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Barbara S. Esbin
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September 25, 2012

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Ex Parte Submission; *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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 Doc. Nos. 12-68, 07-18, 05-192*

Dear Ms. Dortch:

On September 24, 2012, Ross Lieberman, Vice President of Government Affairs, American Cable Association ("ACA") and the undersigned, met, respectively, with Matthew Berry, Chief of Staff to Commissioner Pai and Joseph Calascione, Intern in the Office of Commissioner Pai; Dave Grimaldi, Chief of Staff and Media Legal Advisor to Commissioner Clyburn; and Alex Hoehn-Saric, Policy Director, and on September 25, 2012 met with Erin McGrath, Media Legal Advisor to Commissioner McDowell; to discuss ACA's views concerning the potential sunset of the exclusivity prohibition contained in Section 628(c)(2)(D).¹

¹ *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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.*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012) ("NPRM"); *In the Matter of Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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 Doc. Nos. 12-68, 07-18, 05-192, Comments of the American Cable Association at 2-11 (filed June 22, 2012) ("ACA Comments"); *In the Matter of Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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 Doc. Nos. 12-68, 07-18, 05-192, Reply Comments of the American Cable Association at 8-22 (filed July 23, 2012) ("ACA Reply Comments").

Reiterating arguments made in its filings in the docket, ACA again strongly urged the Commission not to sunset the blanket prohibition on exclusive contracts. ACA explained that the Commission's own data shows that little has changed in the relevant market fundamentals since its last examination of the exclusivity sunset that warrant its expiration.² In 2011, vertically integrated cable operators had an interest in 7 of the top 20 satellite delivered national programming networks (as ranked by subscribership.). This represents an increase since 2007, and falls within a fairly consistent range (between 6 and 9) since 1996. Moreover, in 2011, the number of cable-affiliated RSNs increased significantly since 2007, going from 18 to 57.³ Finally, the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable multi-system operators has only slightly decreased from 48 percent in 2007 to 44% in 2011.

The Commission not only reached the conclusion that vertically integrated cable operators could harm competition and diversity in the market by withholding their programming from other MVPDs in its last sunset review in 2007, it has subsequently examined these same potential harms, and reached largely the same conclusions in its 2010 *Terrestrial Loophole Order*, its 2011 *Comcast-NBCU Order*,⁴ and in several program access complaint cases involving RSNs that were decided as little as one year ago in September, 2011.⁵ It is a *fortiori* the case that no significant changes have occurred in the market in the even briefer interval since these recent decisions were made.

ACA explained that the remedial conditions imposed on Comcast-NBCU do not eliminate the need to retain the program access rules applicable to it and other vertically integrated programmers. The need for protection from the risk of exclusive behavior by cable-affiliated programmers is not limited to one vertically integrated provider, it is industry-wide. Moreover, the Comcast-NBCU remedial conditions are not permanent, but rather are set to expire in 2018, assuming they are not modified or eliminated earlier, whereas sunset of the statutory exclusivity rule will be permanent.⁶

Although the level of vertically integrated programming has both moderately risen and fallen over time, and the identity of the vertically integrated cable operators have changed, the basic market structure wherein a very few vertically integrated cable operators control much of the most important programming has remained constant. Given the ability of vertically integrated cable operators to obtain a competitive edge in the MVPD market through ownership

² ACA Comments at 5-7; ACA Reply Comments at 8-9.

³ *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelpia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et. al.*, MB Docket Nos. 12-68, 07-18, 05-192, Letter from William Wiltshire, Counsel for DIRECTV, LLC to Marlene Dortch, FCC, at 1 (filed Sept. 24, 2012).

⁴ *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 61 (2010) ("2010 Terrestrial Loophole Order"); *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238, ¶¶ 34-48 (2011) ("Comcast-NBCU Order").

⁵ *In the Matter of AT&T Servs., Incorporated/ AT&T Conn. v. Madison Square Garden, L.P.*, Order, 26 FCC Rcd 13206 (2011); *In the Matter of Verizon Tel. Cos. & Verizon Servs. Corp. v. Madison Square Garden, L.P.*, Order, 26 FCC Rcd 13145 (2011).

