September 26, 2012

EX PARTE

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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 Walter B. McCormick, Jr., Glenn Reynolds and the undersigned, of USTelecom met with Commissioner Jessica Rosenworcel, and Alex Hoehn-Saric to discuss policy positions supporting an extension of the cable exclusivity prohibition. During the meeting, we discussed the connection between access to video programming and broadband deployment. Given the Commission's long-standing recognition that the deployment of broadband networks are "linked intrinsically" to a provider's ability to offer video services, USTelecom emphasized the need to extend the cable exclusivity prohibition.[1]

USTelecom noted that where the availability of video revenues is called into question due to program access concerns, an already challenging value proposition can become even harder to justify, resulting in less investment in broadband. As a result, unfair acts involving video programming "have the potential to limit the ability of MVPDs to provide broadband services, particularly in rural areas."[2] USTelecom pointed out that the impact of such acts falls particularly hard on small and rural telcos, whose potential subscriber base is also likely to have the most limited existing broadband options.

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[1] *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, ¶ 62 (2006), *aff'd sub nom. Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[2] *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶ 36 (2010).

Moreover, in its recent Universal Service Reform Order, the Commission emphasized the importance of video revenues in its analysis. The Commission emphasized that its evaluation of appropriate support levels necessarily includes all revenue sources available to the carrier and that its actions did "not alter a provider's ability to collect regulated and unregulated end-user revenues."[3] The Commission went on to note that by taking into account these other revenue streams it believed that "rate-of-return carriers on the whole will have a stronger and more certain foundation."[4] Impeding access to programming would undermine this presumption.

USTelecom also expressed concerns over reports that the Commission was considering reliance upon a combination of the complaint procedures available under Section 628(b) of the Communications Act and the merger conditions imposed on Comcast/NBC Universal.[5] Keeping Section 628(b) while discarding the cable exclusivity prohibition would transform the existing regime, in which cable operators have the option to seek a case-by-case determination in favor of exclusivity, into a regime in which competing MVPDs must bring complaints to overturn exclusivity, with all of the cost and delay attendant to such regulatory procedures. USTelecom also noted the significant time, costs and associated delays inherent in the current complaint process, as evidenced by recent proceedings at the Commission.[6] Such a case-by-case complaint process would be particularly costly for smaller MVPDs, likely leaving them without a practical remedy at all.

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[3] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663, ¶ 291 (2011) (*USF/ICC Order*).

[4] While video is not expressly mentioned there, it is in the context of setting forth the information that a provider would need to submit to obtain a waiver from provisions in the order. *See*, *USF/ICC Order* ¶¶ 539-542. It also emphasized that it intended to "take into account not only revenues derived from network facilities that are supported by universal service but also revenues derived from unregulated and unsupported services as well." *Id.*, ¶540. Specifically, among other information, the waiver petition would need to include details of any video plans, percentage of subscribers taking video services and audited financials that includes information on costs and revenues from video services. *Id.*, ¶ 542.

[5] *Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, Appendix A, Section II (2011) (*Comcast/NBCU Order*).

[6] *See*, Order, *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*, DA 11-1595, 26 FCC Rcd. 13206 (released September 22, 2011); *see also*, Order, *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1594, 26 FCC Rcd. 13145 (released September 22, 2011). The complaints addressed in these orders were filed by Verizon and AT&T in June, 2009 and August, 2009, respectively. They were ultimately resolved by the Commission in September, 2011.

Pursuant to Commission rules, please include this letter in the dockets identified above.

Sincerely,

Kevin G. Rupy
Senior Director, Policy Development

cc: Jessica Rosenworcel
Alex Hoehn-Saric