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October 3, 2012

## VIA ECFS – 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,

On October 1, 2012, Cristina Pauzé of Time Warner Cable (“TWC”) and the undersigned met with Matthew Berry, Chief of Staff to Commissioner Pai, to elaborate on TWC’s written submissions supporting the sunset of the categorical ban on exclusive contracts involving satellite cable programming vendors that are affiliated with a cable operator.

At this meeting, we argued that there is no legal or policy basis for extending the existing exclusivity ban. We noted that any categorical restriction targeting vertically integrated cable operators and programming vendors would necessarily be over-inclusive in today’s marketplace, because there are numerous vertically integrated programming services that lack market power under any conceivable measure. Exclusivity arrangements involving such programmers would not harm competition, as a matter of fact and law, regardless of vertical integration. We noted the Commission’s recent finding that cable operators’ affiliated news services deliver many benefits to consumers without posing any significant threat to competition,<sup>1</sup> explaining that prohibiting such concededly beneficial exclusivity merely because it involves satellite-delivered programming would be wholly irrational.

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<sup>1</sup> See, e.g., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 51 n.200 (2010) (“*2010 Program Access Order*”) (explaining that “exclusivity plays an important role in the growth and viability of local cable news networks” and that “permitting such exclusivity should not dissuade new MVPDs from developing their own competing regional programming services”) (internal quotation marks, citations, and alterations omitted).

In addition, we explained that a singular focus on exclusivity involving satellite cable programming vendors would be under-inclusive as well. Because ensuring access to “must have” programming is the asserted basis for regulation in this context, it would make no sense for any exclusivity restriction to leave untouched arrangements involving *non-cable* MVPDs’ control of “must have” programming, especially where such arrangements confer market power.

To the extent that the Commission chooses to single out exclusivity arrangements involving regional sports networks (“RSNs”) for regulation—notwithstanding the content-based nature of such an approach—we argued that the Commission should reject any proposal to categorically ban exclusivity. Indeed, we argued that the D.C. Circuit’s decision upholding the presumptive right of access to terrestrially delivered RSNs was contingent on the *absence* of a categorical ban, and that any such ban would be legally unsustainable. We further suggested that, if the Commission extends the presumption of access applicable to terrestrially delivered RSNs to satellite-delivered programming, it should reject proposals to adopt a series of additional presumptions with respect to RSN programming (and/or other assertedly “must have” programming). In particular, the Commission should reject recent proposals to presume that withholding any RSN programming or certain other content necessarily (a) constitutes an “unfair act,” (b) has the purpose or effect of significantly hindering the complainant’s ability to compete, and (c) entitles a complainant to interim injunctive relief,<sup>2</sup> as such measures would unreasonably tilt the adjudicatory process in favor of complainants and would undercut the benefits of a case-by-case approach that is ostensibly intended to address the specific marketplace dynamics relevant to any given dispute.

Finally, in response to parties’ complaints about the timing of Commission adjudications of program access complaints, we noted that the appropriate response would be to address such procedural concerns directly, rather than to impose unwarranted substantive restrictions on cable operators and their affiliated programming vendors. For example, we noted that the Commission has established a comprehensive set of Accelerated Docket procedures for complaints against telecommunications carriers, *see* 47 C.F.R. § 1.730, and suggested that similar measures might be employed to accelerate certain program access proceedings in appropriate circumstances. We also noted that a five-month deadline for resolving program access complaints might be reasonable, whereas the 60-day default-grant proposal advanced by CA2C plainly would afford insufficient time for reasonable decisionmaking and would produce arbitrary and capricious results.

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<sup>2</sup> See Letter of Kevin G. Rupy, on behalf of the Coalition for Competitive Access to Content (“CA2C”), to Marlene Dortch, Secretary, FCC, MB Docket Nos. 12-69, 07-18, 05-192 (filed Sept. 26, 2012).

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Please contact the undersigned with any questions regarding this notice.

Sincerely,

/s/

Matthew A. Brill  
LATHAM & WATKINS LLP

*Counsel for Time Warner Cable Inc.*