⁶ ACA Comments at 10-11.

of national and regional programming, the Commission should anticipate that cable operators would seek to obtain more national and regional programming in the event the ban on exclusive arrangements is permitted to sunset. For all these reasons, ACA stressed that the ban on exclusive arrangements contained in Section 628(c)(2)(D) remains necessary and it is imperative that the Commission not permit this restriction to sunset.

However, should the Commission permit the blanket prohibition on exclusive contracts to sunset, leaving multichannel video programming distributors (“MVPDs”) reliant solely on case-by-case complaint procedures and license transfer conditions to protect their access to competitively critical satellite-delivered, cable-affiliated programming, ACA stated that it is imperative that the Commission, at a minimum, take the following actions in addition to maintaining important safeguards that are understood to be already contained in the Order⁷:

- Adopt rebuttable presumptions that an exclusive contract involving a satellite-delivered, cable-affiliated programming network, regardless of whether offered regionally or nationally, is both unfair and has the purpose or effect of significantly hindering its ability to provide satellite-cable programming if the network carries the same minimum amount of sports content as an RSN as previously defined by the Commission;
- Adopt rebuttable presumptions that an exclusive contract involving a satellite-delivered, cable-affiliated programming network that was the subject of a successful complaint filed under Section 628(b) would be unfair and have the purpose or effect of significantly hindering any other MVPD’s ability to provide satellite-cable programming under the same sections.
- Adopt a rebuttable presumption that the four elements required to support relief in a petition for temporary standstill under Section 76.1003(l) of the Commission’s rules are satisfied in cases involving renewal of an existing contract for a satellite-delivered, cable-affiliated programming network brought by a complainant proceeding under any of the rebuttable presumptions.

Adopting Rebuttable Presumptions to Improve the Efficiency of the Section 628(b)

Complaint Process. As the NPRM notes, should the general prohibition on exclusive contracts be permitted to sunset, MVPDs would still be able to bring program access complaints based on exclusive contracts against cable-affiliated programming vendors under Section 628(b) of the Act, which prohibits cable-affiliated vendors from engaging in “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming.”⁸ The principal difference for a complainant between proceeding under Section 628(b) versus the current prohibition on exclusivity found under Section 628(c)(2)(D) is that under subsection (b), a showing must be made both that an act is “unfair”

⁷ It is ACA’s understanding that the Order contains a rebuttable evidentiary presumption of significant hindrance for cases involving access to regional sports networks (“RSNs”) and clarifies that selective refusals to license programming by a cable-affiliated, satellite-delivered programmer violate the prohibition against discrimination among MVPDs in Section 628(c)(2)(B) absent a legitimate business reason.

⁸ NPRM, ¶ 47.

and that it “significantly hinders” competition, whereas under subsection (c)(2)(D), neither showing is required.⁹

ACA noted that it is significantly more difficult and burdensome for a complainant to prevent a cable-affiliated programming from withholding access to its programming using the Section 628(b) complaint process as compared to the existing prohibition on exclusive contracts (Section 628(c)(2)(D)). ACA explained that a significant disadvantage of the Section 628(b) complaint process is that the complainant will need to produce data and information relevant to the competitive harm of not having access to the cable-affiliated programming network that is the subject of the complaint. While the data and information that would allow the complaint to prevail in its case may exist, this data and information may not be accessible to the complainant. For example, to show competitive harm, it would be highly relevant to introduce evidence showing that another MVPD’s loss of access to the programming that is the subject of the complaint or its loss of similar programming caused that operator to lose a significant number of subscribers. Again such evidence may not be available to the complainant, and may not be discoverable because such data and information is not in the possession of the respondent.¹⁰

Furthermore, this complex complaint process will require greater financial and human resources on the part of both the complainant and the Commission. The complaint will likely need to engage in a highly technical analysis of whatever data and information is accessible to it to prove its case. In most cases, the process would require the complainant not only to retain the assistance of an attorney, but also an economist, and taking into account the opportunities to appeal decisions both at the Commission and in the Courts, the overall cost could exceed one million dollars. As a result, some MVPDs, particularly those with fewer subscribers or less access to funding, will not bring complaints to enforce their rights, even if the complaint is highly likely to prevail on its merits. With respect to the burden on the Commission’s resources, for those cases concerning exclusive arrangements that are brought under Section 628(b), Commission staff will have far more evidence and legal and economic analysis to review and analyze, and as a consequence, will have to devote far greater staff resources than for cases arising under Section 628(c).

