WILTSHIRE & GRANNIS LLP

September 24, 2012

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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:

Over the course of the last few weeks, DIRECTV has had a series of meetings with the Commissioners' legal advisors and Commission staff to discuss the need for extending the cable exclusivity prohibition. Attached hereto is a summary of arguments that have been made in those meetings, with a particular focus on demonstrating that an extension would be consistent with the expectation expressed by the D.C. Circuit in affirming the last extension of the rule.

Respectfully submitted,

*/s/*

William M. Wiltshire
*Counsel for DIRECTV, LLC*

Attachment

cc: Elizabeth Andrion
Lyle Elder
Dave Grimaldi
Alex Hoehn-Saric
Holly Saurer
Matthew Berry
Erin McGrath
Sean Lev
Susan Aaron
William Lake

Michelle Carey
Mary Beth Murphy
David Konczal
Steven Broeckaert
Jonathan Levy
Kathy Berthot

## THERE IS NO REASON TO ELIMINATE THE FCC'S CABLE EXCLUSIVITY PROHIBITION RULE

In 2010, the D.C. Circuit upheld the 2007 decision by Chairman Martin's FCC to extend the cable exclusivity prohibition for another five years. In finding that the FCC acted appropriately, the D.C. Circuit allowed that, "if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the exclusivity prohibition is no longer necessary." But the clear facts in the record establish that time has not yet arrived since the evolution anticipated by the court simply has not materialized.

Consider what has happened since the FCC last determined that the market was not competitive and that program access rules were necessary to preserve and protect competition:

- Verizon announced in 2010 that it would not extend its FiOS network to additional markets.
- DIRECTV lost subscribers for the first time in years last quarter, while DISH Network lost subscribers in 2011 and again last quarter.
- Vertically integrated cable companies can gain additional revenues from a subscriber that takes a bundle of video, broadband, and voice (and even wireless) services -- those extra marginal dollars provide those cable operators with additional incentives to withhold programming from rival MVPDs so as to win new customers.

The court's 2010 statement was based upon two specific developments: (1) the increase in the amount and diversity of non-cable-affiliated programming; and (2) the decrease in national cable market share from 95% in 1992 to 67% in 2007. Although the cable industry has tried to highlight both of these factors in arguing that the FCC must allow the rule to sunset, those arguments do not hold up.

### *1. Cable continues to control some of the most popular programming available, especially RSNs.*

- The number of cable-affiliated regional sports networks ("RSNs") has increased substantially since the FCC's last review in 2007, both in raw number (going from 18 to 57) and in percentage terms (going from 46% to 52.3%).[1]
- While the number of non-cable-affiliated national networks has increased since 2007 (from 415 to 685), the FCC has held that the sheer number of unaffiliated networks is not the relevant metric.

[1] In recognition of the competitive importance of RSN programming, the Commission adopted a presumption that withholding of terrestrially-delivered RSNs would harm competing MVPDs. Yet, even with the benefit of this presumption, Verizon and AT&T spent nearly two years prosecuting complaints against Cablevision's MSG Network for withholding their high definition feeds.

> "What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of the programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace."[2]

- As shown in Charts 1 and 2, the number of national networks affiliated with cable has doubled since 1994, while the number of such networks in the Top 20 (by subscribership) has remained in a fairly consistent range (between 6 and 9) since 1996, and both metrics have increased since the last extension of the rule in 2007.[3]

- Indeed, approximately 27 percent of the national video networks that comprise DIRECTV's most popular tier of service (Choice XTRA) are cable-affiliated.

***2. Conditions imposed on Comcast cover only a small portion of the programming subject to the rule.***

- The conditions imposed in the *Comcast/NBCU* proceeding apply only to networks that Comcast controls or manages, and those conditions will remain in place only until January 2018.[4]

- Moreover, more than 70% of national and regional cable-affiliated networks currently covered by the rule are not covered by the *Comcast/NBCU* conditions (either because they are not controlled/managed by Comcast or are affiliated with another cable operator).[5] These channels would be available for exclusive arrangements with any cable operator, including Comcast.

- Cable operators prefer to focus on the percentage of cable-affiliated networks among the overall total number of networks. Using this approach, they argue that cable-affiliated networks not controlled or managed by Comcast comprise only 11% of all national networks and 44% of all RSNs. Those figures are still large enough to put a hole in any

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2 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 37 (2007).

3 Comcast has entered into a contract to sell its interest in A&E Television Networks, which would reduce the number of national cable-affiliated networks by 17 and reduce the number of Top 20 networks to four. That transaction has not yet closed.

4 Nothing in the *Comcast/NBCU* conditions would prevent Comcast from entering into exclusive carriage arrangements with the list of 53 national and 8 regional Comcast-affiliated networks attached hereto. If the A&E transaction is consummated, the number of national networks on the list would decrease by 17.

5 The figures are 85 out of 115 national networks (74%) and 41 out of 57 RSNs (72%). If A&E programming is removed from the national networks, the figure goes to 69% (68 out of 98).

MVPD's programming line-up, especially given the continuing popularity of the networks involved.

