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**Barbara S. Esbin**  
Admitted in the District of Columbia

October 1, 2012

**Via ECFS**

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 27, 2012, Ross Lieberman, Vice President of Government Affairs, American Cable Association ("ACA") and the undersigned, met with Lyle Elder, Attorney-Advisor, Office of Chairman Genachowski; Elizabeth Andron, Acting Chief of the Office of Strategic Planning & Policy Analysis; Mary Beth Murphy, Chief, Policy Division; and David Konczal, Assistant Chief of the Policy Division, Media Bureau to discuss ACA's views concerning the potential sunset of the exclusivity prohibition contained in Section 628(c)(2)(D).<sup>1</sup>

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<sup>1</sup> *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 previous filings in the docket, ACA again strongly urged the Commission not to sunset the blanket prohibition on exclusive contracts, arguing that the ban on exclusive arrangements contained in Section 628(c)(2)(D) remains necessary and must therefore be retained.<sup>2</sup>

However, ACA stated that should the Commission permit the restriction 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, 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 Order:<sup>3</sup>

- 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 the complaining MVPD’s 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; and
- 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.

In response to questions concerning the extension of the rebuttable presumption concerning cable-affiliated RSNs to nationally distributed programming networks carrying the same type and amount of sports programming as a network qualifying as an RSN under the Commission’s rules, ACA reiterated that such a decision would be an appropriate exercise of the Commission’s predictive judgment.

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<sup>2</sup> ACA Comments at 2-11; ACA Reply Comments at 8-19; *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 Esbin, Counsel for the American Cable Association to Marlene Dortch, Secretary, FCC, at 2 (filed Sept. 25, 2012) (“ACA Sept. 25th Ex Parte”).

<sup>3</sup> 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. A more detailed explanation of the justifications supporting ACA’s proposal is contained in the ex parte letter filed on behalf of ACA on Sept. 25, 2012. See ACA Sept. 25th Ex Parte at 3-11.

ACA noted that in 2010 the Commission had adopted a rebuttable presumption that an unfair act involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b) (significant hindrance) in the Terrestrial Loophole Order.<sup>4</sup> The Commission based this rebuttable presumption on record evidence and Commission precedent showing that this class of programming carries content that “is highly likely to be both non-replicable and highly valued by consumers.”<sup>5</sup> In upholding the Commission’s decision, the D.C. Circuit court too examined the content of the programming carried on the network, focusing on the key economic attributes of RSN programming and whether these attributes would affect competition in the market.<sup>6</sup> These economic attributes are, as the court noted, the “desirability and non-replicability,” of the content, rendering it “uniquely likely to significantly impact the MVPD market.”<sup>7</sup> In its decision, the court relied upon the “Commission’s expert observations about RSN programming,” from which it reasonably extrapolated “to a prediction about the impact RSN withholding would ordinarily have.”<sup>8</sup>

ACA explained that the sports programming that airs on national satellite-delivered cable programming networks have the exact same economic attributes, and that withholding the networks that carry a minimum amount of such programming to qualify as an RSN would impact the MVPD market in the same way precisely because it has the same attributes as sports programming distributed regionally. ACA said that it is therefore appropriate to apply the rebuttable presumption to national networks that air the same programming in the same minimum amounts.

There are an increasing number of satellite-delivered national cable programming networks that carry significant amounts of sports content. These networks include well-known sports networks like ESPN and NBC Sports (formally Versus) that typically carry sports programming from multiple major sports leagues, but also includes other networks, like TNT and TBS, that may have the rights to air sporting events from only one of the major sports leagues.<sup>9</sup> Although none of these networks

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<sup>4</sup> *In the Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 52 (2010) (“2010 Terrestrial Loophole Order”).

<sup>5</sup> *Id.*

<sup>6</sup> *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 719-23 (D. C. Cir. 2011)(“*Cablevision II*”).

<sup>7</sup> *Id.* at 717.

<sup>8</sup> *Id.* In fact, the D.C. Circuit noted that it had previously “permitted the Commission to extrapolate from this same study to a much greater degree. . . . Although the study involved only RSNs, the Commission used it to support predictions about the effects of lifting its ban on satellite programming withholding would have for satellite cable-affiliated networks generally, including for national networks.”(citations omitted). *Id.* See *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2007).

<sup>9</sup> ACA uses these networks as representative examples of the type of highly popular national cable programming that carries a significant amount of sports programming for purposes of discussion. ACA recognizes that today, ESPN, TNT and TBS are not currently cable-affiliated and that NBC Sports is currently subject to merger-specific program access license conditions. However, network ownership has been shown to change over time, and the license conditions attaching to NBC Sports will expire by their own terms in 2018, unless removed earlier by action of the Commission. See 2010 Terrestrial Loophole Order, ¶ 61; *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, ¶ 286 (2011) (“Comcast-NBCU Order”) (the conditions and commitments incorporated herein shall continue to apply until the conditions expire by their own terms as expressly stated, or the Commission determines that the conditions or commitments should be modified or removed.”); *id.*, Appendix A, Conditions, XX. Term (“Except as expressly stated, these Conditions shall remain in effect for seven years following the date of this Order.”).

typically focus on airing the regular season games of only one sports team of a league, these networks often feature the most competitive matchups of the week from the leagues, and matchups involving popular teams.<sup>10</sup> 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. Furthermore, the sports leagues, including Major League Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association (NCAA) often distribute their playoff, tournament and bowl games on cable networks, which are often the most desired games to view of the season, particularly for fans whose teams are playing in these games.<sup>11</sup>

Like sports programming on an RSN, sports programming on a national cable programming network is non-replicable, such that “no amount of investment can duplicate the unique attributes of such programming.”<sup>12</sup> There should be no doubt that a national cable network that airs sports content from the same major and college sports leagues as a network qualifying as an RSN under the Commission’s rules is airing non-replicable content. There is no reason to believe that non-replicable programming distributed on a regional basis would somehow lose this quality when distributed on a national basis.

