WILTSHIRE & GRANNIS LLP

September 21, 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 19, 2012, Stacy Fuller of DIRECTV, LLC and undersigned counsel met with Erin McGrath, Media Legal Advisor for Commissioner McDowell, to discuss the necessity for extension of the cable exclusivity prohibition. Allowing the prohibition to sunset would replace a rule of general applicability with reliance upon a case-by-case complaint procedure and merger conditions. Rather than providing the sort of clear industry guidelines envisioned by Congress, such an *ad hoc* approach would create a regulatory morass. Thus, we believe this approach would be a poor substitute for the existing regime.

However, in an effort to be responsive to requests on what must be done to minimize consumer disruption, improve the remaining program access rules, and streamline the process for seeking redress, we offer the following minimum steps:

- Adopting a rebuttable presumption that an exclusive carriage arrangement involving a satellite-delivered, cable-affiliated network that carries sports content has the purpose and effect hindering significantly or preventing any MVPD from providing satellite cable programming. This presumption would mirror the one applicable to terrestrial cable programming with respect to regional sports networks, but extend it to national networks with sports content of the type the Commission has recognized to be non-replicable and valuable to consumers.[1]

[1] *See Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶ 9 (2010) ("*2010 Program Access Order*") (with such sports programming, "no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace"). Such sports networks would be defined as the

- Adopting a rebuttable presumption that an exclusive carriage arrangement involving a satellite-delivered, cable-affiliated network that carries sports content is an unfair method of competition or an unfair or deceptive act or practice. In the *2010 Program Access Order*, the Commission adopted the much broader presumption that any conduct (including exclusivity) categorically proscribed with respect to satellite-delivered programming should be presumed to be unfair with respect to terrestrial cable programming as well.[2] The D.C. Circuit vacated that presumption, finding the Commission's "reasoning by analogy" to be an inadequate justification.[3] Here, the Commission could draw a much narrower presumption based upon the conclusion it has reached consistently in multiple proceedings as to the anticompetitive consequences of withholding sports programming.[4]

- Adopting a rebuttable presumption that, once one complainant has succeeded in a complaint under Section 628(b) (or, potentially, the anti-discrimination provisions of Section 628(c)(2)(B)) with respect to an exclusive arrangement involving a cable-affiliated network, any other exclusive arrangement involving the same network violates Section 628(b) (or Section 628(c)(2)(B)). Such a presumption would greatly streamline the complaint process by obviating the need for repetitive showings on the same issue, and is justifiable as a reasonable exercise of the Commission's predictive judgment that evidence necessary to satisfy the burden in one case would likely suffice in a second case involving the same network.[5]

Commission has defined "RSN" for purposes of the terrestrial cable programming presumption, except for deletion of the phrase "within a limited geographic region." *See id.*, ¶ 53.

[2] *See id.*, ¶¶ 47-49.

[3] *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 719-23 (D.C. Cir. 2011) ("*Cablevision II*").

[4] *See Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶¶ 29, 39 (2011); *Verizon Tel. Cos. and Verizon Svcs. Corp. v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 15849 (2011); *AT&T Svcs. Inc. and S. New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 15871 (2011); *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶ 25 (2010).

[5] *See Cablevision II*, 649 F.3d at 716 (courts defer to an agency's predictive judgment underlying an evidentiary presumption when "there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it" (citation omitted)).

- Adopting a rebuttable presumption that, in a complaint proceeding where either of the presumptions discussed above is applicable, the complainant is likely to prevail on the merits of its complaint and will suffer irreparable harm for purposes of a petition for temporary standstill under Section 76.1003(l) of the Commission's rules.

- Clarifying that a cable-only exclusive or other form of refusal to deal is actionable under Section 628(b) (or Section 628(c)(2)(B)). The Commission cannot allow the general prohibition on exclusivity to sunset without clearly delineating the potential avenues for redress of anticompetitive exclusionary conduct going forward.

These actions are not an adequate substitute for the cable exclusivity prohibition, but in the absence of that rule they are imperative for the protection and preservation of competition and diversity in the distribution of video programming.

In addition, we also discussed the fact that, if the rule is allowed to sunset, nothing in the *Comcast/NBCU* conditions would prevent Comcast from entering into exclusive carriage arrangements with the list of Comcast-affiliated networks attached hereto.

Respectfully submitted,

/s/

William M. Wiltshire
Counsel for DIRECTV, LLC

Attachment

cc: Erin McGrath
Elizabeth Andrion
Lyle Elder
David Grimaldi
Alexander Hoehn-Saric
Holly Saurer
Matthew Berry

COMCAST-AFFILIATED NETWORKS NOT SUBJECT TO ARBITRATION CONDITION

National Networks

A&E
A&E HD
Bio
Bio HD
Crime & Investigation
Crime & Investigation HD
History
History HD
History en Espanol
H2 (formerly History International)
H2 HD
Lifetime
Lifetime HD
Lifetime Real Women
Lifetime Movie Network
Lifetime Movie Network HD
Military History Channel
Current TV
FEARnet
FEARnet HD
MusicChoice
NHL Network
NHL Network HD
Shop NBC
TV One
TV One HD
PBS Kids Sprout
PBS Kids Sprout HD
The Weather Channel
The Weather Channel HD
MLB Network*
MLB Network HD*
iN Demand 1, 2, 3, 4, 5, 6, and 7*
Hot Choice*
Hot Choice HD*
NBA League Pass*
NBA League Pass HD*
MLS Direct Kick*
MLS Direct Kick HD*
MLB Extra Innings*
MLB Extra Innings HD*
NHL Center Ice*
NHL Center Ice HD*
GameHD*

Game2HD*
Team HD*
HDPPV*

Regional Sports Networks

Comcast SportsNet Chicago
Comcast SportsNet Chicago HD
Comcast SportsNet Houston
Comcast Sportsnet Houston HD
SportsNet New York*
SportsNet New York HD*
Comcast/Charter Sports Southeast*
Comcast/Charter Sports Southeast HD*

* Indicates affiliation with additional cable operator(s)

Source: *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd. 3413, Appendix B, Table 2; Appendix C, Table 2 (2012).