ACA pointed out that the Commission has previously found that the operation of Section 628(b) can be improved and made more efficient through the creation of rebuttable evidentiary presumptions regarding whether an act or practice is unfair and whether it has the purpose or effect of hindering significantly or preventing any MVPD from competing, and in certain well-defined circumstances (access to terrestrially-delivered RSNs) has done so.¹¹

⁹ *Id.* ¶ 50.

¹⁰ Ironically, the Section 628(b) process is likely to disfavor MVPDs whose customers have faced the fewest blackouts because these MVPDs are least likely to have relevant data and information in their possession.

¹¹ NPRM, ¶ 53. Although the D.C. Circuit found inadequate justification for the Commission’s creation of a categorical presumption that all Section 628(c)-like conduct was “unfair,” it upheld the creation of a rebuttable evidentiary presumption of significant hindrance in the case of terrestrially-delivered, cable-affiliated RSNs because the presumption did not impermissibly shift the burden of proof to the respondent. *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 719-23 (D. C. Cir. 2011) (“*Cablevision II*”). The NPRM specifically sought comment on the creation of a rebuttable presumption of “significant hindrance” under Section 628(b) for (i) exclusive contracts involving satellite-delivered, cable affiliated RSNs; (ii) other types of non-replicable, highly desired satellite-delivered, cable-affiliated programming besides RSNs with no good substitutes that are important to competition; and (iii) cases where, once a complainant has succeeded under Section 628(b) (or, potentially Section 628(c)(2)(B)) in demonstrating that an exclusive contract involving satellite-delivered, cable-affiliated programming is both unfair and has the purpose or effect of significantly hindering its ability to provide satellite

ACA explained that should the blanket prohibition on exclusive contracts sunset, to preserve and protect MVPD competition, the Commission must adopt a rebuttable presumption that (i) an exclusive contract involving a satellite-delivered, cable-affiliated programming network, regardless of whether offered regionally or nationally, is both unfair and has the purpose or effect of significantly hindering its ability to provide satellite-cable programming if the network carries the same amount of sports content as an RSN as previously defined by the Commission in other related proceedings; and (ii) that an exclusive contract involving a satellite-delivered, cable-affiliated programming network that was the subject of a successful complaint filed under Section 628(b) would be unfair and have the purpose or effect of significantly hindering any other MVPD's ability to provide satellite-cable programming under the same provision.¹²

Exclusive contracts involving satellite delivered, cable-affiliated programming network, regardless of whether delivered regionally or nationally, that carries the same amount of sports programming as a RSN. In its *2010 Terrestrial Loophole Order*, the Commission established rebuttable evidentiary presumptions that an "unfair act" with respect to a terrestrially delivered, cable-affiliated RSN has the purpose or effect of significantly hindering the complainant's ability to provide satellite-delivered programming.¹³ The Commission should adopt a similar set of rebuttable presumptions on the elements of "significant hindrance" and "unfair act" for any satellite delivered, cable-affiliated programming network, including those distributed nationally, that carries the same amount of sports programming as RSNs.

Significant hindrance. The Commission previously found it necessary to take action to address unfair acts involving terrestrially-delivered, cable-affiliated programming in its *Terrestrial Loophole Order* on the basis of Commission precedent and record evidence (i) suggesting that withholding of terrestrially-delivered RSNs has significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming in some cases; and (ii) by significantly hindering MVPDs from providing video programming to subscribers, such conduct may significantly hinder the ability of competitive MVPDs to provide broadband services, particularly in rural areas.¹⁴ As a consequence, the Commission established a Section 628(b) complaint process that included a rebuttable evidentiary presumption that an unfair act involving a terrestrially-delivered, cable-affiliated RSN has the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.¹⁵ In upholding this rule, the D.C. Circuit found that the Commission had advanced "compelling reasons to believe that withholding RSN programming is, given its desirability and non-replicability, uniquely likely to significantly impact the MVPD market," sufficient to render creation of a rebuttable presumption of significant hindrance in the case of withholding of RSN programming based on its economic characteristics a reasonable action.¹⁶

cable programming network, any other exclusive contract involving the same network violates these same provisions for the same reasons. NPRM, ¶¶ 53, 56.

