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EX PARTE

September 25, 2012

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 24, 2012, David Goodfriend and Brian Frederick from the Sports Fan Coalition; John Bergmayer from Public Knowledge; Stacy Fuller, Bill Wiltshire, and Gerry Waldron for DIRECTV; Hadass Kogan and Alison Minea for DISH; Melissa Newman for CenturyLink; Christopher Heimann for AT&T; and Scott Angstreich, Leora Hochstein, and the undersigned for Verizon met with Sean Lev and Susan Aaron from the Commission's Office of General Counsel and with Michelle Carey, Steve Broeckaert, and David Konczal from the Media Bureau to urge the Commission to retain the ban on exclusive programming contracts between cable operators and their affiliated programmers.

The group emphasized that the key facts underlying the exclusive contract prohibition, and the FCC's prior decisions extending that prohibition, have stayed largely unchanged since the Commission's 2007 extension (and the D.C. Circuit's review of that decision). Today, cable operators remain integrated with some of the most popular networks and continue to control roughly half of the regional sports networks (RSNs). The cable incumbents' documented history of abuses by withholding critical programming in order to handicap competitors and deny consumers more meaningful competitive choices has continued to grow over the last five years. If the market has changed at all since 2007, it has been in a direction that increases, rather than decreases, an incumbent cable operator's incentive to withhold programming from competitors-- in particular, to leverage programming exclusives to combat broadband competition from competing providers of bundled services.

While retaining the exclusivity ban for all affiliated programming continues to be justified based on the record evidence in this proceeding, the justification for continued protections with respect to sports programming is particularly pronounced. The Commission and the courts have repeatedly recognized that live sports programming is highly valued by consumers, critical to competition, and impossible to replicate. The Sports Fan Coalition walked through examples of cable incumbents' exercising their control over this must-have programming in ways that harm both consumers and competition Likewise, Verizon described its experiences in obtaining access to MSG HD and MSG + HD in the New York area – channels carrying 7 of the 9 professional teams. In the context of Verizon's program access complaint against Cablevision and MSG, surveys revealed that more than 70 percent of pay television viewers with access to regional sports programming in high definition would be unlikely to switch to another video provider that did not offer that programming.[1] More generally, 54 percent of all viewers — and 77 percent of sports fans — indicated that the availability of regional sports channels in HD was an important factor in any decision whether to switch providers.[2]

The group reiterated that the Commission can extend the prohibition — whether for all programming or limited to non-replicable programming such as sports programming — consistent with the D.C. Circuit's decisions in *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("*Cablevision I*"), and *Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) ("*Cablevision II*"). In *Cablevision I*, in which the court upheld the Commission's 2007 extension of the exclusivity prohibition, the court recognized that, although the video marketplace had grown more diverse since passage of the 1992 Cable Act, "the transformation present[ed] a mixed picture."[3] The court noted that 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." *Id.* The key factors the court relied upon in *Cablevision I* remain practically unchanged today: cable operators are vertically integrated with many of the top national networks, and control roughly half of all regional sports networks.[4] Nothing in *Cablevision I* indicates that the D.C. Circuit would refuse to defer to the

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[1] *See* Order, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, 26 FCC Rcd 13145, ¶ 47 & n.224 (2011) ("*Verizon 2011 Order*"); *see also* Verizon Reply Ex. 1 (Stella Decl.), Ex. A at 6, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, File No. CSR-8185-P (FCC Oct. 22, 2010)("Verizon 2010 Reply, Stella Decl.").
[2] *See* Verizon 2010 Reply, Stella Decl., Ex. A at 9.
[3] *Cablevision I*, 597 F.3d at 1314.
[4] *See Revision of the Commission's Program Access Rules, et. al*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413, at Apps. A, B, C (2012).

Commission's judgment on the basis of the evidence in the current record. Although it is true that the court suggested, in *dicta*, that the Commission might "soon" allow the exclusive contract prohibition to sunset, this statement was couched in express conditional terms — applying only "*if* the market continues to evolve at . . . a rapid pace." *Cablevision I*, 597 F.3d at 1314 (emphasis added). The marketplace has seen many changes since 2007, but the key facts relevant to retaining the rule have not changed.

The legal case for extending the exclusivity ban in the case of regional sports programming is particularly strong. Indeed, even the dissent in *Cablevision I* acknowledged that the unique characteristics of "*regional* video programming networks, particularly regional sports networks," could justify the "targeted restraint" of a "prospective ban" on exclusive deals for such programming.[5] More recently, the unanimous *Cablevision II* court 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." *Id.* The same rationale would apply here: given that sports programming is popular and non-replicable, and therefore uniquely important to competition in the video marketplace, an extension of the exclusivity ban as to this programming is appropriate.

Finally, the group emphasized that reliance on a case-by-case approach to address the withholding of programming under Section 628(b) of the Act would not be adequate to deter unfair and anticompetitive withholding by cable incumbents. This process is inherently burdensome and expensive, providing cable incumbents with ample opportunity to delay, if not prevent completely, providing competitors with access to programming that consumers demand and that the competitors may need to provide a real competitive alternative. Experience has proven that these cases take many of months, if not several years. For example, Verizon filed its initial complaint seeking MSG HD and MSG+ HD in July 2009, and supplemented that complaint in June 2010 following the *Terrestrial Loophole Order*.[6] Yet Cablevision was not ordered to provide access to this must-have programming until September 2011. In other words, more than two NBA and NHL seasons passed as Verizon's complaint was pending, and consumers were denied a meaningful choice for this extended period of time. Indeed, every day that the cable incumbents drag out this process rewards them for their bad acts and undermines competition and consumer choice. Moreover, the burdens and expense of the process are likely to deter many competitive providers from even bothering to pursue the complaint process, while the lack of any penalty for such behavior fails to provide the necessary disincentive to cable operators and their affiliated programmers.

In response to a question about the reason for applying a prospective ban in the context of satellite-delivered programming in light of the Commission's decision to apply a case-by-case approach in the case of terrestrial programming, we noted that such an approach makes sense given the different statutory standards involved. The Commission's decision with respect to

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[5] *Cablevision I*, 597 F.3d at 1326 n.6 (Kavanaugh, J., dissenting).

[6] *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746 (2010) ("*Terrestrial Loophole Order*").

terrestrial programming was based on Section 628(b), which addresses the "purpose and effect" of the provider's acts – an inquiry the Commission has found to be more fact specific and not susceptible to a categorical approach.[7] By contrast, Section 628(c)(5) indicates that the Commission should maintain the exclusivity prohibition where "necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5). Under that standard, the record here confirms that the Commission should keep in force the existing protections that experience has proven to be necessary to preserve and protect competition and consumer choice in the video marketplace.

Respectfully submitted,

William H. Johnson

cc: Sean Lev
Susan Aaron
Michelle Carey
Steve Broeckaert
David Konczal

[7] *Terrestrial Loophole Order*, ¶ 22.