

William H. Johnson
Assistant General Counsel
Federal Regulatory



September 20, 2012

1320 N. Court House Road
Arlington, VA 22201

Ex Parte

Phone 703-351-3060
will.h.johnson@verizon.com

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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 September 18, 2012, Leora Hochstein and I met with Dave Grimaldi, Chief of Staff and Media Legal Advisor to Commissioner Mignon Clyburn, to urge the FCC to retain the ban on exclusive contracts in full. We emphasized, however, that at a minimum this protection should be retained with respect to must-have, non-replicable programming, such as regional sports networks (RSNs). The key facts underlying the exclusive contract prohibition, and the FCC's prior decisions extending that prohibition, have stayed largely unchanged.¹ Today, cable operators are integrated with some of the most popular networks and control roughly half of the RSNs.²

The justification for continued protections with respect to RSNs is particularly pronounced. The FCC has long recognized that live local college and professional sports

¹ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791 (2007), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (“*Cablevision I*”); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) (“*2010 Program Access Order*”), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (“*Cablevision II*”).

² See *Revision of the Commission's Program Access Rules, et. al.*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413, ¶ 28 & at App. C (2012).

programming is highly valued by consumers, critical to competition, and impossible to replicate.³ As illustrated by our recent experience with Cablevision and its affiliate, MSG,⁴ cable incumbents continue to add to the long list of documented abuses with respect to must-have regional sports programming by withholding such programming from competitors.⁵ For the many consumers who will not consider switching to a provider lacking the games of their favorite teams (and having them in HD), such actions deny them a meaningful competitive choice.

We also emphasized that reliance on a case-by-case approach to address the withholding of regional sports programming under Section 628(b) of the Act would not be adequate to deter anticompetitive activity. Verizon's experience with the complaint process has been that the inherent delay and burdens work to the benefit of cable incumbents and can result in prolonged periods where consumers miss out on the sports programming that they demand. Moreover, the burdens and expense of the process are likely to deter many competitive providers from even bothering to pursue complaints. Given the documented history of abuses in this area – and the repeated recognition by the Commission and the courts of the significance of this unique and non-replicable programming – there is no justification for going down that road.

Verizon's recent and successful case seeking MSG HD and MSG + HD is illustrative. Verizon originally filed its complaint under Section 628(b) seeking this programming – which included 7 of the 9 local sports teams – in July 2009.⁶ Verizon later updated that complaint in June 2010 to account for the Commission's subsequent order addressing the availability and application of the complaint process for terrestrially delivered programming.⁷ The Commission's order in Verizon's favor ordering access to the programming did not come until September 2011.⁸ During those 2+ years (and more than two basketball and hockey seasons), consumers in the New York area who insisted on access to their local sports teams in HD did not have Verizon FiOS as a choice. Moreover, while Verizon was ultimately successful in prosecuting its complaint, that result came at a high cost of both internal and external time and resources. In addition to the substantial fees for attorneys and experts – as are generally required in these cases – the parties ultimately engaged in extensive, and thus costly and time-consuming, discovery. As this illustrates, even when the complaint process ultimately leads to the correct

³ *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 535, ¶ 133 (2004); *2010 Program Access Order*, ¶¶ 8 & 52; *see also The Regional Sports Marketplace*, Report, 27 FCC Rcd 154 (MB 2012).

⁴ *See In re Verizon Tel. Cos. & Verizon Servs. Corp.*, Order, 26 FCC Rcd 13145 (MB 2011); *In re Verizon Tel. Cos. & Verizon Servs. Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011) (“*Verizon MSG Program Access Order*”).

⁵ *See, e.g., Game Show Network, LLC, Complainant, v. Cablevision Systems Corp., Defendant*, MB Docket No. 12-122, File No. CSR-8529-P (filed Oct. 12, 2011).

⁶ *See Verizon Telephone Companies et al.*, Program Access Complaint, File No. CSR-8185-P (filed July 7, 2009).

⁷ Verizon's Supplement to Program Access Complaint, File No. CSR-8185-P (filed June 28, 2010)

⁸ *See Verizon MSG Program Access Order*.

result, it leads to substantial delays and costs for consumers and competitive providers that can be avoided by a targeted ban on exclusive agreements.

We also emphasized that an extension of the exclusivity ban is fully consistent with the recent appellate decisions considering the Commission's program access rules. This is particularly true if it were targeted at regional sports programming. Indeed, an extension targeting regional sports would be subject to, and easily survive, intermediate scrutiny. Just last year, the D.C. Circuit in *Cablevision II* upheld the Commission's decision to apply additional protections targeted at regional sports as a "narrowly tailored effort to further the important governmental interest of increasing competition in video programming" in light of the "record evidence demonstrating the significant impact of RSN programming withholding."⁹ The same rationale would apply here: because RSNs are popular and non-replicable, and therefore uniquely important to competition in the video marketplace, a regulation specifically targeting exclusionary behavior involving RSNs would survive intermediate scrutiny. Likewise, such an extension would be fully consistent with the D.C. Circuit's *Cablevision I* decision upholding the last extension of the exclusivity ban. As noted above, the basic underlying facts on which the Commission and the court relied in upholding the full extension of the exclusivity ban in that case have not changed in any significant way. Moreover, even the dissent in that case acknowledged that the unique characteristics of "*regional* video programming networks, particularly regional sports networks," may justify the "targeted restraint" of a "prospective ban" on exclusives deals for such programming.¹⁰ In addition to noting the "highly desirable 'must have'" nature of RSNs, Judge Kavanaugh correctly observed that "the upstream market in which video programming distributors contract with *regional* networks is less competitive than the national market." *Id.* For these and other reasons, an extension of the exclusivity ban as to RSNs would continue to pass legal muster today.

Sincerely,

A handwritten signature in black ink, appearing to read "William A. ...". The signature is written in a cursive style with a large initial "W".

cc: Dave Grimaldi

⁹ *Cablevision II*, 649 F.3d at 717-18 (citations omitted).

¹⁰ *Cablevision I*, 597 F.3d at 1326 n.6 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).