¹² There should be little dispute that a rebuttable presumption is appropriate for a category of programming such as RSNs, which have been shown by both Commission precedent and record evidence to be very likely to be both non-replicable and highly valued by consumers. NPRM, ¶ 53; *2010 Terrestrial Loophole Order*, ¶¶ 8, 52.

¹³ *2010 Terrestrial Loophole Order*, ¶¶ 8, 52.

¹⁴ *Id.* ¶¶ 31-36.

¹⁵ *Id.* ¶¶ 50, 52.

¹⁶ *Cablevision II*, 649 F.3d at 717.

ACA urged the Commission to establish a rebuttable evidentiary presumption for complaints involving satellite-delivered, cable-affiliated programming networks, regardless of whether such network is delivered regionally or nationally, where such networks carry the same types and minimum amounts of sports programming that the Commission has previously used to qualify an RSN as a covered RSN for purposes of its program access license conditions and its terrestrially-delivered, cable-affiliated program access rules.¹⁷ That would include, regardless of whether the network is national or regional or otherwise considered a sports network,

any non-broadcast video programming service that (1) provides live or same-day distribution . . . of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.¹⁸

ACA observed that, with respect to a programming service meeting the requirement of carrying a minimum of 100 hours of programming meeting the criteria of subheading 1, the plain language of the provision is clear that the 100 hours does not have to involve only one team but can be met by multiple teams from multiple leagues, and include playoff games.

Expansion of the category of programming subject to a rebuttable presumption of significant hindrance for any satellite-delivered cable-affiliated programming network that carries the minimum amount of sports programming as an RSN is appropriate because the economic characteristics of the sports content does not vary if provided on a national versus regional basis. A sporting event of the most popular sports leagues remains non-replicable and is highly desired, whether shown on a regional or a national cable programming network and regardless of the technology used in its distribution.¹⁹ Moreover, often, the sporting events carried on cable programming networks that are

¹⁷ *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelpia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelpia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 158 (2006) ("Adelpia Order"); Comcast-NBCU Order, Appendix A, § 1; 2010 Terrestrial Loophole Order, ¶¶ 52-53.

¹⁸ Adelpia Order, ¶ 158; Comcast-NBCU Order, Appendix A, § 1 (defining a RSN as "any non-broadcast video programming service that (i) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (ii) in any year, carries a minimum of either 100 hours of programming that meets the criteria set forth in (i) above, or 10% of the regular season games of at least one sports team that meets the criteria set forth in (i) above").

¹⁹ Demonstrating the point that sporting events are popular even when distributed on national cable programming networks, Monday Night Football on ESPN topped cable viewership for the week ending September 23, 2012 with 15.515 million viewers. Thursday Night Football on the NFL Network was second. Other popular sporting events on national cable networks include College Football Primetime on ESPN (#11) and NASCAR Sprint Cup on ESPN (#15). See Kondoloy, Amanda, *Cable Top 25: Monday Night Football Tops*

distributed nationally are even more desired than the games on regional sports networks. These games are considered marquee events for the networks and the sports leagues, and many times feature the most competitive matchup of the week, and involve the most popular teams. In some instances, the leagues do not schedule any other games on the same day and time as these nationally distributed games to increase their desirability and the network as a whole. As the NPRM notes, the Commission recognized in its Comcast-NBCU Order that “certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming.”²⁰

ACA explained that the Commission may again rely on its predictive judgment to rationally presume that any network, regardless of whether it is distributed regionally or nationally, that carries the same types and amounts of sports programming that the Commission has previously used to qualify a network as a covered RSN for purposes of establishing its program access license conditions and its terrestrially-delivered program access rules, will significantly hinder competitive MVPDs if withheld from them in the marketplace.²¹ This prediction is no different in kind than the predictive judgment that the Commission employed in establishing that terrestrially-delivered cable-affiliated RSNs if withheld from an MVPD will significantly hinder its ability to provide satellite cable programming. All RSNs are not created equal, and some will be far more desirable and necessary for an MVPD to carry than others. Any regulatory policy based on classifications will always carry the risk that some small number of individual cases may be misclassified. However, the Commission is not required to have absolute certainty that the programming will definitely meet the standard in all cases. It is sufficient if its predictive judgment permits the conclusion that it is *likely* that an unfair act with respect to the programming will meet the standard. In cases involving access to any network that carries the same types and amounts of sports programming that the Commission has previously used to qualify an RSN, the Commission would merely be acknowledging the likelihood of an unfair act with respect to this programming would have the identical effect as an unfair act with respect to an RSN based on the economic characteristics of the programming.²²

Cable Viewership for the Week Ending Sept. 23, 2012, TV By the Numbers, (Sept. 25, 2012), available at <http://tvbythenumbers.zap2it.com/2012/09/25/cable-top-25monday-night-football-tops-cable-viewership-for-the-week-ending-september-23-2012/150044/> (last visited Sept. 25, 2012).