***3. Though somewhat decreased, cable maintains a dominant share of the national market and even greater share in key regional markets.***

- While cable's national market share has declined somewhat, it still maintains a 58.5% share – nearly three times the share of the largest competitive MVPD (DIRECTV), and clearly sufficient to confer market power.[6]

- Cable share in many regional markets served by clustered cable systems approaches or exceeds 80% – including Honolulu (89.6%), Boston (86.9%), New York (83.9%), Tampa (79.3%), and Philadelphia at 79.0%.[7]

- In addition, as shown in Chart 3, the market share of the largest vertically integrated cable operators (*i.e.*, national cable *concentration*) is not materially different from concentration levels in 1994, 2002, and 2007. More than one in three MVPD subscribers continues to receive video programming from the two largest vertically integrated cable MSOs.

***4. Congress already put in place a process for pre-approving exclusive carriage arrangements that would serve the public interest.***

- Section 628(c)(4) of the Communications Act provides a process through which any cable operator or cable-affiliated programmer can seek a determination from the Commission that a particular exclusive arrangement would serve the public interest.

- Puts the burden of proof on cable, which has control of the relevant information and timing of implementation.

- The Commission has approved such exclusivity in the past, including an arrangement for New England Cable News Channel.[8]

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6 *See, e.g.*, *In re Cox Enterprises, Inc.*, 2010 WL 5136047, *3 (W.D. Okla. 2010) (plaintiffs sufficiently pled market power in an antitrust tying case over set-top boxes by alleging that Cox provides cable services to 59% of the potential customers that its systems reaches and that in no area does it provide service to less than 46%).

7 *See* ADS and Wired-Cable Penetration by DMA: DMA Household Universe (Nov. 2011), available at http://www.tvb.org/planning_buying/184839/4729/ads_cable_dma (cited by FCC cable exclusivity sunset NPRM at footnote 83).

8 *New England Cable News Channel*, 9 FCC Rcd. 3231 (1994).

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The FCC in recent months has filed briefs with courts of appeals in which they argue that the MVPD market remains non-competitive and subject to abuse.

In a Second Circuit brief filed in June, the FCC told the court:

> Two recent decisions of the D.C. Circuit confirm that vertically integrated companies continue to retain such unique power and that the FCC has good reason to remain wary of the prospect of anticompetitive conduct by vertically integrated MVPDs. Specifically, the court found that "the transformation in the MVPD market" since 1992, "although significant, presents a 'mixed picture' when considered as a whole." *Cablevision*, 649 F.3d at 712 (quoting *Cablevision*, 597 F.3d at 1314).
>
> As the D.C. Circuit observed, "[w]hile cable no longer controls 95 percent of the MVPD market, as it did in 1992, cable still controls two thirds of the market nationally," *Cablevision*, 597 F.3d at 1314; and cable "enjoy[s] [even] higher shares in several markets." *Cablevision*, 649 F.3d at 712. In addition, "as of 2007, 'the four largest cable operators [were] still vertically integrated with six of the top 20 national networks, some of the most popular premium networks, and almost half of all regional sports networks.'" *Cablevision*, 649 F.3d at 712 (quoting *Cablevision*, 597 F.3d at 1314). In view of this evidence, the D.C. Circuit found "no reason to question" recent FCC findings that "cable operators still have a dominant share of MVPD subscribers … and still own significant programming." *Cablevision*, 649 F.3d at 712 (citation omitted).
>
> Petitioners urge the Court to disregard the D.C. Circuit's *Cablevision* decisions because they involved program access rules rather than program carriage rules. TWC Br. 38-39. ***But the findings in those cases confirmed the continuing need for both program access and program carriage rules***.

FCC Brief in *Time Warner Cable Inc. v. FCC* (2d Cir. No. 11-5152) at 35-36 (June 26, 2012) (emphasis added).

