September 21, 2012

BY ELECTRONIC FILING

The Hon. Julius Genachowski
Chairman
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 Chairman Genachowski:

My company, RCN, provides competitive video, broadband, and telephone services in the City of Boston and surrounding area; New York City; the suburbs of Philadelphia; Lehigh Valley, PA; Chicago; Washington, DC; and Montgomery County, MD. In these communities, we provide consumers with an alternative to the dominant cable and phone companies for video, broadband Internet and telephone service. We are also a member of the American Cable Association, which has participated extensively in the proceeding concerning the cable exclusivity prohibition. I am writing separately now, however, in light of recent press reports indicating that the Commission is considering allowing the prohibition to sunset. Such action would harm not just our consumers, but all consumers in the markets we serve.

Access to quality video programming is the cornerstone of our video and video-broadband Internet-voice packages. We pay dearly for these services—particularly for sports. But if sunset occurs, some of the most important programming on television can become unavailable to us and our customers simply because the programmer is affiliated with a cable incumbent that would rather try and take our customers than sell us its programming.

For us, this includes programmers that control the Celtics, Mets, Phillies, Flyers, 76ers, White Sox, Cubs, Bulls, Blackhawks, Capitals, and Wizards. It includes the NBC Sports Network, which controls hockey games that are critical to our customers. And it includes some of the most important national networks, such as USA. Nor is this list static. A cable operator could, without Commission review or approval, buy the rights to

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the Red Sox just as easily as Time Warner bought rights to the Lakers, thus making purchases even more attractive due to the elimination of the exclusivity prohibition.

Were a cable operator to withhold any of this programming, the results would be devastating, particularly for a mid-sized company like RCN that already pays more than our larger rivals for programming in the first place. And the harm is not limited to video. When RCN has access to the same programming as the dominant cable companies, we force them to compete on quality and price. So even the customers who stay with the dominant cable company benefit from the choices that RCN brings to the marketplace.[1]

I recognize that eliminating the exclusivity prohibition would not eliminate all of our customers' protections with respect to this programming. Some of Comcast's programming (but not all of it) is subject to arbitration under the *Comcast-NBCU* order. And all cable-affiliated programming is subject to the general "unfair practices" protections of Section 628(b) of the Act. While these remedies are helpful, they are nonetheless no substitute for the exclusivity prohibition. As others in this proceeding have noted, these secondary remedies take a long time—sometimes years—to resolve. To take just one example, were some future cable-affiliated Red Sox channel to refuse to sell to us, RCN will not be able to afford to spend a year or more arbitrating the issue or compiling evidence of harm for an "unfair practices" complaint. Moreover, smaller companies like RCN cannot afford the expense of such complex litigation against well-funded programmers affiliated with large cable MSOs.

Accordingly, I urge you in the strongest possible terms not to sunset the exclusivity prohibition. If, however, you are set on the apparent course to address these issues through presumptions instead, then I would ask you to take the following into consideration:

- Any presumption should apply at a minimum to all sports programming, not just RSNs. If Comcast, for example, were to withhold NBC Sports Network from our customers (all of whom live in hockey-mad cities), the competitive impact would be enormous.

- Any presumption should be effective. By that I mean that it must at a minimum enable complaints for specified programming to be resolved quickly and cheaply. For example, it makes no sense at all to say that complainants need not prove the "harm" caused by the withholding of sports programming—but then force them to fight with complainants about whether such withholding is "unfair" in the first

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[1] *See* General Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (rel. Feb. 2004) (finding that communities with overbuild competition experienced lower rates (an average of 23 percent lower for basic cable) and higher quality service than did other communities), *available at* http://www.gao.gov/new.items/d04241.pdf.

place. Nor does it make any sense to make subsequent complainants fight about either the unfairness or the harm caused by withholding of particular programming once it is found to violate the provision.

- Any presumption should merit an automatic temporary standstill. If RCN brings a complaint with respect to programming for which the Commission presumes withholding would be an "unfair practice," it should not have to make a separate showing that it is likely to prevail on the merits and suffer irreparable harm. The presumption itself should be sufficient.

- The scope of any presumption should be clear. It should apply to all forms of "unfair practices"—including exclusivity, discrimination, *and* refusal to deal with any particular operator.

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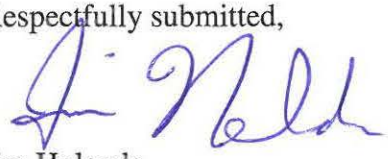
I appreciate your taking the time to consider RCN's point of view on these critical issues, and would be happy to assist you or your staff further as you conclude this proceeding.

Respectfully submitted,



Jim Holanda
Chief Executive Officer

cc: The Hon. Edward Markey
The Hon. Robert M. McDowell
The Hon. Mignon Clyburn
The Hon. Jessica Rosenworcel
The Hon. Ajit Pai
Steve Simmons, Chairman, RCN