²⁰ NPRM, ¶ 53; Comcast-NBCU Order, ¶¶ 45-46 (2011) (explaining that record supported a determination of potential competitive harm from foreclosure involving applicants’ national cable programming networks; “the relevant issue is the popularity of the particular programming that is withheld and how the inability of competing MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service”); see *id.* ¶ 46 n. 110, citing Letter from Barbara S. Esbin, Counsel for ACA, to Marlene Dortch, Secretary, FCC (Nov. 5, 2010) at Exhibit 1, Table 3 (calculating consumer harms arising from combination of Comcast distribution assets and block of NBCU national cable networks).

²¹ The Commission may establish evidentiary presumptions provided that the presumptions (1) shift the burden of production and not the burden of persuasion and (2) are rational. *Cablevision II*, 649 F.2d. at 716. The courts will defer the agency’s predictive judgment and consider an evidentiary presumption permissible “if there is a sound and rational connection between the proved and the inferred facts, and when proof of one fact renders the existence of the other fact so probably that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.” *Id.*

²² It is important to remember that only the burden of production will be shifted in such cases. The cable-affiliated vendor can still attempt to demonstrate that the significant hindrance standard is not met, and can overcome the presumption in the appropriate case. The respondent cable-affiliated programmer will remain able to present factors distinguishing the complainant in its case from the victorious MVPD in the first case, including geographical differences in the service areas of the two MVPDs and characteristics of the particular MVPDs at issue, such as whether one is a small and vulnerable new entrant whereas the other is a larger, established MVPD.

Accordingly, ACA asserted that once the complainant demonstrates that the network at issue is providing the requisite amount of programming of a sports team meeting the definition (establishing desirability and non-replicability), it is rational to infer that withholding of the programming “is uniquely likely to significantly impact the MVPD market.”²³ Because such a presumption is rebuttable, the respondent may nonetheless demonstrate that despite carrying such sports programming, withholding the network does not significantly hinder the complainant in any given case. ACA pointed out that such a presumption does not shift the burden of persuasion, which remains at all times on the complainant. It merely eases the burden of production, making feasible the filing of legitimate complaints in appropriate cases, while reducing the need for repetitive examination of established evidence by both the litigants and Commission staff.

Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. For the same reasons, ACA urged the Commission to establish a rebuttable evidentiary presumption that one category of conduct previously treated by Congress as categorically unfair – exclusive contracts between a cable-affiliated satellite-delivered programmer and a cable operator under Section 628(c)(2)(D) – now presumptively constitutes an unfair act or unfair or deceptive act or practice within the meaning of Section 628(b) when it involves programming carrying significant amounts of sports content.²⁴ Similar to the rebuttable presumption on significant hindrance, the presumption merely lessens the complainant’s burden of production and does not shift the burden of persuasion because the respondent may rebut the presumption and establish that the exclusive contract is not unfair by making an appropriate showing that the exclusive contract is in fact pro-competitive given relevant market conditions. This distinguishes creation of such a rebuttable evidentiary presumption from the Commission’s categorical treatment of all Section 628(c)-like conduct involving terrestrial programming as unfair, which was struck down for lack of adequate justification in *Cablevision II*.²⁵

²³ *Id.* at 717. In explaining the definition of an RSN covered by the program access license conditions in the Adelphia Order, the Commission stated that the 100-hour programming minimum was based on comments in the docket stating that that amount of programming was the minimum amount of RSN programming that could harm competitors if it was withheld from them. The Commission further explained that it included the percentage alternative because for some sports with few games, the 100-hour minimum would allow a network to carry an entire season of games without being categorized as an RSN. Accordingly, the Commission added the “percentage of programming figure” as an alternate method to measure programming time. The Commission selected the 10% figure was selected because it believed a threshold of 20% could enable a network to carry a full season of event without being considered an RSN, whereas a threshold too low could prevent carriage of sports programming of significant interest to viewers in the region. Adelphia Order, ¶ 158.

