite-delivered, it would be subject to the categorical exclusivity ban at issue here. There is simply no justification for presuming news services to pose a threat to competition merely on the basis of vertical integration, particularly when the Commission reached the opposite conclusion in the *2010 Program Access Order*. The same is true of other programming services that happen to be affiliated with a cable operator: The mere fact of vertical integration does not and cannot determine whether the withholding of such programming from rivals would result in net competitive benefits or harm.

To the extent that there is any valid basis for the government to intervene and limit exclusivity arrangements between video programmers and distributors, the current exclusivity ban is under-inclusive because it does not even consider, let alone prohibit, many exclusive programming arrangements that *do* entail market power. For example, DirecTV is the second-largest MVPD in the nation and its exclusive NFL Sunday Ticket arrangement is far more competitively significant than many potential exclusive arrangements involving cable operators, yet the exclusivity ban does not apply to DirecTV at all.⁵ By the same token, DirecTV holds an affiliated interest in certain regional sports networks;⁶ if DirecTV and its allies are correct about the potential concerns associated with RSNs, then those arrangements would present the same policy issues as cable-affiliated RSNs. As TWC has explained, there is no reason why a DBS

² See, e.g., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 51 n.200 (2010) ("*2010 Program Access Order*") (explaining that "exclusivity plays an important role in the growth and viability of local cable news networks" and that "permitting such exclusivity should not dissuade new MVPDs from developing their own competing regional programming services") (internal quotation marks, citations, and alterations omitted).

³ *Id.*

⁴ *Id.* ("[W]e believe it highly unlikely that an unfair act involving local news and local community or educational programming will have the prescribed purpose or effect under Section 628(b)").

⁵ See, e.g., Comments of Cox, MB Docket Nos. 12-68, 07-18, 05-192, at 3 (June 22, 2012) ("the exclusivity deal causing the most significant market distortion today is DirecTV's Sunday Ticket package").

⁶ See DIRECTV, Form 10-K (Annual Report) for fiscal year ended December 31, 2011, at 2, <http://investor.directv.com/sec.cfm?newCIK=&DocType=Annual&Year=>.

provider's exclusive contracts should be treated any differently from a cable operator's—and certainly not as a categorical matter.

The obvious over- and under-inclusiveness of a blanket prohibition on exclusive dealing involving *only* cable-affiliated programming demonstrates that the myopic focus on vertical integration with cable operators gets at the wrong issue and is not a sound methodology for evaluating the continuing appropriateness of the prohibition on exclusive cable-affiliated programming contracts. At a minimum, any justification for the continuation of the ban from a public interest standpoint must consider whether an exclusive arrangement involves the exercise of market power and thus the potential to harm competition. That inquiry does not turn on vertical integration, which often results in pro-competitive arrangements that spur innovative responses by rivals. In the current competitive environment, it is clear that there are numerous potential exclusive arrangements involving vertically integrated cable operators that would create no competitive concerns, and numerous potential exclusive arrangements involving “must have” services that, despite the lack of vertical integration with a cable operator, could create significant competitive concerns. Therefore, an analysis focused solely on vertical integration with cable operators is untethered from the types of competitive harm that might justify prohibiting exclusive arrangements, and a blanket prohibition on exclusivity that targets only cable operators would epitomize arbitrary and capricious decisionmaking.⁷

As TWC has stressed throughout this proceeding, the over- and under-inclusiveness of the vertical integration theory means that using it as a justification for extending the exclusivity ban only to cable-affiliated programming would violate not only the Administrative Procedure Act, but also the First Amendment. Cable operators and cable-affiliated programmers are speakers and editors that are entitled to protection under the First Amendment,⁸ and a limitation on cable operators' and programmers' speech that is substantially over- and under-inclusive plainly is not narrowly tailored.⁹ The government also lacks a substantial interest in limiting the speech of only certain speakers based on a theory of competitive harm that does not have a clear

⁷ See *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (“an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently”) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983)).

⁸ Comments of Time Warner Cable Inc., *Revision of the Commission's Program Access Rules et al.*, MB Docket Nos. 12-68, 07-18, 05-192 (filed June 22, 2012).

⁹ See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-23 (1991) (rejecting narrow tailoring argument because distinction drawn by the law in prohibiting only certain speech was both over- and under-inclusive relative to the state's interest in limiting speech); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793-94 (1978) (rejecting restriction on certain forms of corporate lobbying due to over-inclusiveness and under-inclusiveness of restriction); *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-215 (1975) (rejecting narrow tailoring justification because speech restriction was “broader than permissible” in some respects yet “strikingly underinclusive” in other respects).

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nexus with empirical demonstrations of market power.¹⁰ As a result, maintaining a blanket prohibition on exclusive arrangements *only* with respect to vertically integrated cable operators, especially without any individualized showing of market power, would be unconstitutional. Moreover, as TWC previously has explained, distribution strategies for video programming may involve a complex set of editorial judgments.¹¹ For example, a programmer may wish to keep a non-competitively significant local news channel exclusive in order to provide a unique local voice, and may forego creating the service altogether if prohibited from preserving the channel's uniqueness through exclusive distribution. The categorical ban's interference with such editorial decision-making in the absence of market power further underscores why the singular focus on vertical integration of cable operators is misguided and unlawful.

For these reasons, the Commission should reject arguments that vertical integration between cable operators and satellite programming vendors creates a legitimate justification for continuing the prohibition on exclusive dealing involving cable-affiliated programming.

Sincerely,

/s/

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¹⁰ See *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (recognizing that facial under-inclusiveness raises “serious doubts” about whether the government is, in fact, serving significant interests, and holding that the government “must demonstrate its commitment to advancing [its] interest by applying its prohibition evenhandedly”); see also *id.* at 541-542 (Scalia, J., concurring) (“a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited”) (internal quotation omitted); *First Nat’l Bank*, 435 U.S. at 793 (under-inclusiveness “undermines the likelihood of a genuine state interest”).

¹¹ See Comments of Time Warner Cable Inc., MB Docket Nos. 12-68, 07-18, and 05-192, at 13-15 (filed June 22, 2012).