



October 3, 2012

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: *Ex Parte* Communication: MB Docket Nos. 12-68, 07-18, 05-192**

Dear Ms. Dortch:

On October 1 and October 3, 2012, Micah Caldwell of the Independent Telephone & Telecommunications Alliance (“ITTA”)<sup>1</sup> participated in separate phone conversations with Alex Hoehn-Saric, legal advisor to Commissioner Rosenworcel, and Elizabeth Andrion, acting legal advisor to Chairman Genachowski, to follow up on reports that the Commission intends to allow the contract exclusivity prohibition of the program access rules expire.<sup>2</sup>

Given the Commission’s repeated conclusions during the past several years that vertically-integrated cable companies continue to have the incentive and ability to withhold valuable video programming to the detriment of competition and consumers, ITTA is deeply concerned that the Commission may now reverse course.<sup>3</sup> As Congressman Edward J. Markey,

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<sup>1</sup> ITTA represents mid-size communications companies that provide voice, broadband, Internet, and video services to more than 20 million access lines in 44 states. ITTA’s membership includes CenturyLink, Cincinnati Bell, Comporium Communications, Consolidated Communications, FairPoint Communications, Hargray Communications, HickoryTech Communications, and TDS Telecom. As new entrants to the video distribution marketplace, ITTA members require reasonable and non-discriminatory access to video content in order to compete effectively. The Commission’s program access protections, particularly the contract exclusivity prohibition, are crucial to promoting and preserving such competition.

<sup>2</sup> See 47 U.S.C. § 548.

<sup>3</sup> See, e.g., *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 and Order, 22 FCC Rcd 17791, ¶¶ 60-61 (2007) (“2007 Program Access Extension Order”), *aff’d sub nom. Cablevision Sys. Corp., et al. v. FCC* 597 F.3d 1306 (D.C. Cir. 2010); See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 (2010) (“2010 Program Access Order”), *affirmed in*

the principal House author of the 1992 Cable Act, stated in his recent letter to the Commission, the program access rules “continue to serve vital public interest goals and remain ‘necessary to preserve and protect competition and diversity’ in the marketplace.”<sup>4</sup>

ITTA reiterated its belief that the Commission should extend the contract exclusivity prohibition for an additional five years.<sup>5</sup> Although there have been positive developments in the retail multichannel video distribution (“MVPD”) marketplace since the ban was last extended in 2007, the wholesale market with respect to access to content has not changed sufficiently to warrant elimination or relaxation of the ban. In fact, as the Commission has found, the growth in retail competition has only increased vertically-integrated MVPDs’ incentive to withhold programming that is necessary for ITTA members and other MVPDs to compete effectively.<sup>6</sup>

Furthermore, alternative mechanisms currently available for invoking program access protections, such as the program access conditions adopted in the *Comcast/NBCU Order*<sup>7</sup> and the program access complaint process, are insufficient to safeguard the interests of competing MVPDs or consumers. Among other things, the *Comcast/NBCU Order* conditions do not apply to vertically-integrated programming affiliated with MVPDs other than Comcast. Moreover, those conditions are set to expire within the next several years. The existing program access complaint process, which is inadequate even for large, well-financed MVPDs, is unusable for smaller and new entrant MVPDs like ITTA member companies who cannot devote the substantial time and resources required to pursue such relief.

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*part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011); *Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011), *affirmed*, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2<sup>nd</sup> Cir.); *AT&T Servs. Inc. et al.*, Order, 26 FCC Rcd 13206 (MB 2011), *affirmed*, *AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2<sup>nd</sup> Cir.). Moreover, ITTA observes that in each case, the Commission’s findings have been affirmed by the courts.

<sup>4</sup> Letter from the Honorable Edward J. Markey, 7<sup>th</sup> District, Massachusetts, to the Honorable Julius Genachowski, FCC Chairman, *available at*: <http://markey.house.gov/sites/markey.house.gov/files/documents/Letter%20to%20FCC%20Program%20Access.pdf> (dated Oct. 2, 2012).

<sup>5</sup> See letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (filed Sept. 7, 2012); Comments of the Independent Telephone & Telecommunications Alliance, MB Docket Nos. 12-68, 07-18, 05-192 (filed June 22, 2012).

<sup>6</sup> See *2007 Program Access Extension Order* at ¶¶ 60-61.

<sup>7</sup> See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011).

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In the event the Commission moves forward with its decision to allow the contract exclusivity prohibition to expire, it must adopt other safeguards to ensure that its statutory obligations to protect and preserve competition are being met. ITTA fully supports the recent submission by the Coalition for Competitive Access to Content (“CA2C”), a diverse group of MVPDs of which ITTA is a member, proposing several alternative safeguards that would be appropriate if the Commission is determined to allow the rule to sunset.<sup>8</sup> While extending the contract exclusivity ban is preferable, the coalition’s proposals to preserve the rule for sports and other critical programming, or alternatively, for rebuttable presumptions that lack of access to such programming harms competition and should be subject to a standstill provision, would, along with a shot clock and interim carriage for complaints relating to new programming contracts, provide some means to ensure that competition, consumer choice, and continued broadband investment are not foreclosed.

Please do not hesitate to contact me with any questions regarding this submission.

Respectfully submitted,



Micah M. Caldwell

Vice President, Regulatory Affairs

cc: Alex Hoehn-Saric  
Elizabeth Andrion

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<sup>8</sup> See Letter from Kevin G. Rupy, on behalf of the CA2C Coalition, to Marlene H. Dortch, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (filed Sept. 26, 2012).