²⁴ The presumption is more than adequately supported by the conclusions the Commission has consistently reached in both rulemakings and transaction reviews concerning the anticompetitive consequences of a cable-affiliated programmer withholding sports programming to disadvantage rival MVPDs. See *Comcast-NBCU Order*, ¶¶ 29, 39; *In the Matter of Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, 26 FCC Rcd 13145 (2011); *In the Matter of AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011); 2010 Terrestrial Loophole Order, ¶ 25.

²⁵ *Cablevision II*, 649 F.3d at 719-723 (finding the Commission’s “reasoning by analogy” (i) incomplete because it failed to consider whether there are competitively significant differences between programming delivered terrestrially and by satellite; (ii) faulty because it was based on the mistaken central premise that Congress treated all withholding of satellite-delivered cable-affiliated programming as unfair without exception, when in fact, Congress recognized an exception for exclusive contracts that the Commission concludes are “in the public interest” and by including a sunset provision, thus balancing “the need for regulatory intervention in markets with significant barriers to competition with its recognition that vertical integration and exclusive dealing

Because Congress has already determined that exclusive contracts for satellite-delivered cable-affiliated programming generally constitute an unfair practice, it is reasonable to assume that this will generally hold true with respect to cable-affiliated satellite-delivered programming post-sunset in the limited cases in which the programming contains significant amounts of “must have” sports programming.²⁶

Exclusive Contracts Previously Determined to Violate Section 628(b). In addition to using the foregoing rebuttable presumptions to improve the efficiency of the complaint process, ACA requested that the Commission recognize another circumstance where unfairness and significant hindrance may be presumed, subject to disproof by the respondent cable-affiliated vendor. As suggested in the NPRM, that is where “one MVPD has already successfully won a Section 628(b) complaint against the programming for exclusive contracting.”²⁷ In this limited circumstance, it is reasonable and appropriate to establish rebuttable evidentiary presumptions of unfairness and significant hindrance to another MVPD.

In order to prevail, the first MVPD would have to carry its burden of proof on two issues: demonstrating that the withholding of the programming on the basis of exclusive contracting was “unfair,” that is, had an anticompetitive effect, and that lack of access significantly hindered the MVPD’s ability to provide satellite cable programming. Such a determination by the Commission would establish important facts about the programming at issue – namely, that it qualifies as “must have” on the basis of its economic characteristics and the fact that it is highly desired by subscribers, qualities that render the programming uniquely likely to significantly impact the MVPD market. These qualities render the programming highly likely to have a comparable effect if withheld from another MVPD that is sufficient to support a rebuttable presumption. The presumption recognizes that the “must have” nature of the programming is the primary factor that will determine the result in an adjudication, and that this factor is likely to remain the same across multiple proceedings. ACA reiterated that here too that although cases brought under Section 628(b) are generally decided based on the evidence presented by the parties, the Commission may rely on its predictive judgment to rationally presume that withholding of the same “must have” programming will have the same effect on one MVPD as it does on another.

Finally, the NPRM asked whether it would be rational to create such a presumption in instances where the prior administrative finding of a Section 628(b) violation involved a case brought by a small, fledgling MVPD, whereas the second case is brought by a large, established MVPD.²⁸ ACA argued that the answer is yes, it is rational, because the vendor could make this argument and potentially prevail in the case. This is no different from cases in which a particular RSN subject to a program access complaint is in fact not that popular and is not necessary for an MVPD to compete in the marketplace. The programmer remains able to rebut the presumption by demonstrating that withdrawal of this particular RSN would not “significantly hinder” competing MVPDs.

are not always pernicious and, depending on market conditions, may actually be precompetitive;” and (iii) failed to give consideration to whether it should treat conduct as unfair despite it being precompetitive in a given instance).

²⁶ One factor that troubled the *Cablevision II* court was the Commission’s failure to consider whether there are relevant differences between terrestrial programming, which is generally distributed regionally, and satellite-distributed programming, which includes national networks that would bear on the question of whether withholding in any given case would be competitively unfair. *Cablevision II*, 649 F.3d at 720.

²⁷ NPRM, ¶ 56.

