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October 3, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Revision of the Commission’s Program Access Rules; News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al. MB Docket Nos. 12-68, 07-18, & 05-192

Dear Ms. Dortch:

As the scheduled sunset of the *per se* exclusivity ban approaches, cable’s competitors – who have already benefitted from the ban ten years longer than Congress intended – are mounting a last-ditch effort to ask the Commission to once again extend their regulatory advantage. Although the vast majority of the arguments cable’s competitors are making are simply the same baseless arguments they have been making for a decade – *e.g.*, the marketplace has not changed in the past 10 years – a proposal submitted by USTelecom raises novel issues.¹ USTelecom’s argument boils down to this: if the *per se* ban is allowed to sunset in favor of a case-by-case approach, the Commission should prejudge in favor of competing MVPDs virtually all of the key issues relevant to assessing the competitive impact of an exclusive contract.² This is tantamount to extending the *per se* ban. Just as there is no factual or legal basis for retaining the *per se* ban on exclusive program distribution contracts, there is no justification for adding new burdens to the standards for case-by-case adjudication of program access complaints.

First, there is no basis for adopting special presumptions for the “top 20” cable-affiliated programming networks or for national programming networks that carry sports programming.³ The Commission considered and rejected in 2002 and 2007 proposals to distinguish between essential and non-essential – or popular and unpopular – cable-affiliated programming, ultimately deciding there was “no workable mechanism” for doing so and that such an approach

¹ Letter from Kevin G. Rupy, Senior Director, Policy Development, USTelecom, to Marlene Dortch, Secretary, FCC (Sept. 26, 2012) (filed in MB Docket Nos. 12-68, 07-18, 05-192) (“USTelecom Letter”).

² *See id.* at 3-5.

³ *See id.* at 2.

raised constitutional concerns.⁴ Unlike the presumption for terrestrially-delivered regional sports networks (“RSNs”), which was at least based on some record evidence and studies, such an expansive presumption would have absolutely no evidentiary support.⁵

Second, there is no basis for adopting a presumption that an exclusive contract involving RSNs, national sports or popular cable-affiliated programming is both “unfair” and “significantly hinders” competition.⁶ If marketplace conditions are sufficiently competitive to warrant a sunset of the *per se* ban – which they clearly are – exclusive agreements cannot also be deemed to be *presumptively* unfair. Indeed, in its review of the *2010 Program Access Order*,⁷ the D.C. Circuit cautioned the Commission against conflating the “unfairness” prong of Section 628(b) with the “significant hindrance” prong.⁸ Whether or not exclusive contracts are pro-competitive or anticompetitive – fair or unfair – can only be assessed on a case-by-case basis; there is no evidence on which the Commission could justify a presumption of unfairness.

Third, there is no basis for establishing a rebuttal presumption that an exclusive contract involving a cable-affiliated network that was the subject of a successful Section 628(b) complaint satisfies both evidentiary prongs of Section 628(b) with respect to any future MVPD

⁴ See *In re implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report & Order, 22 FCC Rcd 17791 ¶ 69 (2007), *aff’d sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report & Order, 17 FCC Rcd 12124 ¶ 69 (2002).

⁵ There is no justification for subjecting satellite-delivered RSNs to a more stringent presumption than terrestrial RSNs. The existing presumption has been shown to be meaningful: in the only two proceedings in which it has been invoked, complainants prevailed. The litigation in those proceedings was prolonged because the Commission – prompted in part by Verizon and AT&T – opted to change its rules in the midst of the complaint proceeding and then deferred a final decision until after the D.C. Circuit ruled on the appeal of those new rules. More generally, there is no basis for treating RSNs differently than other programming. The record shows that major MVPDs have on multiple occasions chosen not to carry various RSNs without demonstrable loss of their ability to compete. See Comcast Reply Comments at 12. The record shows that major MVPDs have on multiple occasions chosen not to carry various RSNs without demonstrable loss of their ability to compete. See *id.* Major RSNs in several markets (e.g., California, New York, New Orleans, Philadelphia, and Portland) are available for any MVPD to carry, but in each case major MVPDs have either chosen not to carry the networks at all or have dropped them for sustained periods of time. See *id.* The simple fact is that each RSN, like every other programming network, entails a distinct price/value proposition; viewer interest in sports varies from market to market, and from team to team, and the number and value of sporting events varies dramatically from one RSN to the next. These facts undercut any argument that RSNs must be subject to a more rigorously applied presumption or any other special rules. See *id.*; MSG Comments at 22-25 (quoting DISH Network’s CEO telling investors that his company is “certainly prepared to not have regional sports. We don’t do it in New York today as an example and we certainly have plenty of customers in New York.”).

