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SEP 19 2012
Federal Communications Commission
Office of the Secretary

September 19, 2012

VIA HAND DELIVERY – EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Revision of the Commission's Program Access Rules,*
MB Docket Nos. 12-68, 07-18, 05-192
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Time Warner Cable Inc. hereby submits an ex parte filing redacted for public inspection pursuant to the Second Protective Order in this proceeding.[1] Copies of the Highly Confidential filing have been provided to the Secretary's Office and the Media Bureau, as directed by the Second Protective Order.

Please contact the undersigned should you have any questions regarding this matter.

Sincerely,

Matthew A. Brill
LATHAM & WATKINS LLP

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[1] *Revision of the Commission's Program Access Rules*, Second Protective Order, MB Docket Nos. 12-68, 07-18, 05-192, DA 12-942, (MB June 14, 2012) ("Second Protective Order").

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September 19, 2012

VIA HAND DELIVERY – EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Revision of the Commission's Program Access Rules,*
MB Docket Nos. 12-68, 07-18, 05-192

Dear Ms. Dortch,

DirecTV recently filed an economic analysis by Kevin Murphy that considers recent changes in the video distribution of San Diego Padres baseball games.[1] Those games previously were distributed on a local network that was carried by Cox and Time Warner Cable ("TWC"), but beginning in March 2012 the games became available on a new RSN that was carried by DirecTV and Cox. Despite recognizing that "the number of months of available data is small," Professor Murphy nevertheless concludes based on just five months of data that DirecTV's carriage of the RSN in San Diego had a positive impact on DirecTV's subscribership. Professor Murphy's analysis, however, has significant flaws that render the study irrelevant for purposes of the Commission's evaluation of whether to sunset the prohibition on vertically integrated cable operators' ability to pursue exclusive arrangements with affiliated satellite-delivered programmers. But even if the analysis were methodologically sound, it would in no way justify extending the ban on exclusive arrangements involving vertically integrated cable operators and programmers.

Professor Murphy makes at least two key errors in analyzing the carriage of Padres games. First, Professor Murphy concedes that during the time period in question the Padres games were not available *at all* on TWC systems. He therefore is examining a situation in which the games went from being available exclusively on cable to a situation in which the games were available exclusively on DirecTV in much of the San Diego DMA. That is not a salient comparison for purposes of evaluating the Commission's program access rules. Rather, because the rules prohibit exclusive cable distribution, the relevant question is how the competitive

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1 *See* Letter from William M. Wiltshire, counsel for DirecTV, to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, 05-192 (filed Aug. 31, 2012).

impact of programming being available exclusively from cable operators would compare to programming being available from *both* cable operators *and* DBS providers. Professor Murphy's study does not purport to address that comparison or to control for TWC's lack of carriage of Padres games during the relevant period.

Second, despite the sparse data available, Professor Murphy concludes that DirecTV's average monthly growth rate in San Diego increased during the five months he considered, which he attributes to its carriage of Padres games. But the increase in growth rate that he identifies is **[BEGIN CONFIDENTIAL]** REDACTED **[END CONFIDENTIAL]** even assuming that DirecTV's self-serving model based on minimal data is reliable. Such an effect could not remotely establish that the previously exclusive cable distribution constituted an "unfair method of competition" under Section 628(b) of the Communications Act.[2] Nor would it support the type of governmental interest in restricting cable operators' speech that is required to satisfy the First Amendment. If anything, Professor Murphy's study only confirms that the record in this proceeding cannot justify extending rules that suppress the speech only of cable operators and cable-affiliated programmers.

Indeed, simply demonstrating an impact on subscribership arising from carriage (or non-carriage) of a particular RSN cannot establish that exclusivity is an unfair business practice, regardless of the magnitude of the impact. Exclusive arrangements represent only one of many strategies MVPDs can pursue to differentiate themselves from rivals and attract new subscribers. Often, vertically integrated programming vendors determine that broad distribution is the best strategy, as TWC announced with respect to its new Lakers RSNs.[3] Other times, exclusivity may be advantageous, as reflected in DirecTV's flagship NFL Sunday Ticket offering. It is untenable for the government to scrutinize such complex business judgments and, especially in the absence of demonstrated market power, to condemn a particular strategy merely because it would affect a particular rival's subscriber levels. To the contrary, attracting subscribers is the object underlying *every* business strategy, and an MVPD's success in doing so does not remotely demonstrate "unfairness." Surely DirecTV would argue that a rival MVPD's demonstration that its lack of access to NFL Sunday Ticket has an impact on its subscribership is not sufficient to show that DirecTV is engaging in an unfair method of competition.