Nor should there be any doubt that sports content is highly-valued wherever it is distributed. SNL Kagan ratings data indicates that the ratings of national cable networks ESPN, TNT, and TBS that air the same type and amount of sports programming as networks that qualify as RSNs under the Commission’s rules would be among the top rated RSNs.<sup>13</sup> For 2011, ESPN was the second most watched network with a 1.84 average prime time rating, TNT was the fourth most watched network with a 1.49 average prime time rating, and TBS was the tenth most watched network with a 1.07 average prime time rating. In comparison, the only RSNs with higher average prime time ratings than TBS were Root Sports Pittsburgh (2.48), Comcast SportsNet Philadelphia (2.41), Fox Sports Detroit (2.20), Fox Sports North (1.81), New England Sports Network (1.58), and FOX Sports Midwest (1.22).<sup>14</sup> The remaining 28 regional sports networks had an average prime time rating below .96, and the overall industry average was .73. As the NPRM notes, the Commission recognized in its Comcast-NBCU Order that “certain national cable programming networks produce

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<sup>10</sup> When a national network such as TNT, TBS, ESPN, or NBC Sports decides to carry a game, the game is generally blacked out on the RSN, so even local viewers have no alternative to the national feed.

<sup>11</sup> See Press Release, TBS to Exclusively Air Major League Baseball Wild Card Contests, Comcast Spotlight, available at <http://www.comcastspotlight.com/news/programming-news/tbs-exclusively-air-major-league-baseball-wild-card-contests> (last visited Oct. 1, 2012); see also Cohen, Rachel, *NBA Extends TV Deals with ESPN/ABC & TNT*, USA Today (rel. June 27, 2007), available at [http://usatoday30.usatoday.com/sports/basketball/2007-06-27-3096131424\\_x.htm](http://usatoday30.usatoday.com/sports/basketball/2007-06-27-3096131424_x.htm) (last visited Oct. 1, 2012); see also Press Release, NBC Sports Group Presents the 2012 Stanley Cup Final, (rel. May 29, 2012), available at <http://sportsmedianews.com/nbc-sports-group-presents-the-2012-stanley-cup-final/> (last visited Oct. 1, 2012); see also *Rivals CBS, Turner Unite for March Madness*, WSJ (rel. Mar. 14, 2011), available at <http://online.wsj.com/article/SB10001424052748703327404576194402423091980.html> (last visited Oct. 1, 2012); and see also Weir, Tom and Michael Hiestand, *BCS officially headed to ESPN starting in 2011*, USA Today, (rel. Nov. 19, 2008), available at [http://usatoday30.usatoday.com/sports/college/football/2008-11-17-bcs-fox-espn\\_N.htm](http://usatoday30.usatoday.com/sports/college/football/2008-11-17-bcs-fox-espn_N.htm) (last visited Oct. 1, 2012).

<sup>12</sup> 2010 Terrestrial Loophole Order, ¶ 9.

<sup>13</sup> TV Network Summary: Basic Cable Networks by Average Prime Time Rating, SNL KAGAN (2012) (proprietary data, on file with author).

<sup>14</sup> TV Network Summary: RSN Networks by Average Prime Time Rating, SNL KAGAN (2012) (proprietary data, on file with author).

programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming.”<sup>15</sup> Even when evaluated on an individual program basis, sports content of the kind described by the Commission in determining whether a network qualifies as an RSN, is highly-valued when distributed nationally.<sup>16</sup>

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, is both non-replicable and highly-desired, and will significantly hinder competitive MVPDs if withheld from them in the marketplace.<sup>17</sup> 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.<sup>18</sup>

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<sup>15</sup> NPRM, ¶ 53; Comcast-NBCU Order, ¶¶ 45-46 (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).

<sup>16</sup> 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 Kondoljy, Amanda, *Cable Top 25: Monday Night Football Tops 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 Oct. 1, 2012).

<sup>17</sup> 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.*

<sup>18</sup> 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

ACA cautioned that it would be short-sighted to look only at which satellite-delivered cable programming networks are today either vertically integrated or affiliated with a cable operator, or to solve only those marketplace problems already known to exist. It has been 20 years since cable operators and their affiliated programmers have been permitted to enter into exclusive arrangements without seeking a ruling under Section 628(c)(2)(D)(4) from the Commission that the arrangement would not harm competitors and is in the public interest.<sup>19</sup> As ACA has noted, given the incentive and ability of vertically integrated cable operators to obtain a competitive edge in the MVPD market through ownership of cable network programming, the Commission should anticipate that cable operators would seek to obtain more of this programming in the event the ban on exclusive arrangements is permitted to sunset.<sup>20</sup> The only way the Commission can discharge its statutory obligation to preserve and protect competition and diversity in the distribution of video programming is by focusing on the forward looking question of what programming that is non-replicable and highly desired needs to be protected now and in the future rather than what programming is or is not currently affiliated with cable operators.<sup>21</sup>

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ACA again observed that although none of its proposed remedies 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.

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MVPDs at issue, such as whether one is a small and vulnerable new entrant whereas the other is a larger, established MVPD.

<sup>19</sup> 47 U.S.C. § 548(c)(2)(D)(4).

<sup>20</sup> ACA Sept. 25th Ex Parte at 2-3.

<sup>21</sup> 47 U.S.C. § 548(a).

Marlene Dortch  
October 1, 2012  
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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): Elizabeth Andrion  
Lyle Elder  
Mary Beth Murphy  
David Konczal  
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