



September 12, 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:

On September 10, 2012, Stacy Fuller of DIRECTV, LLC ("DIRECTV") and undersigned counsel spoke by telephone with Elizabeth Andrion, Acting Chief of the Commission's Office of Strategic Planning & Policy Analysis, and on September 10 and 11, 2012, had follow-up calls with William Lake, Chief of the Media Bureau, with regard to Comcast's ability to enter into exclusive carriage arrangements if the cable exclusivity prohibition is allowed to sunset. Some have assumed or argued in this proceeding that, even in the absence of the exclusivity prohibition, Comcast will continue to be precluded from entering into exclusive arrangements under the terms of the *Comcast/NBCU Order*.¹ That is not correct. As discussed below, if the rule is allowed to sunset, the array of programming potentially available for Comcast exclusivity would increase substantially.

As in previous merger proceedings, the Commission concluded in the *Comcast/NBCU* proceeding that the program access rules would not alone be sufficient to address the potential anticompetitive effects of the proposed transaction, and considered additional safeguards to enhance and extend those rules as appropriate.² Thus, the conditions ultimately imposed in that proceeding do not include the explicit prohibition

¹ See, e.g., Comments of Comcast Corporation and NBC Universal, Inc., at 13 n. 11 (filed June 22, 2012) (noting that "the Notice suggests that the Comcast-affiliated networks might be excluded from the analysis of the exclusivity prohibition" because they are subject to program access conditions adopted in the *Comcast/NBCU Order*); Comments of the Madison Square Garden Company, at 12 (filed June 22, 2012) ("a sunset will have no impact on the availability of Comcast-affiliated program networks, since those will continue to be subject to access provisions in the *Comcast/NBCU Order*").

² *Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶¶ 34-35, 49 (2011) ("*Comcast/NBCU Order*").

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on exclusive carriage arrangements with all cable-affiliated programmers already covered in the rules.

Rather, the sole program access remedy specifically available under the *Comcast/NBCU* conditions—and the sole remedy that would be available were the exclusivity prohibition to sunset—is commercial arbitration.³ While arbitration can be a powerful remedy, no one should think that arbitration fulfills the same function as the exclusivity prohibition,⁴ or that it would be sufficient in the absence of the prohibition.

Most significantly, if the Commission were to allow the rule to sunset, Comcast would be able to enter into exclusive arrangements with a much wider array of programmers. Under the terms of the arbitration condition, an MVPD is entitled to demand an offer for carriage of programming that any “C-NBCU Programmer” has made available to a similar MVPD.⁵ The condition defines a “C-NBCU Programmer” as Comcast, Comcast/NBCU, any entity directly or indirectly controlling, controlled by, or under common control of Comcast or Comcast/NBCU, and any entity for which Comcast or Comcast/NBCU manages or controls the licensing of video programming.⁶ Thus, unlike the cable exclusivity prohibition, the arbitration right does *not* apply with respect to (1) programming in which Comcast has an interest but not control or management rights, and (2) programming that is affiliated with other cable operators.

The *Notice* in this proceeding lists 53 national networks and eight regional sports networks that are affiliated with, but not controlled by, Comcast.⁷ Exclusive arrangements with those networks would not be allowed under the rule, but presumably would be permitted under the condition. The same would be true with respect to the many other national and regional networks that are affiliated with other cable operators. As a result, the universe of programming amenable to a Comcast exclusive would expand substantially.

* * *

The *Comcast/NBCU Order* implicitly assumed that the arbitration condition would work in tandem with the exclusivity prohibition to provide the full spectrum of

³ *Id.*, Appendix A, Section II. By contrast, online video distributors enjoy explicit protection against exclusivity, with limited exceptions. *Id.*, Section IV.B.

⁴ For example, there is a significant qualitative difference in the deterrent effect of an outright ban (where exclusivity is a violation of a Commission order or rule) compared to an obligation to arbitrate (arising from a failure to reach agreement on terms of carriage).

⁵ *Id.*, Section VII.A.2.

⁶ *Id.*, Section I.

⁷ *See Revision of the Commission’s Program Access Rules*, 27 FCC Rcd. 3413, Appendix B, Table 2; Appendix C, Table 2 (2012) (“*Notice*”).

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protections necessary to offset the vertical integration effects of the transaction. Allowing the rule to sunset could compromise this carefully crafted regime of competitive safeguards deemed necessary just last year, and will significantly expand the opportunities for exclusivity available to Comcast. The Commission cannot ignore these effects as it weighs the necessity for extension of the rule.

Respectfully submitted,

/s/

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