In an effort to distinguish exclusivity involving vertically integrated cable operators from other (often larger) MVPDs' exclusive arrangements, DirecTV continues simply to assert that

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2 47 U.S.C. § 548(b).

3 **[BEGIN CONFIDENTIAL]** REDACTED

[END CONFIDENTIAL]

cable operators have market power.[4] But the Commission and courts have concluded otherwise.[5] And while DirecTV suggests that the burden should be on cable operators to demonstrate an *absence* of market power in a given geographic area,[6] that is backwards under the governing statute and the First Amendment, as the Commission may not extend the exclusivity ban unless it can find, based on substantial evidence, that the ban remains "necessary" and is narrowly tailored to the governmental interests at stake.[7] DirecTV also ignores the fact that a major DBS operator with a large subscriber base can leverage its clout to secure major exclusive arrangements far more readily than most cable operators can. DirecTV is now the second-largest MVPD and has sufficient market leverage to have secured the exclusive rights to NFL Sunday ticket, which gives it a substantial competitive advantage compared to cable operators and DISH. DirecTV wants the Commission to protect its own exclusive arrangements while prohibiting cable operators, including much smaller cable systems, from pursuing the same business strategies, but it cannot have it both ways.

Finally, DirecTV's efforts to deny the relevance of the First Amendment in this proceeding are unavailing. Contrary to DirecTV's suggestion that vertically integrated cable operators and programming vendors have no "cognizable First Amendment interest at stake,"[8] the relevant interests are well established. The D.C. Circuit unequivocally held that "there can be no disagreement on an initial premise: cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[9] Tellingly, DirecTV does not respond at all to TWC's argument that some programmers may choose not to develop certain programming at all if they cannot preserve the unique characteristics of the programming through exclusivity arrangements. That reality underscores the importance of the speech rights at stake in this context.

DirecTV falls back on the observation that the D.C. Circuit rejected a First Amendment challenge to the program access rules "over fifteen years ago,"[10] but the court's analysis of the constitutional issues under starkly different marketplace conditions has no bearing on the proper

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4 *See* Ex Parte Letter from William Wiltshire to Marlene H. Dortch, MB Docket Nos. 12-68, 07-18, 05-192, at 2-3 (filed Sept. 14, 2012).

5 *See* Reply Comments of Time Warner Cable Inc., MB Docket Nos. 12-68, 07-18, 05-192, at 6-7 (filed July 23, 2012).

6 *See* DirecTV Sept. 14, 2012 Ex Parte at 3.

7 47 U.S.C. § 548(c)(5); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2512, 2513 (2009) (holding that constitutional burdens "must be justified by current needs"); *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996) (holding that the burdens on speech must not be greater than is "essential" to furthering the governmental interests at stake).

8 DirecTV Sept. 14, 2012 Ex Parte at 3.

9 *Time Warner Entertainment*, 93 F.3d at 966 (citation omitted).

10 DirecTV Sept. 14, 2012 Ex Parte at 3.

analysis today. To the contrary, the D.C. Circuit has expressly recognized that stale rationales for speech-affecting mandates cannot survive First Amendment scrutiny.[11] Moreover, in its 2010 decision reviewing the previous extension of the exclusivity ban, the court stated its clear expectation that "the Commission ... soon [would] be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming."[12] As a result, the court's 1996 ruling does not remotely support the proposition that a further extension of the exclusivity ban in today's robustly competitive marketplace would pass muster.

For these reasons, and for the reasons set forth in TWC's comments and reply comments, the Commission should sunset the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
LATHAM & WATKINS LLP

Counsel for Time Warner Cable Inc.

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11 *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 882 (D.C. Cir. 1999); *see also Nw. Austin Mun. Util. Dist. No. 1*, 129 S. Ct. at 2512, 2513 (holding that where a statute "fails to account for current ... conditions," a court must "not shrink from [its] duty 'as a bulwar[k] of a limited constitution against legislative encroachments.'" (quoting The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton)).

12 *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010).