**Chart 1. Number of Cable-Affiliated National Networks**

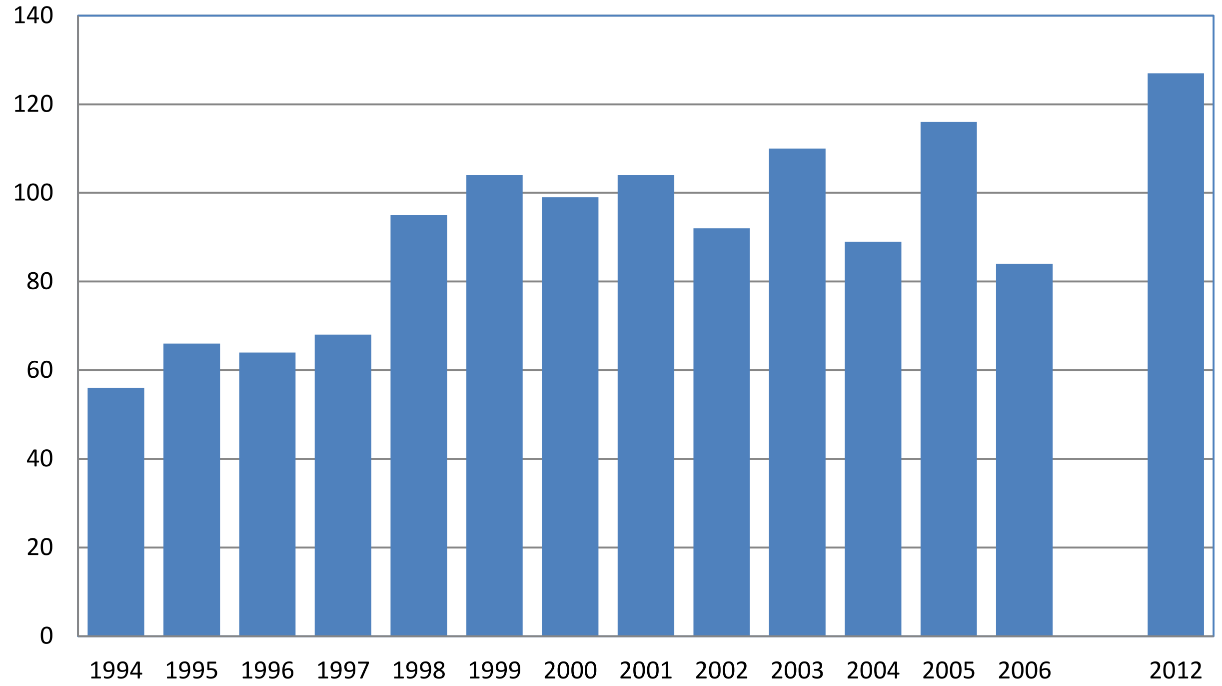
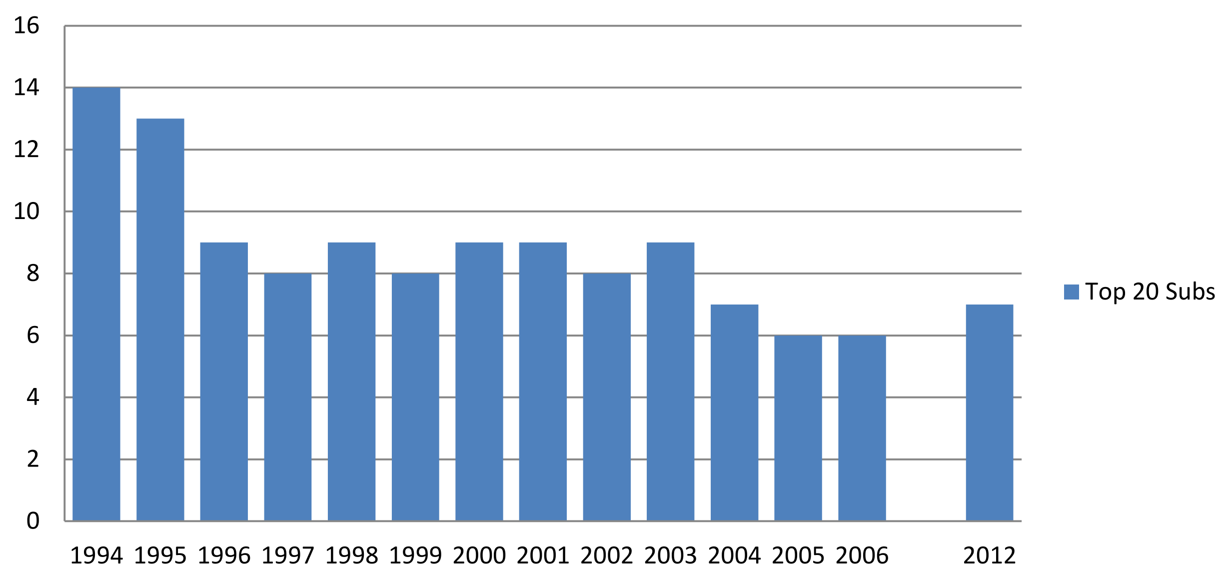



**Chart 2. Popularity of Cable-Affiliated National Networks**




Source: FCC Video Competition Reports

## Chart 3. Cable Concentration

| # of MVPD subscribers receiving video from one of the: | First Annual Report (1994)[9] | Eighth Annual Report (2002)[10] | Thirteenth Annual Report (2007)[11] | Most Recent |
|---|---|---|---|---|
| **Top 2 Vertically Integrated MSOs** | 37.28% | 23.88% | 39.05% | 34.53% |
| **Top 3 Vertically Integrated MSOs** | 42.36% | 30.86% | 44.69% | 39.30% |
| **Top 4 Vertically Integrated MSOs** | 47.18% | 34.26% | 47.89% | 43.64% |

9 *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, Appendix G, Table 1 (1994).

10 *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 17 FCC Rcd. 1244, Appendix C, Table C-3 (2002).

11 *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 24 FCC Rcd. 542, Appendix B, Table B-3 (2009). All figures in this column combine Adelphia's market share with that of Comcast and Time Warner Cable, which is consistent with the approach taken by the Commission in 2007. *2007 Extension Order*, ¶ 54.

## 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).