⁶ See USTelecom Letter at 3.

⁷ See *In re Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report & Order, 25 FCC Rcd 746 (2010).

⁸ *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 721-22 (D.C. Cir. 2011).

complainant.⁹ Both elements of a Section 628(b) violation – whether the conduct is unfair and the extent to which the conduct at issue hinders competitors – are fact-specific and depend not only on the programming at issue but also on the particular MVPD and the particular circumstances of the localities involved.¹⁰ For instance, it would be patently unfair, and arbitrary and capricious, to prejudge the pro-competitive benefits and anti-competitive effects of an exclusive arrangement entered into in an urban market in the Northeast based upon an exclusivity involving that same network entered into a rural market in the Southwest. Whatever the merits of the Commission’s finding in a particular program access complaint proceeding about one MVPD’s need for a particular network in a particular market, it cannot rationally presume that these findings apply to a different market, or as to a different MVPD.

Fourth, there is no basis for a rebuttable presumption that a complainant seeking a standstill is likely to prevail on the merits of its complaint and that, in the absence of a standstill order, it will suffer irreparable injury.¹¹ Even if confined to exclusive contracts with cable-affiliated RSNs, such presumptions would be wholly unwarranted. A standstill order requires cable-affiliated networks to continue making their programming available after a contract has expired and before there has been a finding of a violation of the rules. A complainant seeking such extraordinary relief should bear the burden of producing evidence showing that, *in its particular circumstances*, it is likely to prevail on the merits and that, in the absence of a standstill, it will suffer irreparable injury.

Fifth, there is no basis for giving new entrants a special, 60-day process for resolution of claims under Section 628(b).¹² A 60-day timeframe for resolution of a complaint regarding an exclusive contract for cable-affiliated programming risks short-circuiting a meaningful examination of the pro-competitive benefits and anti-competitive effects (if any) of an exclusive arrangement.¹³

Finally, there is no basis for adopting *any* of the proposals in USTelecom’s letter because there has not been adequate notice that the Commission was considering them nor has there been an adequate record developed to support them.¹⁴

⁹ See USTelecom Letter at 4.

¹⁰ See 47 U.S.C. § 548(b).

¹¹ See USTelecom Letter at 4-5.

¹² See *id.* at 5.

¹³ Program access cases should be adjudicated as expeditiously as possible, but there is no record evidence to adopt such an arbitrary deadline, nor was there notice of a shot-clock proposal in the NPRM. In the one (program carriage) case where the Media Bureau established and tried to enforce short and arbitrary deadlines, it was reversed by a unanimous Commission. See *In re Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc., et al.*, 24 FCC Rcd 1581 ¶ 2 (2009). As the full Commission recognized in that case, due process must not be sacrificed in the interests of expedition.

¹⁴ The Administrative Procedure Act (“APA”) requires an agency proposing a rule to provide public notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3).

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The Commission should not be diverted by this last-minute distraction. The fact remains that the ban no longer remains necessary to preserve and protect competition and diversity in what has become a robustly competitive and diverse video marketplace – especially where case-by-case adjudication of complaints under the general provisions of Section 628(b) remains available.¹⁵ The Commission should reject the proposals to adopt presumptions in case-by-case proceedings that would essentially replicate the expired provisions of Section 628(c).

Sincerely,

/s/ Rick Chessen

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cc: Zachary Katz
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¹⁵ See NCTA Comments at 16-17.