



September 14, 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:

Earlier this week, Time Warner Cable (“TWC”) submitted a letter again asserting its position that the cable exclusivity prohibition should be allowed to sunset.¹ Each of TWC’s arguments has been fully addressed in the record of this proceeding. Nearly all of them have been rejected multiple times by the Commission and the courts. For the Commission’s convenience, DIRECTV summarizes its responses to TWC’s assertions below.

1. Vertical Integration. TWC argues that vertical integration should have nothing to do with the exclusivity ban.² This, it argues, is because some vertically integrated programming (*e.g.*, news) can be withheld without competitive impact and because some non-vertically integrated programming (*e.g.*, the NFL Sunday Ticket) is also distributed on an exclusive basis. But the focus on vertical integration between cable operators and programmers comes from Congress—indeed it runs throughout the statute,

¹ See Letter from Matthew Brill to Marlene H. Dortch (filed Sept. 12, 2012) (“TWC Letter”). Unless otherwise indicated, all items cited in this letter were filed in MB Docket Nos. 12-68, 07-18, and 05-192. For brevity’s sake, this letter will cite to DIRECTV’s prior pleadings in this proceeding, which in turn contain citations to Commission and court precedent.

² See TWC Letter at 3 (arguing 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”).

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including the provisions that do not sunset.³ The Commission cannot simply ignore it. The Commission, moreover, has repeatedly and without exception found that a vertically integrated cable company has the incentive and ability to withhold programming, which in turn harms competition.⁴

2. *Alleged Underinclusiveness.* TWC complains that the exclusivity prohibition is underinclusive, because it neither prohibits DIRECTV's exclusive carriage of the NFL Sunday Ticket nor prohibits DIRECTV from carrying its four affiliated RSNs exclusively.⁵ This complaint is irrational on both counts.

Anybody—including TWC—can have exclusive carriage of independent programming such as the NFL Sunday Ticket because the prohibition does not apply to independent programming.⁶ And DIRECTV cannot carry its RSNs exclusively due to conditions imposed 2008, when Liberty Media acquired *de facto* control of the company, that prohibit exclusive arrangements with affiliated programming.⁷ Notably, although DIRECTV is subject to essentially the same exclusivity prohibition as cable, and that restriction presumably would be set aside if the cable rule were allowed to sunset, DIRECTV nonetheless does not seek such relief and opposes a sunset.

More broadly, there are ample policy grounds for treating cable-affiliated programming differently than both independent programming and satellite-affiliated programming. Despite the gains of cable's rivals in recent years, incumbent cable operators (including TWC itself)⁸ still possess dominant market shares both within their franchise areas and within the footprints of key regional programming. As the Commission has discussed repeatedly, it is this market share that makes vertical exclusivity profitable—whether the arrangement in question involves a single cable

³ See 47 U.S.C. § 548(c)(2)(D) (prohibiting exclusive contracts between a “cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest”); *id.* § 548(b) (more generally prohibiting unfair practices by “a cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest”).

⁴ See Comments of DIRECTV, LLC at 6-9 (filed June 22, 2012) (“DIRECTV Comments”) (citing cases).

⁵ TWC Letter at 2-3.

⁶ Reply Comments of DIRECTV, LLC at 10 (filed July 23, 2012) (“DIRECTV Reply Comments”).

⁷ See *News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd. 3265, Appendix B, § III (2008).

⁸ See Comments of the National Association of Broadcasters, MB Docket No. 12-203, at 15 (filed Sept. 10, 2012) (noting that TWC “enjoys a 66 percent or greater share of the MVPD markets in eight DMAs, including Honolulu, HI (90.9 percent); Rochester, NY (77.9 percent); Syracuse, NY (71.3 percent); and Albany, NY (70.5 percent)”).

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operator or an industry-wide “cable only exclusive” arrangement.⁹ DIRECTV, by contrast, is dominant nowhere and overlaps with its rivals’ service areas everywhere. Because the combination of vertical integration and market dominance makes anticompetitive activity profitable, it makes perfect sense to focus restrictions on cable-affiliated programming.

3. *Alleged Overinclusiveness.* TWC argues that the exclusivity prohibition is overinclusive because it applies to programming that cannot be presumed to harm competition if withheld.¹⁰ It is ironic that TWC has also rejected the Commission’s proposals for narrowing the rule’s applicability.¹¹ But more fundamentally, TWC’s argument ignores the fact that the exclusivity prohibition, as currently constituted, does *not* flatly ban all cable-affiliated exclusives with cable operators. Rather, the rule provides a safety valve under which cable-affiliated programmers can offer exclusive programming where such exclusivity would not harm competition.¹² Moreover, DIRECTV and others have proposed that the Commission adopt additional mechanisms to streamline that process,¹³ which is a far better way to address any potential overinclusiveness than is wholesale abandonment of a necessary safeguard.

4. *First Amendment.* TWC argues that the exclusivity rule impinges on its rights as a First Amendment speaker, serves no sufficient government interest, and is insufficiently tailored to any government interest it might arguably serve.¹⁴ This is wrong for two reasons. First, the D.C. Circuit rejected this very argument over fifteen years ago,¹⁵ and TWC provides no new empirical evidence that would change that conclusion. Second, it is not at all clear that TWC has a cognizable First Amendment interest at stake here at all. TWC does not seek the right to “speak” in a particular way, nor does it seek the right *not* to speak. Rather, it seeks to limit the distribution of its speech by, for example, refusing to make Lakers games available to DIRECTV subscribers as it does for its own subscribers. The exclusivity prohibition neither compels TWC to say something it does not wish to say nor forces TWC to associate with a message not its own. This is simply not meaningful government compulsion from a constitutional perspective.¹⁶

⁹ See DIRECTV Comments at 7 (describing cable’s market share and “cable-only” exclusives).

¹⁰ TWC Letter at 2.

¹¹ See TWC Comments at 17-21.

¹² 47 C.F.R. § 76.1002(c)(5).

¹³ See DIRECTV Comments at 11-12; AT&T Comments at 5.

¹⁴ TWC Letter at 5.

¹⁵ *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 977-79 (D.C. Cir. 1996); see also DIRECTV Reply Comments at 14-15 (discussing importance of government interest).

¹⁶ See DIRECTV Reply Comments at 21-15 (citing cases).

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TWC's letter raises arguments that conflict with decisions of the Commission, decisions of the courts, and the overwhelming record of this proceeding. The Commission should reject them and extend the exclusivity prohibition.

Respectfully submitted,

/s/

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