WILTSHIRE & GRANNIS LLP

1200 18TH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW. WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

October 3, 2012

REDACTED – FOR PUBLIC INSPECTION

BY HAND DELIVERY

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

Re: *Revisions 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 Docket Nos. 12-68, 07-18, 05-192

Dear Ms. Dortch:

DIRECTV, LLC ("DIRECTV") hereby submits, pursuant to the Federal Communication Commission's Second Protective Order in the above-referenced proceeding, an ex parte filing redacted for public inspection. Copies of the Highly Confidential ex parte have been provided to the Secretary's Office and to David Konczal in the Media Bureau.

Please contact me with any questions.

Sincerely,

Kristine Laudadio Devine
Counsel to DIRECTV, LLC

Encl.

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BY ELECTRONIC FILING

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

Re: *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68; *News Corporation, The DIRECTV Group, Inc., and Liberty Media Corporation*, MB Docket No. 07-18; *Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, MB Docket No. 05-192

Dear Ms. Dortch:

On August 31, 2012, DIRECTV submitted an economic analysis by Professor Kevin Murphy demonstrating that it has attracted substantially more subscribers in San Diego in the five months since it gained access to Padres games through Fox Sports San Diego ("FSSD") than would have been expected based on its subscribership trends in comparable markets, a conclusion supported by customer surveys that evidence an increase in the number of new subscribers citing "access to sports channels" as the reason for subscribing to DIRECTV since it began carriage of FSSD.[1] In a recent filing, Time Warner Cable ("TWC") takes issue with that analysis.[2] In doing so, TWC not only mischaracterizes the findings of DIRECTV's study and fails to provide any counter-evidence or its own analysis of subscribership in the market, but also highlights a significant issue with any case-by-case regime for addressing exclusionary conduct: the fact that cable will challenge the sufficiency of an analysis of programming effects based on "just five months of data."[3]

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1 *See* Letter from William M. Wiltshire to Marlene H. Dortch (filed Aug. 31, 2012) (attaching Kevin M. Murphy, "Economic Analysis of the Impact on DIRECTV's Subscribership of Carrying an RSN: Evidence from San Diego" (Aug. 31, 2012) ("Murphy Report")). Unless otherwise indicated, all items cited in this letter were filed in MB Docket Nos.12-68, 07-18, and 05-192.

2 *See* Letter from Matthew Brill to Marlene H. Dortch (dated Sept. 19, 2012) ("TWC Letter").

3 *Id.* at 1.

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TWC asserts that Professor Murphy's analysis yields an increase in DIRECTV's growth rate in San Diego that is **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**[4] This mischaracterizes Professor Murphy's conclusion, which takes account of DIRECTV's growth compared to a group of control markets. Thus, his estimation of the effect of gaining access to the Padres is nearly three times as great, as DIRECTV's average monthly growth rate in San Diego increased by **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** relative to other comparable markets in the five months he considered – a measure that likely understates the long-term impact.[5] TWC also criticizes the analysis because in the portion of the San Diego market served by TWC (which has chosen not to carry FSSD), DIRECTV now has Padres games while the cable competitor does not.[6] That portion of the market is relatively small (about 30 percent). Moreover, although TWC obviously has access to its own subscriber data and now has the data on DIRECTV subscribership in San Diego, TWC provides no analysis of its own. The failure to show that there is any material difference in DIRECTV uptake between areas served by TWC and the rest of San Diego is telling, and completely undermines the validity of TWC's critique.

Of perhaps more concern to the Commission should be TWC's characterization of "just five months of data" used in the DIRECTV analysis as "sparse" and "minimal," and therefore unreliable to demonstrate the market effect of this sports programming.[7] This is but another illustration of the tactics the Commission can expect if it moves to a case-by-case regime, in which cable operators will demand that a complaining MVPD do without vital sports content for an entire sports season or more before it can demonstrate harm under Section 628(b). Rather than acting only after the harm has been inflicted, the Commission should retain its prophylactic prohibition subject to exceptions where exclusivity would serve the public interest.

In its letter, TWC yet again recycles purported justifications for cable-affiliated exclusive arrangements that have been rejected in prior proceedings. For example, it argues that such arrangements can be used to attract investment and differentiate offerings[8]—a claim the Commission rejected in extending the cable exclusivity prohibition in both 2002 and 2007,[9] and again in granting the recent program access

4 *Id.* at 2.

5 Murphy Report at 2.

6 TWC Letter at 1-2.

7 *Id.*

8 *Id.* at 2.

9 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution*, 17 FCC Rcd. 12124, ¶ 64 (2002) ("the retention of the exclusivity prohibition will not reduce the

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complaints against Cablevision/MSG.[10] TWC faults DIRECTV for not responding to the argument that some programmers may choose not to develop certain programming if they cannot distribute it exclusively.[11] Not only is this inaccurate,[12] but the consistent lack of support for such assertions found in prior Commission proceedings and the absence of any contrary evidence in the record of this proceeding makes any further response unnecessary.

TWC also continues to assert that DIRECTV wants to prohibit cable operators "from pursuing the same business strategies" that DIRECTV has, such as the exclusive NFL Sunday Ticket arrangement.[13] As DIRECTV has previously pointed out, *anybody*—including TWC—can have exclusive carriage of independent programming such as the NFL Sunday Ticket because the prohibition does not apply to independent programming.[14] Moreover, DIRECTV is effectively subject to the same restrictions as cable due to conditions imposed 2008, when Liberty Media acquired *de facto* control of the company, that prohibit exclusive arrangements with affiliated programming.[15]

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incentives to create new or diverse programming"); *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 63 (2007) (concluding that the "purported benefits" of exclusivity would not "outweigh the harm to competition and diversity in the video distribution marketplace that would result if we were to lift the exclusive contract prohibition"), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

10 *Verizon Tel. Cos. and Verizon Svcs. Corp. v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13145, ¶ 33 (MB 2011), *aff'd*, 26 FCC Rcd. 15849 (2011); *AT&T Svcs. Inc. and Southern New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Sys. Corp.*, 26 FCC Rcd. 13206, ¶ 34 (MB 2011), *aff'd*, 26 FCC Rcd. 15871 (2011).

11 TWC Letter at 3.

12 *See, e.g.*, DIRECTV Reply Comments at 8-15 (debunking alleged benefits of exclusivity and First Amendment claims).

13 TWC Letter at 3.

14 *See, e.g.*, Letter from William M. Wiltshire to Marlene H. Dortch at 2 (dated Sep. 14, 2012).

15 *See News Corp., The DIRECTV Group, Inc., and Liberty Media Corp*, 23 FCC Rcd. 3265, Appendix B, § III (2008).

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Respectfully submitted,

/s/

William M. Wiltshire
Michael Nilsson

Counsel for DIRECTV, LLC