²⁸ *Id.*

Moreover, ACA observed here again that it is more difficult for a complainant to prevail in a Section 628(b) program access complaint process, and it is very expensive. Not only is the process expensive, but, as previously discussed, it requires the production of data and information, some of which will not be accessible to smaller MVPDs, as well as the analysis of whatever data and information is available. This means that large established MVPDs are much more likely to both bring and win Section 628(b) complaints than smaller new MVPDs for two reasons. First, small firms and new entrants are much more likely to be limited in the access to funding. Second, while the cost of a complaint is relatively fixed regardless of the size of the MVPD, the benefit of winning the complaint is proportional to the MVPD's customer base. As a result, MVPDs with small subscriber bases may generally not find it profitable to launch a complaint that could cost more than one million dollars even if they are reasonably sure that they will win. Therefore, the possibility identified in the NPRM that a small MVPD or new entrant will have launched and won a Section 628(b) complaint, while its large established rivals hold back, seems much less likely to occur than the reverse case where a larger better-funded MVPD launches and wins a Section 628(b) case while small rivals and new entrants hold back.

If only the largest MVPDs are able to bring and win these cases, in practice ACA explained, there should be no problem with large MVPDs taking advantage of Section 628(b) decisions reached for smaller MVPDs. This will mean that it is highly likely that the only cases that will be brought to the Commission for decision are those that could be won by larger, better-financed MVPDs. However, a benefit of the rebuttable presumption will be that it will make it more likely that smaller firms and new entrants will be able to gain access to the same types of programming to which their larger better-established rivals are able to gain access.

Rebuttable Presumptions Supporting Standstill Relief. Under the Commission's rules, an MVPD may obtain a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract upon a showing that the complainant is likely to prevail on the merits of its complaint and will suffer irreparable harm. That is, that (i) the complainant is likely to prevail on the merits; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay.²⁹ ACA urged the Commission to also adopt a rebuttable presumption that the four elements required to support relief in a petition for temporary standstill under Section 76.1003(l) of the Commission's rules are satisfied in cases involving renewal of an existing contract brought by a complainant proceeding under any of the rebuttable presumptions.³⁰ ACA explained that such an approach has several benefits, including minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint and increasing the efficiency and usefulness of the program access complaint process.

Nonetheless, it is essential for this relief to be meaningful to MVPDs that the Commission must require the cable-affiliated programmer to respond to the complainant's petition for temporary standstill within days not weeks, and, as soon as the complainant replies to the respondent's response, also commits to act within days on the petition. For an MVPD seeking extension of an expiring programming contract involving a satellite-delivered, cable-affiliated programming network carrying the requisite amount of sports content, missing even weeks a season while awaiting action

²⁹ 47 C.F.R. § 76.1003(l).

³⁰ 2010 Terrestrial Loophole Order, ¶¶ 71-75; 47 C.F.R. § 76.1003(l).

on a petition for temporary standstill would be tantamount to a denial, even in the most meritorious of cases.

* * *

ACA observed that although none of the foregoing actions provide an adequate substitute for a categorical rule of conduct concerning exclusive agreements, in the absence of an across-the-board rule of conduct pertaining to exclusive agreements, it is imperative that these measures be adopted in order to protect and preserve competition and diversity in the distribution of video programming.³¹

Finally, ACA noted that it was pleased to have learned that the Commission intended to seek comment on its proposals to reform the Commission's rules concerning buying groups so that they could be utilized by the nation's largest buying group, the National Cable Television Cooperative.³²

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely



Barbara Esbin

cc (via email): Matthew Berry
Joseph Calascione
Dave Grimaldi
Alex Hoehn-Saric
Erin McGrath

³¹ 47 U.S.C. § 548(a).

³² See ACA Comments at 11-33; *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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 Doc. Nos. 12-68, 07-18, 05-192, at 2 (filed Aug. 2, 2012); *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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 Doc. Nos. 12-68, 07-18, 05-192, Letter from Barbara S. Esbin, Counsel, American Cable Association to Marlene Dortch, at 4-5 (filed Aug. 31, 2012); *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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 Doc. Nos. 12-68, 07-18, 05-192, Letter from Barbara S. Esbin, Counsel, American Cable Association to Marlene Dortch, at 2-3 (filed Sept. 13, 2012).